Australia's Approach to International Treaties on Human Rights

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Introduction

The purpose of this article is to examine some of the more important policy and legal factors that have determined the attitude of successive Australian governments, since 1948, on the question of assuming international legal obligations on human rights. In so far as they can be distinguished, the emphasis will be on the domestic rather than on the international policy aspects of this question.

The *Universal Declaration of Human Rights* was adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948. That year is a convenient starting point for the purpose of this article as the Universal Declaration represents the first of a number of major achievements of the United Nations in systematically elaborating standards on human rights in international instruments. The *Universal Declaration of Human Rights*, which was proclaimed 'as a common standard of achievement for all peoples and all nations' recognizes a wide variety of civil, economic, social, religious, cultural and criminal process rights and freedoms. Some of these minimum standards have been the subject of specialized and general treaties sponsored by the United Nations, including the Specialized Agencies, since 1948. This article will concentrate on Australia's approach to the more important of these treaties.

For the purpose of this article, the word 'treaties' is used in a broad sense to describe a genus which includes the many differently named instruments by means of which States conclude international agreements. In the field of human rights the most important treaties are the multilateral instruments referred to under the appellation of 'Covenant', 'Convention' or 'Protocol'. These instruments are all international agreements which create legal obligations on States that have become a Party to them — normally as a result of the ratification of, or accession to, the treaty.

The matters that will be examined are the circumstances which have determined Australia, as a sovereign State, to assume international legal obligations on human rights. It will be convenient to examine, first, Australia's policy and practice in this area from 1948 to 1972. As important changes in policy have occurred since December 1972, it will be convenient to examine the present Government's approach to these matters in a separate section.

Australia's Policy and Practice 1948-1972

Australia participated in the creation of the United Nations, and its early activities, with enthusiasm and distinction. Dr Evatt was conspicuously active in the preparation of the United Nations Charter before becoming President of the General Assembly at a time when the Universal Declaration was adopted by that organ. What is less well known, however, is that Mr Whitlam's father, who had been Crown Solicitor, was Australia's representative on the United Nations Commission on Human Rights in 1950 and 1954 and was, during that period, special adviser to the Government on human rights.

Australia's commitment to human rights was also expressed in other ways during that early period. It was one of the 48 countries that voted in favour of the *Universal Declaration of Human Rights* in 1948. As the Universal Declaration was considered to be 'too weak' by itself, the Commission on Human Rights had also been requested to draft a Convention on human rights, containing legal obligations, and 'measures of implementation'. At that time, the policy and direction of interest of the Australian delegation was a continuation and development of its San Francisco policy: emphasis upon the primary importance of economic rights and the need for international obligations to secure and protect them.[1]

Australia emphasized, at an early period, the need to include in the proposed legally-binding Convention articles on socio-economic rights and it supplied much of the constructive thinking on this question. In June 1949, when a Labor Government was in power, Australia proposed the inclusion in the proposed Convention of articles dealing with the right to work, to social security, to education and State supervision of wages and working conditions.[2] The change of government at the end of the year brought no significant change of attitude on this issue. However, a number of delegations, including those of the United States and the United Kingdom, were strongly opposed to the inclusion of such rights in the proposed convention while other countries, including Third World countries and the East European bloc, were just as unyielding in their opposition to the exclusion of economic rights from the Convention. Australia eventually modified its position and gave its support to the compromise decision in 1951 to draft two separate Covenants, one to cover civil and political rights, the other economic, social and cultural rights.[3] More will be said about these very significant Covenants at a later stage.

In the meantime, treaties dealing with particular areas of human rights were elaborated and adopted by the United Nations. Australia wasted little time in ratifying some of them. In 1949, it ratified the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948. Australia became a Party to the *Slavery Convention* in 1953 and to the *Convention relating to the Status of Refugees* in 1954. In 1956, it ratified the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* adopted in that same year. In 1958, Australia ratified the four *Geneva Conventions on the Protection of Victims of War.*

However, the late 1950's, the 1960's and early 1970's were years in which Australia displayed some reluctance in assuming international obligations on human rights. During that period, few treaties on human rights of any great significance were signed and ratified by Australia. Australia became a

Party to the *Convention on the Nationality of Married Women* in 1961 and to the *Convention Against Discrimination in Education* in 1966 but did not take any steps to ratify major treaties dealing with human rights generally, and proscribing discrimination on improper grounds in particular. No steps were taken, for example, to ratify such important Conventions as the *Convention on the Political Rights of Women* of 1952, the ILO *Equal Remuneration Convention, 1951* and the *Discrimination (Employment and Occupation) Convention, 1958*. Over seventy States have already ratified these important Conventions that seek to abolish discrimination on the basis of sex in the political and employment fields. Similarly, the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966* and what is referred to as the *International Covenants on Human Rights* — namely, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights, 1966*—were not ratified.[4]

There were important technical and policy reasons for Australia's reluctance to ratify these treaties on human rights. Before discussing these reasons in some detail, it is necessary to identify the organs of Government involved in concluding and implementing treaties in Australia.

The Australian Constitution does not contain any express provision on the subject of treaty-making, but it is clear that such power is covered by the 'executive power' of the Commonwealth under section 61 of the Constitution.[5] The ratification of treaties resides, by virtue of the common law inherited by Australia from Great Britain, in the Crown as a Royal prerogative. The same consideration applies to the negotiation and signature of treaties, and the conduct of foreign affairs generally. In theory, therefore, the Crown in right of the Commonwealth has an unfettered power to commit Australia to international obligations by ratifying or acceding to treaties, including those pertaining to human rights. In practice, however, different considerations apply. Under the English and Australian legal systems, treaties are not 'self-executing' — they do not in themselves become part of the domestic legal system until they are implemented into domestic law by Parliament.[6] As a result, this may mean that—in the Australian context—the co-operation of the Federal, State or Federal and State Parliaments is required in order to give effect to international obligations that require changes in domestic law and practice.

The implications of such a system are that while the Executive is competent to negotiate international agreements and undertake international obligations on behalf of Australia on a wide variety of subjects, the Federal or a State Parliament[7] may prevent Australia from fulfilling its international obligations, in so far as action within Australia is required.[8] If the international treaty in question is infringed by some act, or failure to act, by a State Parliament Australia would become internationally responsible for non-performance of a treaty obligation. Under international law, a State that is Party to a treaty cannot excuse itself from the international obligations it has assumed by pleading that it does not, for example, have the constitutional power to rectify the situation. This has some very important implications for Australia's approach to international treaties on human rights. It largely explains the reasons why Australia has not ratified some of the important treaties on human rights referred to above.

Australia's practice in relation to treaties that have implications for domestic law is to become a Party to them only when satisfied that the relevant laws and practices are in accord with the requirements of the treaty. In referring to this established practice in a speech delivered in 1969 to the Working Conference of the Australian Committee on Human Rights, the Hon N H Bowen, QC, MP, who was then Attorney-General of Australia, explained that in a particular case this may sometimes mean that adherence is held up because of one or two points of divergence notwithstanding that there is overall substantial compliance with the standards laid down in the treaty in question.[9] The relevant laws and practices that, according to Mr Bowen, must comply with the requirements of an international treaty before Australia ratifies that treaty are, in the case of human rights, for the most part State laws. In other words, most basic human rights, such as freedom of expression, freedom of assembly, freedom from arbitrary or unlawful interference with privacy, the right to certain minimum safeguards when arrested, detained and tried on a criminal charge come within the jurisdiction of the Australian States and Territories. As Mr Bowen pointed out, the need that often exists to consult the Australian States on matters coming within their administration is a further complicating factor. If, for example, the authorities in a State refuse to rectify a law that is inconsistent with the requirements of a treaty which the federal authorities wish to ratify this was sufficient to prevent ratification.

There have been many instances where deficient State laws have prevented Australia from ratifying treaties on human rights. For example, sections 23, 24, 42, 48 and 291 of the *Mining Act, 1904-1965*, section 130A of the *Licensing Act, 1911-1965* and section 8 (3) of the *Firearms and Guns Act*[10] in Western Australia, which have now been repealed, and a number of provisions in the *Aborigines' and Torres Strait Islanders' Affairs Acts, 1965-1967*, some of which are now incorporated in the *Aborigines Act, 1971*, and *Torres Strait Islanders Act, 1971*[11] have, for some time, prevented Australia from ratifying the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966*[12].

In the area of labour relations there were also serious difficulties. In a comprehensive review of Australia's position in relation to all Conventions adopted by the International Labour Organisation, published in 1970, it was pointed out that there had not been full compliance with the terms of the *Equal Remuneration Convention, 1951* in the Commonwealth or any State jurisdiction and that no State had agreed to ratification. It was also stated that although ratification of the Convention could be undertaken on the basis of a progressive implementation of the principle of equal remuneration for work of equal value, ratification entailed an obligation to apply the Convention to *all* workers. It was pointed out by one State that the law in that State could only ensure the application of the principle of equal remuneration for work of equal value to persons subject to an award of the State's Industrial Tribunal, and not to *all* workers. It was said that this difficulty was also present in other jurisdictions.[13] In relation to the *Discrimination (Employment and Occupation) Convention, 1958* it was pointed out in that review that there were still a few State awards which did not conform with the Convention and that an impediment to ratification was

the existence of distinctions based on sex, in relation to access to employment and to wage and salary rates.[14]

The use of a 'federal clause'[15] in treaties on human rights would have overcome the constitutional and legal difficulties, discussed above, in a federation like Australia where laws of a human rights nature are, for the most part, State laws. The desirability of such a clause was emphasized in the past by Australia. At the early stages of the drafting of the *International Covenants on Human Rights*, Canada, Australia and the United States were vitally concerned with the inclusion of a 'federal clause' in these instruments. As early as 1950 the Australian delegate at the Third Committee of the General Assembly argued firmly that the inclusion of a 'federal clause' in the Covenants is essential if Australia was to ratify them. He pointed out that the central government could not assume responsibilities which were beyond its competence without endangering the basic compromise of federation and ultimately the federation itself. It was a basic function of the Australian High Court to 'maintain the balance between the federal government and the governments of the constituent States'.[16] It seemed for a time that such a clause would be incorporated in the Covenants, but proposals for inclusion of a 'federal clause' in the Covenants were finally rejected in 1954.

Both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* contain an article to the effect that the provisions of the Covenant concerned shall extend to all parts of federal States without any limitations or exceptions.[17] A large number of countries have indicated in debates in the Third Committee of the General Assembly that they do not consider that constitutional limitations on legislative power should be permitted to constrain the consolidation and extension of the 'rule of law' in the family of nations. It has been argued, with some force, that a 'federal clause' could result in greater obligations being imposed on unitary States than on federal States.[18]

It may have been possible for Australia to have ratified, or acceded to, some of the treaties mentioned above, subject to reservations.[19] However, for reasons of policy, this approach has not been adopted by successive Australian Governments in relation to the major treaties under discussion. Furthermore, the extent to which reservations could have been made is not always clear. Article 20 (2) of the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966* forbids a reservation where it is incompatible with the object and purpose of the Convention while the *International Covenants on Human Rights* do not provide for reservations at all.[20]

It should be pointed out that in certain cases Australia refuses to ratify, or accede to, treaties of a human rights nature for reasons other than its inability to overcome domestic laws and practices that are defective. It may refuse to become a Party to a treaty because it disagrees with its political or symbolic value or because the drafting is unsatisfactory or the requirements of the Convention unclear.

There is little doubt, however, that by far the most important reason for Australia's failure to become a Party to the major treaties on human rights during the period 1948-1972 has been the inability of the federal executive to obtain the necessary co-operation from some States in matters

coming within their administration. If the laws and practices in the federal sphere and in all States conform to the requirements of the international treaty in question, the problems are minimal. In such situations, reasons of administrative convenience and economy would normally dissuade the federal authorities from duplicating State laws[21] or administrative agencies. Furthermore, it was an unwritten rule under successive Liberal Governments that the federal authorities would not pass laws on matters which were considered, traditionally, to come within the jurisdiction of the States. In the majority of cases, however, the practice of consulting the States and obtaining their approval to ratification has led to delays, misunderstandings and, in some cases, outright refusal to co-operate with the federal authorities.[22] Professor A C Castles has summarized the implications of this approach:

'Given the maintenance of the Commonwealth's present policy on ratification where the subject matter of international agreements do not fall normally within the constitutional authority of the Commonwealth, then the results of Doeker's researches point only too clearly to the conclusion that Australia will fail, for many years to come, to be drawn more closely into efforts to extend the international order, in a variety of fields. In the existing situation, the parochialism of only one State can hinder the conduct of our international relations. It can make it impossible for Australia to set a lead to other countries on the protection of human rights and not surprisingly it can bring criticism to bear on this country for its refusal to join in multinational efforts to consolidate and extend the "rule of law".'[23]

These difficulties are the logical result of a policy which has led Australia to refrain from becoming a Party to international treaties on human rights until the constituent States had first amended the relevant laws and practices that were inconsistent with the treaty in question. This approach meant that the constituent States often had the 'last say' in fact, if not in theory, on the question of whether Australia should become a Party to an international treaty on human rights. This has obvious implications for the conduct of one aspect of Australia's foreign policy. This approach was challenged in a dramatic manner shortly after the present government was elected to office on 2 December, 1972.

Australia's Policy and Practice 1972-74

In a press statement made on 12 December, 1972, the new Prime Minister, Mr Whitlam, announced that the proper procedures had been taken at the previous day's Executive Council meeting to sign the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights.*[24] The Prime Minister added that steps would be taken 'fairly soon' to ratify various ILO Conventions: *Convention No 87—Freedom of Association and Protection of the Right to Organise Convention; Convention No 98—Right to Organise and Collective Bargaining Convention; Convention No 100—Equal Remuneration Convention;* and *Convention No 111—Discrimination (Employment and Occupation) Convention.*

What is more significant, however, is that the Prime Minister also announced on that day that the Government was taking legislative steps to enable Australia to ratify the *International Convention on the Elimination of All Forms of Racial Discrimination* and that it was the Government's hope to be in a position to ratify the above treaties on human rights by 10th December, 1973 — the 25th Anniversary of the adoption by the United Nations of the *Universal Declaration of Human Rights.*

The above statement tends to indicate that the Government would not exercise its executive power in relation to the ratification of international treaties on human rights before the domestic situation is first in order. This appears to be a continuation of the previous Government's practice not to commit Australia to international obligations until the Government is first satisfied that the relevant laws and practices are in accord with the requirements of the treaty. This interpretation of the present Government's attitude receives some support from the fact that neither the *International Convention on the Elimination of All Forms of Racial Discrimination* nor the *International Covenants on Human Rights* were ratified by 10 December, 1973, as the Prime Minister had hoped.

What has changed radically, however, is the method which the present Government is prepared to resort to in order to ensure that Australia will comply with the requirements of the above treaties on human rights before ratifying them. This was hinted at by the Prime Minister's reference, in his press conference of 12 December 1972, to the legislative steps which were being taken to enable Australia to ratify the *International Convention on the Elimination of All Forms of Racial Discrimination.*

Since then, the Government's initiatives have made it clear that it will not wait for all the States to bring their laws and practices in line with the requirements of some treaties before ratifying them. Where the States have not co-operated the Government is prepared to introduce legislation in the Australian Parliament to overcome existing defects in law and practice. The purpose of the *Human Rights Bill* and the *Racial Discrimination Bill*, which were first introduced into Parliament on 21 November 1973,[25] is to implement into Australian law the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of All Forms of Racial Discrimination* respectively. These important Bills have been introduced into Parliament with a view to passing legislation under section 51 (xxix) (the 'external affairs' power) of the Constitution.[26] Whether or not legislation on human rights represents a valid exercise of the 'external affairs' power of the Constitution is a matter which will probably be determined by the High Court, if either or both Bills are passed by the Australian Parliament.

It is important to emphasize that these Bills, and in particular the *Human Rights Bill*, are also designed to give effect to the Government's policy to pass legislation on human rights and civil liberties.[27] The Government's view is that the basic rights and freedoms recognised in the *International Covenant on Civil and Political Rights* are, in virtually every case, inadequately protected in Australia.[28] The purpose of the *Human Rights Bill 1973* is to overcome these defects by implementing, in an Act of the Australian Parliament, the *International Covenant on Civil and Political Rights.* By recognising basic rights like the equal protection of the law, freedom of expression, the right of peaceful assembly and association, freedom of movement, freedom from arbitrary or unlawful interference with a man's privacy and recognising various rights in the criminal law area as legal rights, the *Human Rights Bill* is in itself very significant in Australia's political and legal history.

Therefore, both the *Human Rights Bill 1973* and the *Racial Discrimination Bill 1974* are designed, on the one hand, to enable Australia to comply with the international standards of the *International Covenant on Civil and*

Political Rights and the *International Convention on the Elimination of All Forms of Racial Discrimination* respectively and, on the other, to provide for comprehensive legislation in the area of civil rights and racial discrimination. In the absence of that second purpose, it may have been open to the Australian Government to press for the necessary legislation to be passed, by Federal and State Parliaments, in order to enable Australia to comply with the minimum requirements of the above treaties. What these minimal requirements are is not always clear, especially in the case of the *International Covenant on Civil and Political Rights*. For example, does freedom from '. . . *arbitrary or unlawful interference with . . . privacy . . .*', recognised in Article 17 of the Covenant, require the creation of comprehensive laws protecting the right to privacy or are the existing laws forbidding, subject to certain exceptions, the interception of telephonic communications[29] or the use of listening devices (for the purpose of eavesdropping),[30] and the actions in trespass, nuisance, defamation and other actions that indirectly protect privacy, adequate to comply with the requirements of that article? The requirements of that Covenant, which is not in force yet, will in the final analysis have to await the determination of the Human Rights Committee, foreshadowed in Part IV of the Covenant.

Despite these uncertainties, it could be argued that the *International Covenants on Human Rights* at least should be ratified forthwith as they are not yet in force and, in any event, complete compliance with the requirements of the Covenants is not required at the time of ratification of, or accession to, these Covenants.[31] The question of timing here is ultimately one that has to be determined by the central executive, presumably after carefully weighing the international and domestic advantages of ratifying a particular treaty forthwith against the risk that Australia might be in breach of its international obligations if Federal, State and Territory laws and practices inconsistent with the requirements of the treaty in question are not remedied in time.

In the present writer's view it may be preferable to take this risk in relation to certain international treaties on human rights than to adhere to the rigid practice of not ratifying, or acceding to, an international treaty until all laws and practices affected by it are first in order. Some of the considerations that could be taken into account, for example, include the question of what short-term and long-term diplomatic advantages could be gained from immediate ratification of such a treaty, whether or not the treaty in question is already in force, whether the treaty is subject to 'progressive implementation', the seriousness of the divergencies between the domestic situation and international standards, the nature and likelihood of international sanctions if the treaty in question is not fully complied with, the effect of ratification on the political processes in federal and State jurisdictions, and the degree to which 'reservations' or 'declarations' are possible and desirable.

The fact that the present Government has not yet ratified, at the time of writing, some of the major treaties on human rights, such as the *International Covenants on Human Rights* of 1966 and the *Equal Remuneration Convention, 1951* — two of which are subject in varying degrees to 'progressive implementation' only—is indicative of the cautious approach it has taken so far on the question of the ratification of international treaties on human

rights. Nevertheless, in the two years that it has been in office the Government, in addition to signing the major treaties referred to above, has ratified some major ILO Conventions: the *Freedom of Association and Protection of the Right to Organize Convention* of 1948 was ratified by Australia on 28 February 1973 and the *Right to Organize and Collective Bargaining Convention* of 1949 was also ratified on that date. The *Discrimination (Employment and Occupation) Convention* of 1958 was ratified on 15 June 1973. International obligations have also been assumed by Australia in other areas: on 13 December 1973 the *Convention relating to the Status of Stateless Persons* of 1954 and the *Convention on the Reduction of Statelessness* of 1961 were ratified. On that date, Australia also acceded to the *Protocol relating to the Status of Refugees.* In yet another important area, the Government acceded, on 22 August 1974, to the *Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education, 1962.*

In ratifying the above treaties, it has not been necessary for the Government to resort to the 'external affairs' power of the Constitution to introduce federal legislation to ensure that Australia would be in a position to observe all its international obligations. The changes in domestic law and practices that were required to enable Australia to ratify these Conventions were minimal. It is interesting to note that in relation to ILO Conventions it is still the practice of the Department of Labor and Immigration to consult with the authorities, in each State, to determine to what extent existing laws and practices conform with the standards of the Convention and to obtain the approval of each State Government to ratification. It seems, therefore, that the Government is prepared to introduce legislation under the 'external affairs' power of the Constitution only in isolated cases, where important Government policies are at stake and in cases where the States have been slow in changing their laws and practices to conform with the requirements of the treaty in question.

The political and other interests of some States, and their own view of co-operative federalism, have made them reluctant to change their laws and practices that seem inconsistent with the requirements of the *International Covenant on Civil and Political Rights.* This may be understandable in relation to certain provisions in the Covenant which, on a strict interpretation, may require some fundamental changes in the constitutional and legal practices of those States.[32] What is more perplexing, however is the reluctance of some States to change, within a reasonable time, even minor divergencies from the standards of particular treaties. It is this type of response on the part of some States that can give the central Government an added pretext for introducing legislation in the Australian Parliament to rectify the situation.

It is not within the scope of this paper to examine the implications of using the 'external affairs' power of the Constitution to pass legislation on human rights or to attempt to weigh the advantages against the disadvantages of this course of action. Suffice it to say that if legislation, such as the *Human Rights Bill,* is passed by Parliament and is upheld as constitutionally valid in any subsequent challenge, the political and legal implications of such legislation will be enormous.

Conclusion

It seems that the present government is as reluctant as its predecessor to ratify, or accede to, a treaty on human rights, on behalf of Australia, before all relevant laws and practices are consistent with the treaty in question. Although this practice is well motivated, it is submitted that its detailed application could be reassessed in the light of the actual requirements of different treaties. There would seem to be no reason, for example, why Australia could not become a Party to treaties which are subject to 'progressive implementation' only in situations where domestic policies, laws and practices are *substantially* in accord with the requirements of the treaty in question.

What is significant, however, is that the present government is prepared to introduce legislation in the federal Parliament in some cases, rather than continue to approach the authorities in each State, to give effect to an international treaty on human rights. Whichever approach is adopted, it is important that the constituent States in Australia be made more aware of the importance which the ratification and implementation of international treaties on human rights can have in efforts to consolidate and extend the international legal order. It is becoming increasingly obvious that the effective protection of human rights is not the sole concern of individual countries, let alone that of the Australian States, but is a matter of world concern. In the present writer's view, it is essential that minor problems in State laws and practices should not isolate Australia from the very important efforts that are being made to create a more viable international legal order.[33]

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1 N Harper and D Sissons, *Australia and the United Nations* p 256, Manhattan Publishing Company, New York, 1959.

2 United Nations Doc E/CN4/SR 131, 27 June 1949, pp 3-4.

3 N Harper and D Sissons, *Australia and the United Nations*, pp 257-258, Manhattan Publishing Company, New York, 1959.

4 Australia, however, signed the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1966 which, at the time of writing, has already been ratified by eighty one countries. The signature of a treaty does not impose any binding legal obligations as such on Australia. On the other hand, it is normal practice for Australia not to sign treaties that are subject to ratification unless there is the intention of proceeding to ratification in due course.

5 In referring to section 61 of the Constitution in *The King v Burgess; Ex parte Henry* (1936) 55 CLR, 608, p 644, Latham CJ said the following:

> 'The execution and maintenance of the Constitution, 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 (sec 61).'

6 Under the rule known as the rule in *Walker v Baird* (1892) AC 491 treaties entered into by a British Government which, by virtue of their provisions or otherwise, impair the private rights or duties of British subjects or involve any modification of the common or statute law, do not bind citizens and will not receive application by courts of law in the absence of specific legislation implementing the relevant provisions of the treaty concerned. This rule also applies to Australia.

7 This does not apply, however, if the Australian Parliament makes laws under section 51 (xxix) of the Constitution, which is examined in the next section. By virtue of section 109 of the Constitution such laws prevail over inconsistent State laws.

8 In delivering the Opinion of the Privy Council in *Attorney-General for Canada v Attorney-General for Ontario and Others* [1937] AC 326, p 347, Lord Atkin emphasized the distinction between the role of the Executive and the role of Parliament in concluding and implementing treaties respectively. 'It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alterations of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice pointed out, has a constitutional control over the executive but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed on the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses.'

Lord Atkin then dealt with the different case of a federal State as follows:

'But in a State where the Legislature does not possess absolute authority, in a federal State where legislative authority is limited by a constitutional document, or is divided up between different Legislatures in accordance with the classes 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 the one Parliament to whom they may be responsible, but possibly of several Parliaments to whom they stand in no direct relation. The question is not how is the obligation formed, that is the function of the executive; but how is the obligation to be performed, and that depends on the authority of the competent Legislature or Legislatures.'

9 For a reference to Mr Bowen's speech, see *Current Notes on International Affairs*, Vol 40, 1969, 66, p 67.

10 A memorable provision that contravened both the spirit and the letter of the *International Convention on the Elimination of All Forms of Racial Discrimination* was section 8 (3) of the Western Australian *Firearms and Guns Act, 1931*, which stated that:

'No Asiatic or African alien or person of Asiatic or African race claiming to be a British subject shall hold a licence under the Act, unless with the express approval of the Commissioner of Police . . .; Provided that this paragraph shall not apply to any person of the Jewish and Lebanese races.'

This provision was repealed by section 2 of the *Firearms and Guns Act Amendment Act, 1971*.

11 The defective provisions of the 1971 Queensland legislation are examined in detail in G Nettheim, *Outlawed: Queensland's Aborigines and Islanders and the Rule of Law*, Australia & New Zealand Book Co Pty Ltd, Sydney, 1973.

12 In addition, there is little doubt that to fully comply with the requirements of that Convention legislation is required to give effect to the terms of the Convention.

13 *Review of Australian Law and Practice Relating to Conventions Adopted by the Inter-*

national Labour Conference, 1969, Parliamentary Paper No 197, Commonwealth Government Printing Office, Canberra, 1970, p 90.

14 Ibid, p 99.

15 A 'federal clause' in a treaty is a provision that takes note of the constitutional difficulties which may arise in the performance of the treaty obligations in federal States, and which permits such a State to become a Party to the treaty insofar as the authority responsible for the conduct of external relations has constitutional authority to effect bona fide implementation of the obligations.

16 GAOR, 5th Session, Third Committee, 292nd Meeting, 25 October 1950, p 134.

17 Article 28 of the *International Covenant on Economic, Social and Cultural Rights;* Article 50 of the *International Covenant on Civil and Political Rights.*

18 See inter alia, GAOR, 5th Session, Third Committee, pp 107-269; GAOR, 8th Session, Third Committee, pp 198-269.

19 A 'reservation' is defined in Article 2(1)(d) of the *Vienna Convention on the Law of Treaties* as 'a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.'

20 In treaties which do not provide for the making of reservations it is still legally possible to make them provided, among other things, they are compatible with the nature and purpose of the Convention: *Advisory Opinion on Reservations to the Genocide Convention*, ICJ Reports (1951), pp 15 et seq.

21 Successive federal governments have, since 1949, consistently refrained from introducing legislation and implementing the terms of the *Convention on the Prevention and Punishment of the Crime of Genocide* in a federal law, despite pressure to do so from various sections of the public. State laws and practices have been sufficient to enable Australia to fulfil its international obligations adequately under the Convention.

22 Examples of this are to be found in Dr G Doeker's *The Treaty Making Power in the Commonwealth of Australia*, Nyhoff, 1967. The subject is well summarized in Professor A C Castles' revealing article entitled: *The Ratification of International Conventions and Covenants* in *Justice* No 2 (June 1969) pp 1-8.

23 A C Castles, *The Ratification of International Conventions and Covenants* in *Justice* No 2 (June 1969) pp 1-8.

24 Australia officially signed these two treaties on 18 December 1972.

25 The *Racial Discrimination Bill* has been re-introduced into the Senate on 3 April 1974, before the dissolution of Parliament, and has been re-introduced with amendments on 31 October 1974.

26 The recital of the *Racial Discrimination Bill 1974* indicates that powers other than the 'external affairs' power of the Constitution are also being relied on as a constitutional basis for that legislation.

27 See paragraphs 2 and 3 of Chapter XXII (Civil Liberties) of the ALP's *Platform, Constitution and Rules* as approved by the 30th Federal Conference, Surfers Paradise 1973. Published by David Combe, September 1973.

28 This view has been expressed by the Attorney-General, Senator the Honourable Lionel Murphy, QC, in his Second Reading Speech for the *Human Rights Bill* when it was first introduced on 21 November, 1973. This view has been reiterated in speeches given by the Attorney-General to various organisations in Australia and is to be found also in the pamphlet *Why Australia needs a Bill of Rights* in answer to a series of articles on the *Human Rights Bill* by Sir Robert Menzies.

29 *Telephonic Communications (Interception) Act 1960*

30 *Listening Devices Act, 1969 (Victoria); Listening Devices Act, 1969 (NSW);* Part IV of *Invasion of Privacy Act, 1971 (Qld)* and *Listening Devices Act, 1972 (SA).*

31 Article 2 (1) of the *International Covenant on Economic, Social and Cultural Rights* provides as follows:

'1 Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

Article 2 (2) of the *International Covenant on Civil and Political Rights* provides as follows:

'2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measure as may be necessary to give effect to the rights recognized in the present Covenant.'

32 Article 25(a) of the *International Covenant on Civil and Political Rights*, for example, states that every citizen shall have the right and the opportunity, without distinctions on improper grounds and without unreasonable restrictions, 'to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.' On a strict interpretation of the requirement of that provision it is not difficult to envisage strong political opposition to the implementation of that standard in two, and possibly three, States in Australia.

33 For a more complete examination of this point see A C Castles *The Ratification of International Conventions and Covenants* in *Justice* No 2 (June 1969) pp 1-8.