CHINA OCEAN SHIPPING CO. AND OTHERS v. SOUTH AUSTRALIA[1]

Constitutional law — Applicability of Imperial law in Australia — Whether Merchant Shipping Act 1894-1900 (U.K.) extends to South Australia — Whether U.K. Act applies to the Crown of its own force or by virtue of Judiciary Act 1903 (Cth) — Merchant Shipping Act 1894 (U.K.) — Merchant Shipping (Liability of Shipowners and Others) Act 1900 (U.K.) — Judiciary Act 1903 (Cth)

Proceedings before the High Court comprised a stated case removed from the Supreme Court of South Australia in the course of litigation arising from the collision of a ship with port facilities in South Australia which were the property of the Crown. The Minister of Marine of South Australia brought actions in the Supreme Court claiming damages under the Harbors Acts 1936-1974 (S.A.) against the owner of the ship, China Ocean Shipping Co., its "agent" in Australia, Patrick Operations Pty Ltd, and its master; the defendants thereupon commenced an action in the Supreme Court seeking declarations under section 504 of the Merchant Shipping Act 1894-1900 (U.K.) that their liability for damages was, by virtue of section 503 of the Act, limited to an amount of £8 stg. per ton of the registered tonnage of the ship. The parties agreed to state a special case to resolve three questions of law:

1. Did section 504 of the Merchant Shipping Act entitle the plaintiffs or any of them to make an application relating to alleged liability in respect of damage to property on-shore (disregarding the ownership of the property for the purposes of this question)?
2. Did section 503 of the Merchant Shipping Act apply to the Crown in right of South Australia so as to entitle the plaintiffs to limit their liability for damages to that defendant?
3. If section 503 did not apply of its own force to the Crown, did it apply by virtue of section 64 of the Judiciary Act 1903 (Cth)?

The High Court by majority decided that at least the owner of the ship was entitled to invoke section 504 of the Imperial Act to limit liability for damage to on-shore property, but that the identity of the claimant for damages, the Crown in right of South Australia, was fatal to the limitation proceedings, because section 503 neither of its own force nor by virtue of the Judiciary Act (Cth) bound the Crown. Specifically the Court held:

(1) The Merchant Shipping Act, 1894 (U.K.) and the Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (U.K.) were operative in South Australia by paramount force at the date of the collision and the institution of the Minister's suits. Murphy J. dissented, and consequently expressed no opinion on the following two findings of the majority.

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[1] (1979) 27 A.L.R. 1. High Court of Australia; Barwick C.J., Gibbs, Stephen, Murphy and Aickin JJ.

(2) Properly construed, section 504 of the Act authorises limitation proceedings in relation to on-shore property. The 1900 amendment which expressly extended the limitation of liability in section 503 from damage to property afloat to all damage whether on land or water, but made no reference to section 504, nevertheless impliedly incorporated section 504, the procedure provision, which entitles the owner of a ship to initiate limitation proceedings. However, properly construed, section 504 does not permit the master of the ship to bring such proceedings.[2]

(3) Properly construed, sections 503 and 504 of the Imperial Act do not apply to the Crown, there being neither express words nor necessary implication to bring the Crown within the terms of the Act. Therefore the plaintiffs could not invoke those provisions to limit their liability in the actions instituted by the South Australian Minister. Barwick C.J. dissented.

(4) Section 64 of the Judiciary Act 1903 (Cth), which directs, *inter alia*, that in any suit to which a State is a party the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject, did not indirectly enable the plaintiffs to limit their liability in relation to claims by the Crown. The judges provided different reasons for this finding. Gibbs J. held that section 64 had no operation because there was no suit in which a State was a party within the meaning of section 64; proceedings had been brought against the Crown and it was "no more than a confusing coincidence"[3] that the Crown under South Australian legislation is sued under the title of the State. Stephen J. held that section 64 is only applicable in proceedings in which a court is exercising federal jurisdiction, and that the Supreme Court of South Australia in the limitation proceedings was not exercising federal jurisdiction but an Imperial jurisdiction. Aickin J. pursued a similar course. Murphy J. held that the Supreme Court was exercising federal jurisdiction, but because the Merchant Shipping Act no longer extended to South Australia there were no "rights" to be litigated. Barwick C.J. found it unnecessary to consider this question, given his decision on finding (3).

It is proposed in this Case Note to discuss the first finding, which engaged the Court in an analysis of the view developed in earlier cases by Murphy J. on the operation of Imperial legislation in Australia. It is noted in passing that the diversity of reasoning applied to section 64 of the Judiciary Act leaves unresolved complex questions arising not only from that section but from the "still obscure" Admiralty jurisdiction.[4]

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[2] On the question whether the "agent" of the ship could bring limitation proceedings, Stephen and Aickin JJ. held that an answer was not necessary, Gibbs J. answered "No" and Barwick C.J. answered "Yes". Murphy J. must be taken to have answered "No.". The order of the Court read: "As to the agent. Not answered."

[3] (1979) 27 A.L.R. 1, 25.

[4] Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed. 1978) 228. The authors recommended that the doubts and difficulties in relation to this issue should be resolved by the enactment of Commonwealth legislation: 233. Aickin J.

The Operation of Imperial Legislation in Australia

The most ambitious submission mounted by South Australia to counter the plaintiffs' limitation proceedings was that the Merchant Shipping Act 1894-1900 (U.K.), however construed, had no operation in Australia after Federation in 1901, a submission apparently formulated to test the Court's response to the unorthodox views of Murphy J. expressed in *Bistricic* v. *Rokov*[5] and *Robinson* v. *Western Australian Museum*.[6] Simply, Murphy J. argued that the legal supremacy and legislative authority of the United Kingdom over outside territories were linked to political control; once the United Kingdom surrendered political control of Australia, the Westminster Parliament no longer had power to legislate for the independent nation of Australia; furthermore, older statutes which regulated imperial-colonial relations, including the Merchant Shipping legislation, were no longer operative.

No member of the Court accepted the invitation to add support to the views of Murphy J. and together the judges marshalled evidence of judicial authority, legal principle and historical fact to rebut what Barwick C.J. described as "a very quaint aberration".[7]

Stephen J. engaged in the most comprehensive analysis.[8] Rather than parade authority, he chose to "meet the submission upon its own ground, which invokes the realities of the relationship this century between the United Kingdom and Australia".[9]

The starting point was 1901. Whereas Murphy J. argued that Federation marked the emergence of the Commonwealth of Australia as a new political entity with the status of a nation, Stephen J. documented "the common understanding" of the Australian and Imperial negotiators that the establishment of the Commonwealth "would not of itself involve either the ending of the application to Australia of existing Imperial laws or the denial to the Parliament at Westminster of continued competence to legislate for Australia".[10] Barwick C.J. described the political reality of 1901 more cryptically:

> There was neither a desire nor an intention to sever relationships with Great Britain by the formation of the Commonwealth. . . . [which] was no more than a self-governing colony . . .[11]

Next Stephen J. examined the Statute of Westminster 1931 (U.K.) and the Statute of Westminster Adoption Act 1942 (Cth), enactments which completed the evolution of the Commonwealth to Dominion status. The matters he emphasised were: the persistence well into the

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acknowledged the difficulties and noted that "they are . . . readily solved by legislation", (1979) 27 A.L.R. 1, 57.

[5] (1976) 11 A.L.R. 129.

[6] (1977) 16 A.L.R. 623.

[7] (1979) 27 A.L.R. 1, 7.

[8] Aickin J. expressed himself to be "in complete agreement" with Stephen J. on this question, *id.* 54. Barwick C.J. also fully agreed with Stephen J., but he added some comments, *id.* 7.

[9] *Id.* 29.

[10] *Id.* 29-30.

[11] *Id.* 7, 8.

twentieth century of the Imperial-colonial relationship prevailing at Federation; the active participation of the Dominions in the drafting of the Statute, which "affords testimony, attested to by each of the Dominions, of the continuing operation of Imperial legislation in the Dominions";[12] the optional nature of the independence from Imperial law offered by the Statute, which was to apply to the Commonwealth of Australia only if the Parliament adopted it by specific legislation (section 10); the tardiness of the Commonwealth in enacting adoption legislation, hence prolonging its legal subordination; and express provisions in the Statute which inherently acknowledged Imperial legislative authority, that is, section 2(2), which authorised a Dominion Parliament to repeal or amend existing or future Imperial statutes which formed part of the law of the Dominion, thus assuming that the Imperial statutes remained part of the law of the Dominion until repealed or amended, and section 4, which preserved but restricted the United Kingdom Parliament's power to pass laws having effect in a Dominion.

Finally Stephen J. drew on evidence of recent recognition of the operation of Imperial law in Australia. Those who would sever one Imperial link, appeals to the Privy Council, do not hesitate to advocate as a means to that end legislation by the United Kingdom Parliament to terminate appeals from State Supreme Courts. And the Law Reform Commission of New South Wales recommended in 1972, in its Working Paper on Legislative Powers, that the surviving Imperial constraints on State legislative power be removed by a United Kingdom Act.

The fundamental thesis in the constitutional scheme devised by Murphy J. was that the political realities of the relationship between Australia and the United Kingdom belied the legal theory of Australia's subordination. That thesis was supported less by evidence than presumption, and Stephen J. demonstrated that the realities tend to contradict the presumptions:

> The legislative power of the Parliament at Westminster, albeit responsive only to prior Australian initiatives, remains, for Australia, a factor in present-day constitutional law, despite the undoubted changes in relationships which have occurred and which are reflected in the current realities of national political power and in Australia's own nationhood.
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> It is, then, not the rejection of the legislative power of the Parliament at Westminster to make laws in the future for Australia, still less the abrogation of existing Imperial laws, that has marked, in this century, the progressive development of the constitutional relationship between Australia and the United Kingdom. Instead the realities of the relationship have involved the continued application of existing Imperial laws, but subject now to the power of repeal or amendment by Commonwealth legislation.[13]

Gibbs J. attacked the thesis not on its own terms but on principle:

> Statutes do not cease to be part of the law because the conditions in which they were enacted have changed.[14]

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[12] *Id.* 31.
[13] *Id.* 31-32.
[14] *Id.* 18.

Notwithstanding the gradually changing relationship between Australia and the United Kingdom there was no ground for concluding that the law changed accordingly.[15] He supplemented this legalist doctrine with a warning of the consequences of its rejection: if political developments did result in the silent abrogation of some or all Imperial legislation in force in Australia, then the law would be defective, gravely uncertain, or even non-existent. Barwick C.J. and Stephen J. shared this concern that vacuums would be created if the views of Murphy J. were accepted,[16] and they listed historical instances of Imperial statutes providing the only Australian law in important fields after Federation. However this conviction that some law is better than no law is hardly a substantive rebuttal of the primary thesis of Murphy J., who pointed out that any inconvenience arising from the cessation of operation of Imperial law would be transitional and minimal, and easily overcome by appropriate Commonwealth or State legislation.[17]

Of course Murphy J. had the opportunity in this case to reiterate his views. He avoided the debate on the "realities" and relied on two points of principle. First, while acknowledging that the Commonwealth Constitution was a creature of the United Kingdom Parliament, he argued that it possessed a character different from ordinary statutes, a character which freed Australia from colonial status and precluded future legislative supremacy of the United Kingdom Parliament. The peculiar feature was section 128 which gave power to the local legislature and electorate to amend the Constitution "without reference to the United Kingdom".[18] As a constitutional amendment could expressly exclude the operation of any United Kingdom Act, or expressly exclude the United Kingdom's legal supremacy as prescribed by the Colonial Laws Validity Act 1865 (U.K.), then the United Kingdom must be taken to have tacitly surrendered its supremacy in 1901. Secondly, and directly opposed to the stand taken by Gibbs J., he asserted that a "fundamental change of a political nature may bring about a fundamental change in legal doctrine".[19] In support he cited a similar statement from de Smith's *Constitutional and Administrative Law.*

The contention of Murphy J. as to the scope of section 128 is plausible, if unsupported by any judicial authority.[20] However, the next step in the reasoning, that the Imperial Parliament's implied sanction to such amendments terminated its legislative supremacy, is less tenable.

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[15] Gibbs J. reiterated this view in the contemporaneous case before the High Court, *Southern Centre of Theosophy Inc.* v. *South Australia* (1979) 27 A.L.R. 59, 65. "The fact that there has since been a change in the political or constitutional relationship between the United Kingdom and South Australia does not cause part of the existing law of South Australia to disappear . . . ." Barwick C.J., Stephen, Mason, Aickin and Wilson JJ. fully agreed with the reasons.

[16] (1979) 27 A.L.R. 1, 7 *per* Barwick C.J., 32 *per* Stephen J.

[17] *Id.* 53.

[18] *Id.* 51.

[19] *Id.* 52.

[20] Professor Geoffrey Sawer has argued the possibility that s. 128 may apply to State constitutional law and Imperial legislation: "The British Connection" (1973) 47 A.L.J. 113, 113-114. Cf. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed. 1976) 541-542.

Murphy J. was attributing to the initial grant of a general power the same effect as the exercise of that power in a particular way; the corollary, that the exercise of the power is not necessary to achieve the effect, is a *reductio ad absurdum.*

Although not elaborated, the second principle, postulating "fundamental change", is the lynchpin of the constitutional theory espoused by Murphy J. in this and earlier cases. Federation is perceived as effecting a change in sovereignty, a shift of legislative supremacy from the United Kingdom to Australia. The persistent problem with this theory is to prove that such a change occurred.

In the first place, reliance on de Smith is misplaced. During a discussion of sources of authority for a constitutional order de Smith examined the historically common situation of a new constitution produced in a manner which, according to the pre-existing legal order, is legally invalid, classic examples being the English Revolution of 1688 and the American Revolution. The conclusion was that

> [l]egal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legality... sooner or later a breach of legal continuity will be treated as laying down legitimate foundations for a new constitutional order, provided that the "revolution" is successful.[21]

De Smith's final comment that "a fundamental change of a political nature may bring about a fundamental change in legal doctrine"[22]—the passage adopted by Murphy J.—related then to revolutionary change, to abandonment of the existing legal regime, to what Dixon J. had referred to many years before as a "political convulsion".[23] The act of federation in 1901 in Australia clearly lacked such revolutionary character. Indeed de Smith had described the Australian experience of constitutional change as "exceptional" in the modern world precisely because legal continuity had been preserved:

> The constitution is valid because it was duly enacted by the United Kingdom Parliament, which had power to enact it. Subsequent amendments to the constitution are valid because they have been made in the manner and form prescribed by the constitution.[24]

In context, therefore, de Smith's proposition is not apposite to the argument of Murphy J. For de Smith the word "fundamental" denoted a *type* of change, while Murphy J. was concerned merely with *degree* of change.

With analysis narrowed to the degree of change in the Australia—United Kingdom relationship, Murphy J. must still meet the objection that history does not support him; the debate about the "realities" which he avoided becomes central. The evidence he presented was limited to the views of an Australian Prime Minister noted for his concern for Australia's international prestige, and passages from High Court judg-

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[21] De Smith, *Constitutional and Administrative Law* (3rd ed. 1977) 66-67.
[22] *Id.* 68.
[23] Dixon, "The Statute of Westminster 1931" (1936) 10 A.L.J. Supp. 96, 106.
[24] De Smith, *op. cit.* 64.

ments which rarely confirm his case. For example, the statement by Griffith C.J. in 1907 in *Baxter* v. *Commissioners of Taxation* asserting the sovereignty of the Commonwealth and its immunity from interference "by any external power"[25] was directed not at Imperial but *State* interference. In the 1926 case in which Isaacs J. commented that political realities were relevant to constitutional interpretation,[26] he explicitly acknowledged the supremacy of paramount Imperial law; the issue was not whether the Colonial Laws Validity Act restricted the Commonwealth's legislative power but whether it restricted Commonwealth legislative power in relation to a particular subject, that of judicial appeals. Murphy J. also cited the Report of the 1926 Imperial Conference as evidence of the "constitutional realities" of Dominion autonomy.[27] As Dixon J. reminded the Second Australian Law Convention in 1936, the declarations and resolutions of the Conferences "effected no change in the constitutional law of the Empire".[28]

In discussing decisions by the High Court before the passage of the Statute of Westminster, in which particular Commonwealth statutes were held to be void for repugnancy to Imperial Acts by virtue of the Colonial Laws Validity Act, Murphy J. formulated another notable proposition: that, by admitting a choice between laws of the Commonwealth made under the Constitution and laws of the United Kingdom Parliament, the High Court, vested by the Constitution with only the judicial power of the Commonwealth, was exercising some other power, "some purported additional imperial judicial power".[29] This proposition appears to confuse "judicial power" with the concept of "jurisdiction". In section 71 of the Constitution the phrase, "the judicial power of the Commonwealth", describes one function of government as distinct from the other—legislative and executive—functions, for the purpose of allocating it to one of the three branches of the Commonwealth government, the judiciary. The only delimiting effect of these words is to ensure a separation of powers. On the other hand, the power of a court to entertain certain proceedings, and limitations on that power, are matters of jurisdiction. The jurisdiction of the High Court of Australia is prescribed in Chapter III of the Constitution and in laws of the Commonwealth Parliament. Murphy J. offered no evidence from either source to establish that the High Court was, in the cases under consideration, acting beyond its powers.

In summary, the majority of the Court in this case rejected the views of Murphy J. on the operation of Imperial legislation in Australia on the basis of authority, principle and fact. Moreover there were intrinsic weaknesses in the exposition by Murphy J. of his views. However, while Murphy J. has failed to win support from his brethren, he has some backing from academic writers.

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[25] (1907) 4 C.L.R. 1087, 1121; quoted (1979) 27 A.L.R. 1, 50-51.
[26] *Commonwealth* v. *Kreglinger and Fernau Ltd* (1926) 37 C.L.R. 393, 412; cited (1979) 27 A.L.R. 1, 52.
[27] (1979) 27 A.L.R. 1, 52.
[28] Dixon, *op. cit.* 97.
[29] (1979) 27 A.L.R. 1, 53.

In a study of Mr Justice Murphy's constitutional jurisprudence published after the decision in *Bistricic* v. *Rokov*,[30] Bickovskii suggested that the concept of parliamentary sovereignty, which underlies the doctrine of United Kingdom supremacy over Australia, may be regarded as modified by the emergence of politically independent states; the achievement of that independence disrupted the integrated legal system of the Empire and permitted the development of independent legal systems.[31] However Bickovskii disagreed with Murphy J. on the date of Australian independence. On the basis that an essential ingredient of this type of political change is general acceptance or acquiescence on the part of those who are in a position to bring the processes to a stop, "it cannot be said that in 1901 Australia was legally independent, when all the historical evidence is that our degree of political independence, if any, was minute".[32] Furthermore, while it is arguable that the Commonwealth is legally independent because it is unequivocally politically independent, there is no evidence that the States have the political independence requisite for legal independence.[33]

Likewise Cooray[34] had sympathy with the views of Murphy J. but in his analysis highlighted some defects. The principal problem, according to Cooray, was the lack of theoretical underpinning for the basic thesis that a "legal revolution" had taken place; he indicated possible sources —Wade, Jennings, Hart, Kelsen—for such a theory that constitutional change can occur gradually while the letter of the written law remains unchanged.[35] There are two further problems, the same problems identified by Bickovskii. First, the date of 1901. Cooray suggested that "if he [Murphy J.] had not specifically referred to 1901 but argued that at some point between 1901 and 1977 a revolution took place which had legal consequences, his argument would have been compelling",[36] for he could have relied on evidence of the emergence of the international personality of Australia—entry into treaties, declaration of war, peace negotiations, establishment of diplomatic relations—all evidence, incidentally, of "political realities" which would have counterbalanced to some extent the evidence accumulated by Stephen J. in this case. Secondly, the position of the States: "it is difficult to argue that a political revolution has taken place between the States and Britain such that the colonial tie is no longer in existence" since "the States to a certain extent by their own actions recognise the colonial situation or a semi-colonial situation".[37]

The decision in this case, that provisions of an 1894 Imperial Act based on nineteenth century monetary values can still govern recovery

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[30] *Supra* n. 5.

[31] Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 F.L. Rev. 460, 468.

[32] *Id.* 469.

[33] *Id.* 470.

[34] Cooray, *Conventions, The Australian Constitution and the Future* (1979).

[35] *Id.* 95-98. See also Blackshield, "The Abolition of Privy Council Appeals: Judicial Responsibility and 'The Law for Australia' " (1978) Adelaide Law Review Research Paper No. 1, 169-174.

[36] *Id.* 98.

[37] *Id.* 100.

of damages in Australian shipping accidents, confirms the need revealed in the earlier case of *Bistricic* v. *Rokov* for reform of the law of merchant shipping and reform of constitutional law.[38] Stephen J. acknowledged that the law governing merchant shipping is unsatisfactory:

> It is a situation which has remained substantially unaltered through the lives of many successive governments, Imperial law continuing to overlay what might be thought to be proper areas for the operation of Australian laws. It no doubt calls for radical reform but it is by legislative initiative, possible ever since the adoption of the Statute of Westminster, that it must be achieved. . .[39]

Notably the Commonwealth Parliament in late 1979 enacted the Navigation Amendment Act 1979 which up-dated a considerable amount of merchant shipping legislation, including limitation of liability of shipowners.[40] In the constitutional law field some developments have occurred since 1976. The Premiers' Conference has asked the Standing Committee of Commonwealth and State Attorneys-General "to examine constitutional matters that may need review to reflect more accurately the political and legal autonomy of Australian Parliaments and other authorities in Australian matters". The review is to focus in particular on limitations which at present apply to the Australian States.[41] And the New South Wales and Tasmanian Parliaments have passed Acts requesting the Commonwealth to legislate to remove the limitation—in the Colonial Laws Validity Act 1865 (U.K.)—on their power to repeal or amend Imperial laws extending to the State.[42]

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[38] Case Note, *Bistricic* v. *Rokov* (1977) 8 F.L. Rev. 346, 353-356.

[39] (1979) 27 A.L.R. 1, 33.

[40] Act No. 98, 1979.

[41] Press Release by the Attorney-General (Cth), 76/79, 13 October 1979.

[42] Constitution Powers (New South Wales) Act 1978 (N.S.W.) and Constitution Powers (Tasmania) Act 1979. The Constitutional Powers (Request) Bill, introduced in the Victorian Legislative Council on 5 June 1979, makes a similar request in respect of Victoria.

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