A UNITED STATES GUIDE TO CONSTITUTIONAL LIMITATIONS UPON TREATIES AS A SOURCE OF AUSTRALIAN MUNICIPAL LAW

INTRODUCTION

An eminent American constitutional law scholar in the not too distant past offered some advice to his readers which bears repeating to those who would cast their eyes towards the Australian Constitution for a solution to the problems which are presented in the nation's life. He suggested that 'a glimpse into the households of our neighbors serves the better to illuminate our own, as when by pressing hard against the pane we see not only the objects on the other side but our own features reflected in the glass.'[1] In an attempt to contribute some small assistance to those who could press against that pane, this article lightly dips into the vast reservoir of American constitutional law in an endeavour to ascertain and postulate express and implied limitations on treaties[2] as a source of domestic law within the Australian legal system.[3] There is, however no extensive canvassing of the general

1 Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, (1953) 53 Colum L Rev 597.

2 The term treaty has been defined as 'a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves'. Harvard Law School Research in International Law, *Draft Convention on the Law of Treaties*, (1935) 29 Am J Int'l L Supp Pt 3, 653, 686; The United States Supreme Court has used a similar definition: 'a compact between two or more independent nations with a view to the public welfare.' B Altman & Co v United States (1912) 224 US 583, 600. See generally Myers, *The Names and Scope of Treaties* (1957) 51 Am J Int'l L 574; The general practice of the Department State in determining whether an agreement should be a treaty or an executive agreement and the standards applied by the Department in making such determinations are set forth in *Memorandum of Law Regarding Conclusion of Agreement with Portugal and Bahrain* (1972) 66 Department of State Bulletin 283-284.

3 One commentator has suggested the international reasons for such a study are that it 'may enable us to know whether and how far these limitations hinder the Federal States from co-operating with other members of the Family of Nations in economic, social and cultural matters and particularly in the field of Human Rights. It is now universally recognized that without international co-operation in solving international problems that involve these matters, and in promoting and encouraging respect for Human Rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, there cannot be any durable world peace.' R Ghosh, TREATIES AND FEDERAL CONSTITUTIONS: THEIR MUTUAL IMPACT 139 (1961).

problems relating to the interaction of domestic and international law,[4] except insofar as they affect the issues posed in this article.[5]

As implied by the title, this article will focus on treaties rather than other species of international agreements which have come to play an increasingly important role in affairs between nations. In particular, three varieties of such agreements have been extensively used by the United States; namely those authorized by Congress, others concluded under the authority of a prior treaty, and purely Presidential agreements which are made pursuant to executive authority and also express Presidential powers.[6] But this is not to say that constitutional limitations suggested herein do not equally apply to these agreements as well as treaties. Indeed in a recent dictum by Justice Black dealing with this question, the language used and cases cited refer to treaties although the opinion explicitly recognizes that the case involved executive agreements.[7]

Finally, it should be noted that the primary concern of this inquiry will focus on judicial materials, relating to treaties rather than being a study of the practice followed by governments with respect to them. Of course, these two aspects cannot be kept entirely distinct, but insofar as Australian courts have shown less deference for a continued course of legislative and executive conduct than their American counterparts, reference to governmental practice will be correspondingly restricted.

---

4 The interaction of municipal and international law has been considered by the High Court of Australia, eg Zachariassen v The Commonwealth (1917) 24 CLR 166; Ffrost v Stevenson (1937) 58 CLR 528, 579-581; Polities v The Commonwealth (1945) 70 CLR 60; Chow Hung Ching v The King (1948) 77 CLR 449.

5 International law 'provides a general framework which controls the external conduct of the United States in making treaties and which defines international rights and obligations created by them. Within that framework lies a large area of permissive national regulation concerned with domestic procedures of treaty making and with the status of international agreements within the domestic law of the United States.' McLaughlin, *The Scope of the Treaty Power in the United States* (1958) 42 Minn L R 709, 711.

6 United States v Belmont (1937) 301 US 324; United States v Pink (1942) 315 US 203; McDougal and Lans, *Treaties and Congressional-Executive Agreements or Presidential Agreements: Interchangeable Instruments of National Policy* (pts 1-2) (1945) 54 Yale L J 181, 534; Berger, *The Presidential Monopoly of Foreign Relations* (1971) 71 Mich L R 1; R Berger, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974) especially chapters 3, 4, 5.

7 Reid v Covert (1957) 354 US 1, 17 n 2 (Black J with Warren CJ, Douglas and Brennan, JJ concurring).

CONSTITUTIONAL PROVISIONS

Some one hundred and thirteen years after the ratification of the Constitution of the United States of America, the Commonwealth of Australia Constitution Act of 1900[8] was proclaimed,[9] thereby giving birth to a nation[10] whose overall constitutional structure, institutions, and powers are remarkably similar to those embodied in the American Constitution of 1787.[11] With respect to the treaty making and enforcement powers this overall tendency is also evident. The decision to negotiate a treaty, discussion of the principles which shall guide the negotiators and formulation of the agreement during negotiations is, in both countries, a function of the Executive.[12] The power to make treaties is expresssly vested in the President by and with the advice and consent of the Senate.[13] Although the Australian Constitution does not in so many words enunciate a treaty making power, this power has come to reside in the Australian Government,[14] which

8 63 and 64 Vict c 12. The Constitution of the Commonwealth of Australia which comprises 128 sections, is contained in the ninth clause of the British statute.

9 Proclamation dated September 17, 1900 declaring 1st January 1901 as the date of the establishment of the Commonwealth of Australia. For the text see [1901-1927] 4 Clth Stat Rules 3621.

10 'The Constitution established the Commonwealth of Australia as a political entity and brought it into existence as a member of the community of nations'. Barton v Commonwealth of Australia (1974) 131 CLR 477, 498 (Mason J); 'To describe the establishment of the Commonwealth as the birth of a nation has been a common place'. The City of Essendon v Criterion Theatres Ltd (1947) 74 CLR 1, 22 (Dixon J as he then was).

11 'Indeed it may be said that, roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions'. Dixon, *Two Constitutions Compared,* (1942) 28 ABAJ 733, 734. See also, Cowen, *A Comparison of the Constitutions of Australia and the United States* (1954) 4 Buffalo L R 155. Contrast, Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.

12 '[The President] alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.' United States v Curtiss-Wright Export Corp (1936) 299 US 304, 319. For details of the development of this power in the President see E Corwin, THE PRESIDENT: OFFICE AND POWERS 1787-1957, 207-217 (4th rev ed 1957); and also L Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 37-50 (1972). The Australian position is dealt with by G Doeker, THE TREATY MAKING POWER IN THE COMMONWEALTH OF AUSTRALIA 107-129 (1966).

13 US Const art II, Section 2; see L Henkin, supra note 12, 131-136. But international agreements other than treaties do not require Senate participation.

14 Aust Const Section 61, Section 2; Jolly v Mainka (1933) 49 CLR 242, 281-282 (Evatt J); The King v Burgess ex parte Henry (1936) 55 CLR 608, 644 (Latham CJ); New South Wales v Commonwealth of Australia (1975) 8 ALR 1; G Doeker, supra note 12, 50-52, 108-113.

includes the common law prerogative powers of the Crown in right of the Commonwealth,[15] and is exercised by the Commonwealth Executive. The Australian Senate has, unlike its American counterpart, no power under the Constitution to participate at the treaty making stage with the Executive. There has, however, evolved in Australia a general constitutional practice 'that treaties of major political significance or treaties demanding legislative approval by their own terms will be submitted to Parliament for discussion and—in many cases—implementation before the government will ratify such treaties.'[16]

The fifty one states of the American Union are expressly forbidden to enter into any treaty.[17] Again the Australian Constitution has no such express constitutional injunction, yet the same result has been achieved through the development of domestic and international practice as well as adjudication by the High Court of Australia.[18]

Two broad categories of treaties may be considered with regard to the possibility of a treaty becoming associated with the municipal law of both countries. Firstly, those treaties which may be considered

---

15 'By Section 61 the executive power of the Commonwealth was vested in the Crown. . . . It includes the prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.' Barton v Commonwealth supra note 10, 498 (Mason J); New South Wales v Commonwealth supra note 14; Dixon, *The Common Law as an Ultimate Constitutional Foundation* (1957) 31 ALJ 240; Blackstone points out that under English law the King is the representative of the nation and people in regard to foreign affairs and what is done in these matters by the royal authority is the act of the whole nation. 1 W Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 252 (1765).

16 L Wildhaber, TREATY-MAKING POWER AND CONSTITUTION: AN INTERNATIONAL AND COMPARATIVE STUDY 32 (1971) (footnote omitted); G Doeker, supra note 12, 130-140.

17 US Const art I, Section 10; However pursuant to the same section a state may with the consent of Congress 'enter into any agreement or compact . . . with a foreign power.' For a discussion thereon see eg Holmes v Jennison (1840) 39 US (14 Pet) 540; L Henkin, supra note 12, 227-234; Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments* (1969) 61 Am J Int'l L 1021.

18 'In fact other countries deal with Australia and not with the States of the Commonwealth and this practice follows the evident intention of the Constitution.' The King v Burgess ex parte Henry, supra note 14, at 645 (Latham CJ) 685-686 (Evatt and McTiernan JJ). But Professor O'Connell has some doubts about this. D P O'Connell, INTERNATIONAL LAW IN AUSTRALIA 15-16 (1965). See also Doeker, supra note 12, 210-242; R Ghosh, supra note 3, 53-55, 245-6; L Wildhaber concludes that 'the Australian states have no locus standi in foreign affairs and consequently may not conclude any international agreements;' supra note 16, 297, 274-5; Commonwealth v New South Wales (1923) 32 CLR 200, 210, 218; Bonser v La Macchia (1964) 122 CLR 177.

as self-excuting, in the sense that they become a segment of the law of the land without the necessity of implementing legislation.[19] Secondly, non-self-excuting treaties which require legislation to translate them into municipal law.[20] Taken at its face value the United States Constitution[21] would seem to entail that all treaties made under the authority of the United States fall within the first category. That this could not be so in all cases was pointed out by Chief Justice Marshall in 1829:[22]

> A Treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

When a treaty is self-executing within the above test, it obtains the force of municipal law by virtue of the Supremacy Clause; while congressional power to implement non-self-executing treaties derives from the provisions set forth in Article 1, Section 8.[23]

---

19 Henry, *When is a Treaty Self-Executing*, (1929) 27 Mich L R 776; Riensenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community* (1973) Am J Int'l L 50.

20 'Strictly, if a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively "law of the land".' L Henkin supra note 12, 157.

21 US Const art VI.

22 Foster & Elam v Neilson (1829) 27 US (2 Pet) 253, 314. For a similar statement see Justice Miller's opinion for the court in Head Money Cases, Eyde v Robertson (1884) 112 US 580, 598. For examples of self-executing treaty provisions see S Crandell, TREATIES: THEIR MAKING AND ENFORCEMENT, 36-42, 49-62, 151, 153-163, 179, 238-239, 286, 331, 338, 345-346 (2d ed 1916). For examples of non self-executing treaty provisions, see id at 162-163, 232, 236, 238, 493, 497, 532, 570, 598.

23 'The power of Congress to make all laws necessary and proper for carrying into execution as well as the powers enumerated in section 8 of Article 1 of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent

The first portion of the dictum of Chief Justice Marshall, set forth above, is the general rule adopted by the courts of England[24] and Australia;[25] namely that the making of a treaty does not entail alteration of the existing municipal law unless the municipal legislature[26] carries into effect[27] the provisions of the treaty. Constitutional power, to enable the Commonwealth Parliament to enact such implementing legislation, is to be found in the external affairs provision

---

of the Senate to insert in a treaty with a foreign power.' Neely v Henkel (No 1) (1900) 180 US 109, 121; 'If the treaty is valid then there can be no dispute about the validity of the statute under article 1, Section 8, as a necessary and proper means to execute the powers of the government.' Missouri v Holland (1920) 252 US 416, 432; But Justice Story offered a different theory in Prigg v Pennsylvania (1842) 41 US (16 Pet) 539, 619; The Necessary and Proper Clause at first expressly contained the power 'to enforce treaties' but this pharse was deleted. M Farrand, 2 THE RECORDS OF THE FEDERAL CONVENTIONS OF 1787, 382 (Rev ed 1937) (hereinafter cited as Farrand); Note also that the States have been able to implement some United State's obligations under treaties, see Koenig, *Federal and State Cooperation under the Constitution* (1938) 36 Mich L Rev 752, 775-776.

24 Walker v Bird [1892] AC 491, 492, 497; Affirmed by Blackburn v Attorney General [1971] 1 WLR 1037, 1039, 1041 [C of A]; Nissan v Attorney General [1970] AC 179, 211, 212, 224, 232-3, 235 [H of L].

25 The King v Burgess ex parte Henry, supra note 14, 644; Chow Hung Ching v The King supra note 4, 478 (Dixon J).

26 At this municipal level there are three legislative possibilities; firstly, a state legislature may be able to implement a treaty. See Romeo v Commissioner for Railways [1962] NSWR 348, 350-1 (1961); Georgini v Electric Power Transmission Pty Ltd [1963] NSWR 258, 266-7 (1962); G Doeker supra note 12, 218-220. Secondly, the Commonwealth Parliament may legislate, see infra note 34. Thirdly, both the States and the Commonwealth may enact legislation in a spirit of 'co-operative federalism'. See G Doeker, supra note 12, 223-242.

27 The King v Poole ex parte Henry [No 2] 61 CLR 634 (1939); 'The Parliament has passed the Charter of the United Nations Act 1945 (Clth), Section 3 of which provides that "the Charter of the United Nations (a copy of which is set out in the schedule of this Act) is approved". That provision does not make the Charter itself binding on individuals within Australia as part of the law of the Commonwealth . . . Section 3 of the Charter of the United Nations Act 1945 was no doubt an effective provision for the purposes of international law, but it does not reveal any intention to make the Charter binding upon persons within Australia as part of the municipal law of this country, and it does not have that effect. Since the Charter and the Resolutions of the Security Council have not been carried into effect within Australia by appropriate legislation, they cannot be relied upon as a justification for executive acts that would otherwise be unjustified, or as grounds for resisting an injunction to restrain an excess of executive power, even if the acts were done with a view to complying with the resolutions of the Security Council.' Bradley v The Commonwealth of Australia (1973) 128 CLR 577, 582-583 (Barwick CJ and Gibbs J).

of the Australian Constitution.[28] The use of this provision for such purpose has, since 1901, been conceded[29] and is illustrated by legislation on the statute books.[30] This general rule does admit exceptions,[31] though they are considerably less than the range of self-executing treaties under the United States Constitution. Perhaps the Australian Prime Minister is in a stronger position than an American President to alter domestic law by the use of treaties, for he controls not only the federal executive but also the national legislature.[32]

It should also be noted that the Judiciary clauses in both Constitutions include a provision relating to treaties.[33]

Constitutional Conventions and Legislative Debates—A Rule of Constitutional Interpretation

In contrast to the position taken by the Supreme Court,[34] the High Court has adhered to the view that, although there may be recourse

---

28 Aust Const Section 51 (xxix); Of course, other heads of Commonwealth legislative power may be used to support the constitutionality of the implementing statute when the subject matter of the treaty falls within them. Eg The King v Poole ex parte Henry [No. 2] supra note 27, 650-653 [relying on Section 51 (i)], 644-645, 647-648, 654-656, 660-664 [relying on Section 51 (xxix)]; Sloan v Pollard (1947) 75 CLR 445, 468-469.

29 See eg McKelvey v Meagher (1906) 4 CLR 265, 286 (Barton J, who was one of the Australian Founding Fathers); J. Quick & R Garran, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 770 (1901); W Harrison Moore, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 142-143 (1902); id (2d ed 1910) 460-462.

30 For a list of Commonwealth statutes between 1920-1961 see G Doeker supra note 12, 257-261.

31 Roche v Krohneimer (1921) 29 CLR 329, 338-339 (Higgins J); The King v Burgess ex parte Henry, supra note 14, 644. Alexandrowicz, *International Law in the Municipal Sphere According to Australian Decisions* (1964) 13 Int'l & Comp L Q 78, 94 n 51; A McNair, LAW OF TREATIES 105 (1961); McNair, *When Do British Treaties Involve Legislation?* (1928) 9 BYIL 59; G Doeker, supra note 12, 198-204; L Wildhaber supra note 16, 190-192; cf Meyer v Poynton (1920) 27 CLR 436, 441 (Starke J).

32 Aust Const Section 64; the High Court has referred to the principle of responsible government embodied in section 64; see eg Amalgamated Society of Engineers v Adelaide Steamship Co Ltd supra note 11, 146 (Isaacs J).

33 US Const art III Section 2; Aust Const Section 75 (i); see Z Cowen, FEDERAL JURISDICTION IN AUSTRALIA 24-32 (1959).

34 The Supreme Court permits citation of constitutional convention debates; 'It is never to be forgotten that, in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.' Ex parte Bain (1887) 121 US 1, 12; Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation* (1964) 31 U Chi L Rev 502; C Miller, THE SUPREME COURT AND THE USES OF HISTORY (1969).

to legislation passed by the Imperial and Colonial Legislatures before 1900 in construing the Constitution,[35] no resort can be had to the Australian constitutional convention debates and the opinions of members of the conventions for that purpose.[36] The justification for this approach is said to be that the Australian Constitution is a statute of the British Parliament,[37] and therefore should be construed in accordance with the general rules of statutory interpretation used by English Courts.[38] Yet despite there being a number of grounds on which this rule, at least as applied to a Constitution,[39] may be criti-

---

35 See eg The King v MacFarlane ex parte O'Flanagan and O'Kelly (1923) 32 CLR 518, 557-564, 580; Bonser v La Macchia, supra note 18, 187-192; Bennett, *Commonwealth Powers in the Light of Legislative Precedent* (1952) 26 ALJ 630; The High Court has, however, issued a warning that 'the uncertain inferences drawn from colonial legislation as to the conceptions afloat in the decade during which the Constitution was adopted form no foundation on which implications of grave significance can be read into the Constitution'. The Queen v Kirby ex parte Boilermakers Society of Australia (1956) 94 CLR 254, 297 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

36 'We think that as a matter of history of legislation the draft bills which were prepared under the authority of the Parliaments of the several states may be referred to. That will cover the draft bills of 1891, 1897 and 1898. But the express opinions of members of the convention should not be referred to.' State of Tasmania v Commonwealth of Australia and State of Victoria, (1904) 1 CLR 329 at 333 (Griffith CJ; see also eg Municipal Council of Sydney v The Commonwealth (1904) 1 CLR 208.

37 Supra note 8. In contrast to the Constitution of the United States which was adopted by the people, the Australian Constitution was not only 'accepted' by the people but was enacted in statutory form by the United Kingdom Parliament. The fact of such enactment has led a former Chief Justice of the High Court to observe that the Australian Constitution derives all its force and effect from the enactment and it alone. Latham, *Interpretation of the Constitution* in ESSAYS ON THE AUSTRALIAN CONSTITUTION (Else-Mitchell ed 2d ed 1961); Dixon, *Law and the Constitution* (1935) 51 Law Quarterly Rev 590, 597.

38 See eg CRAIES ON STATUTE LAW (S G G Edgar ed 7th ed 1971).

39 'We must . . . remember that it is a constitution we are construing.' The Queen v Public Vehicles Licensing Appeal Tribunal of the State of Tasmania ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207, 225; '[A]lthough we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that *it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.*' Attorney General for the State of New South Wales v Brewery Employees Union of New South Wales (1908) 6 CLR 469, 611-612 (Higgins J). '[W]e must never forget that it is a *constitution* we are expounding.' McCulloch v Maryland (1819) 17 US (4 Wheat) 316, 407 (Marshall CJ).
Indeed 'Marshall has been able not only to exert a prodigious influence upon the constitutional history of his own country but . . . to extend it into the

cized,[40] the High Court has not given any indication of a willingness to adopt the American practice.[41]

THE AUSTRALIAN POSITION—A HISTORICAL ANALYSIS

Making a Constitution—The American Influence[42]

Long before a federal convention convened in Sydney on March 2, 1891 to debate and approve a draft Constitution, decisions made by people in the United States of America had proved to be a major influence on the course of events within Australia—an influence which has continued to the present day.[43] But perhaps nowhere is this influence more evident than in the structure and provisions of the Australian Constitution. This document, which evolved during the 1890s and was submitted to the United Kingdom Parliament in 1900, had been moulded by men who 'turned to American sources of instruction and, according to their various propensities, studied the constitutional history and law of the United States.'[44] Indeed Sir Isaac Isaacs,[45] who was a member of the 1897-1898 Convention, is

judicial interpretation of the Constitution established a century later in a land unknown at his birth'. Dixon, *Marshall and the Australian Constitution* (1955) 29 ALJ 420, 424.

40 G Sawer, AUSTRALIAN GOVERNMENT TODAY 12 (1967).

41 Transcript of argument before the High Court in Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468 reproduced in Clarke, *Book Review* (1972) 5 Federal L R; cf the citations in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd supra note 11, 147 of Lord Haldan's speech in the House of Commons on the introduction of the Commonwealth Constitution Bill. W Wynes, LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA 20 (5th ed 1976) does not regard this as affecting the general rule against citation of debates regarding the formation of the Australian Constitution. But for a contrary view see D Kerr, THE LAW OF THE AUSTRALIAN CONSTITUTION 50 (1925).

42 For a general history of the federation movement in Australia and evolution of the Australian Constitution see J La Nauze, THE MAKING OF THE AUSTRALIAN CONSTITUTION (1972) and J Quick and R Garran supra note 29; E Hunt, AMERICAN PRECEDENTS IN AUSTRALIAN FEDERATION (1930). And the comment by Sir Owen Dixon that '[t]he framers of our Federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation dampened the smouldering fires of their originality.' Dixon, supra note 37, 597.

43 Indeed some Australian historians have argued that the loss of the American colonies was a major, if not the dominant, reason for the British decision to establish a colony in Australia. A recent example of American influence on Australia is provided by Australia's participation in the Vietnam War.

44 Dixon, *Marshall and the Australian Constitution* supra note 39, 420.

45 A Justice of the High Court (1906-1930) then Chief Justice (1930) and subsequently Governor General of Australia. See Z Cowen, ISAAC ISAACS (1967).

reported to have remarked 'that at that time he had read through the five volumes of Elliot's Debates.'[46] But the source of influence sometimes ran even deeper. Thus, for example, Andrew Inglis Clark, who played a leading role in the actual drafting of the Constitution,[47] was a personal friend of Justice Holmes, staying with him on more than one occasion during visits to the United States.[48] Supreme Court decisions were also influential as is indicated by Section 75(v) which was inserted for the express purpose of overcoming the actual result in *Marbury v Madison*.[49]

Yet despite all this, the Australian Constitution does involve some fundamental departures from the American model. For instance, the Australian document does not contain a comprehensive Bill of Rights,[50] and it makes express provision for the so-called 'autochthonous expedient'[51] of investing state courts with federal jurisdiction.[52] Also, the Australian Constitution incorporates the principle of parliamentary responsibility by requiring that Ministers of State shall be or become members of the Federal Legislature within three months of their appointment to the Executive government.[53]

This portion of the article will trace the historical evolution of, and the American influence on, three provisions of the Australian Constitution which have a bearing on the question of constitution limitations on treaties as a source of domestic law.

---

46 Dixon *Marshall and the Australian Constitution* supra note 39, at 420.

47 He was a member of the committee on constitutional machinery and the distribution of functions and powers and the drafting subcommittee which drafted the draft Constitution approved by the full Convention at Sydney on April 9, 1891. He was also a member of the Judiciary Committee at the Adelaide session of the Convention in June 1897. His personal draft constitution dated February 6, 1891 is reproduced in the Appendix to Reynolds, *A I Clark's American Sympathies and his Influence on Australian Federation* (1958) 32 ALJ 62, 67-75.

48 Id. See also Neasey, *Andrew Inglis Clark Senior and Australian Federation* (1969) 15 Aust J Pol and Hist 1.

49 (1803) 5 US (1 Cranch) 137.

50 For an explanation see La Nauze supra note 42, 227-232; Though several provisions may be said to have a bill of rights flavour see eg s 41, s 51 (xxxi), s 80, s 92, s 116 and s 117.

51 The Queen v Kirby ex parte Boilermakers Society of Australia supra note 35, 268; Z Cowen supra note 33, 149-195.

52 Australia: Aust Const S 77 (iii); Judiciary Act of 1903 as amended (Clth) s 39. United States: US Const art VI s 2; H M Hart & H Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17-18, 218-219, 312, 339, 373-374, 388, 391-399, 475-476, 517, 524 (1953).

53 Aust Const SS 61-66; cf US Const art I s 6 cl 2.

(A) *Covering Clause 5*[54]

As originally drafted[55] and approved by the full National Australasian Convention at Sydney on April 9, 1891, Covering Clause 5 provided that:[56]

> The Constitution established by this act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all treaties made by the Commonwealth, shall, according to their tenor, be binding on the courts, judges, and people, of every state, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding: and the laws and treaties of the Commonwealth shall be in force on board all British ships whose last port of clearance or whose port of destination is in the Commonwealth.

A striking similarity between the first portion of this clause and Article VI of the United States Constitution lends support to the conclusion that the framers intended thereby that all treaties made under the authority of the Commonwealth should be the supreme law of the land.

The clause in the same form was approved by the full Convention at Adelaide on April 14, 1897; discussion of the clause focusing on its applicability to British ships.[57] La Nauze, however, notes that the Colonial Office in England was prepared to insist that references to 'treaties made by the Commonwealth' be deleted.[58] But it was not

---

54 For a comprehensive coverage of this clause see J Quick & R Garran supra note 29, 345; this clause does not form part of the Constitution of the Commonwealth of Australia supra note 8; see also Spratt v Hermes (1965) 114 CLR 226, 246; The Queen v Foster ex parte Eastern and Australian Steamship Co Ltd (1959) 103 CLR 256.

55 The Draft of A Bill to Constitute the Commonwealth of Australia submitted by the Committee on Constitutional Machinery and the Distribution of Functions and Powers to the 1891 National Australasian Convention on March 31, 1891, OFFICIAL RECORD OF THE PROCEEDINGS AND DEBATES OF THE NATIONAL AUSTRALASIAN CONVENTION held in Parliament House, Sydney, New South Wales in the Months of March and April 1891 CXXIV (1891) (hereinafter cited as OFF REC PROC and DEB SYD 1891).

56 Id at CLXVII; For the short debate on the clause see OFFICIAL REPORT OF THE NATIONAL AUSTRALASIAN CONVENTION DEBATES SYDNEY March 2 to April 9, 1891 at 558-560 (1891) (hereinafter cited as CONV DEB SYD 1891); Note the similarity of clause 92 of Clark's personal draft reproduced in Reynolds supra note 47, 70.

57 OFFICIAL REPORT OF THE NATIONAL AUSTRALIAN CONVENTION DEBATES ADELAIDE March 22 to May 5 1897 at 626-628 (1897) (hereinafter cited as CONV DEB ADEL 1897).

58 J La Nauze supra note 42, 184.

necessary for the Colonial Office to pursue this matter further, as in the interim, the Legislative Council of New South Wales had, on August 17, 1897 recommended that the phrase 'and all treaties made by the Commonwealth' and the words 'and treaties' in the last portion of the clause be omitted,[59] and the full session of the Convention in Sydney on September 9, 1897 adopted their recommendation.[60]

Speakers in the New South Wales Legislative Council favouring deletion of these words argued that their retention would erect the Australian colonies into a sovereign state able to make treaties inconsistent with treaties made by England and thus contribute to disunity within the British Empire. Federation was not intended to be a vehicle through which to achieve the status of a sovereign state but rather to be a means of ending the 'barbarism of boarderism'[61] while remaining under the British Crown and therefore incompetent to make treaties. Also advanced was the suggestion that the United Kingdom Parliament would not pass a bill containing such provisions, for it had never done so in the past, either in respect of its Australian colonies or other parts of the Empire. Those who advocated retention of the provisions pointed to Section 15(a) of the Federal Council of Australasia Act of 1885,[62] and to treaties between England and other countries providing that the British colonies could make their own arrangements as to whether or not they would accept the particular treaty.[63] Exemption of the Crown's prerogative and the mandatory reservation provision in that statute, would however, add weight to refutation of their claims.

---

59 NEW SOUTH WALES, COMMONWEALTH OF AUSTRALIA (DRAFT CONSTITUTION BILL), REPORT OF THE DEBATES IN THE LEGISLATIVE ASSEMBLY AND LEGISLATIVE COUNCIL May 12 to August 26 1897 at 959-977 (1897) (hereinafter cited as NSW DEB 1897).

60 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION, SECOND SESSION SYDNEY September 2 to 24 1897 at 239-240 (1897) (hereinafter cited as CONV DEB SYD 1897).

61 The Peanut Board v The Rockhampton Harbour Board (1933) 48 CLR 266, 298 (Evatt J).

62 'Saving Her Majesty's prerogative, and subject to the provisions herein contained with respect to the operation of this Act, the Council shall have legislative authority with respect to the several matters following:

(A) The Relations of Australasia with the islands of the Pacific . . . Every Bill in respect of matters marked (a) . . . shall, unless previously approved by Her Majesty through one of Her Principal Secretaries of State, be reserved for the signification of Her Majesty's pleasure.' 48 & 49 Vict c 60 (1885).

63 The legal competence of Australian colonies with respect to matters of Imperial treaties and international trade is dealt with by G Doeker supra note 12, 24-30.

The point was again urged at the full session of the Convention, that the sole treaty making power for the Australian colonies was vested in the Crown of the United Kingdom and therefore any reference to the making of treaties by the Commonwealth should be omitted.[64] But perhaps the only argument in the debates which indicates a correct understanding of the intended legal effect of the clause at it then stood was that:[65]

> This is an expression which would be more in place in the United States Constitution, where treaties are dealt with by the President and the senate, than in the constitution of a colony within the Empire. The treaties made by her Majesty are not binding as laws on the people of the United Kingdom, and there is no penalty for disobeying them. Legislation is sometimes passed to give effect to treaties, but the treaties themselves are not laws.

Arguments relating to the treaty making power would have been appropriate in a discussion of the clause intended to give the Federal Legislature treaty making power[66] but to use them in support of amendments to a clause dealing with the domestic effect of treaties after the treaty had been made, would seem to indicate a lack of understanding of the original intent of Covering Clause 5. The intended effect of the clause can be gauged by a comparison with Section 92 of Clark's personal draft and an understanding of his American connections.[67] It would have been quite consistent to retain the rule that the Crown possessed, exclusively, treaty making power with respect to the Australian Commonwealth while altering for purposes of the Australian context, the general rule governing domestic implementation of treaties which prevailed in the United Kingdom. Failure to appreciate this possibility has left the Australian Constitution silent on the question of domestic treaty implementation; a result which possibly was not intended by the drafters of the original Covering Clause 5 who, judging from the terms of that provision, intended to follow the Supremacy Clause of the United States Constitution, nor by the debaters who, judging from their arguments, were concerned about

---

64 CONV DEB SYD 1897 supra note 60, 239 (E Barton).

65 Id 240 (G H Reid). For an explanation of why Reid used this argument see De Garis, The Colonial Office and the Commonwealth Bill, in ESSAYS IN AUSTRALIAN FEDERATION 110 (A Martin ed 1969); B K de Garis, BRITISH INFLUENCE ON THE FEDERATION OF THE AUSTRALIAN COLONIES 1880-1901 at 270-301 (unpublished PhD thesis Oxford 1965).

66 This clause is dealt with in the discussion of the historical evolution of Section 51 (xxix).

67 Supra notes 47, 48, 51.

the location of the treaty making power, rather than the effect of treaties on Australia's internal legal system.

(B) *The External Affairs Power—Section 51(xxix)*

Like a number of other provisions in the Australian Constitution, the origin and reasons for the existence and particular wording of the external affairs power is obscure. Two major factors accounting for this state of affairs are the High Court's refusal to use the convention debates as an aid in constitutional interpretation, with the resultant negative effect on historical scholarship in this area, and lack of available historical data. For example, there are no minutes, beyond the record of actual decisions reached, of committee meetings and there are no records in existence concerning the work of the drafting subcommittee which was primarily responsible for the 1891 Constitution Bill.[68]

The draft bill submitted by the Committee on Constitutional Machinery and the Distribution of Powers to the full session of the 1891 Convention provided *inter alia*:[69]

> The Parliament shall, subject to the provisions of this constitution, have full power and authority to make all such laws as it thinks necessary for the peace, order, and good government of the Commonwealth with respect to all or any of the matters following, that is to say:—
>
> External affairs *and treaties.*

La Nauze suggests that when the drafting subcommittee reported to the Constitutional Committee, a portion of the phrase stood as 'External Affairs of the Commonwealth,' but that it thereafter reverted to its original form of 'external affairs.'[70] As already indicated, there is no record of the reasons for such a change, which makes it more difficult for the States to advance a claim of competence to act in this area and correspondingly increases the Commonwealth Parliament's powers. Also there is no evidence to indicate why the drafting sub-

---

68 This drafting subcommittee which consisted of Griffith, Barton, Inglis Clark and Kingston, carried out the actual drafting over the Easter weekend in 1891 on board the Queensland Government yacht, *Lucinda,* during three days of seclusion in the picturesque reaches of the Hawkesbury River. The only details of how the drafting was carried out are remarks made by Inglis Clark to the Tasmanian House of Representatives while it was considering the clauses of the Commonwealth of Australia Bill approved by the Second National Convention and the statements of S W Griffith at the last session of the Federal Council of Australasia.

69 OFF REC PROC and DEB SYD 1891 CXXXIX (emphasis added).

70 J La Nauze supra note 42, 69.

committee included the provision in the draft bill, and unlike Covering Clause 5, the external affairs power was not included in Clark's personal draft bill of February 1891.

The draft external affairs and treaties provision was approved by the 1891 Convention without discussion. The same form of wording was adopted by the Adelaide session of the 1897-1898 Convention, again without discussion. Once more it was the Legislative Council of New South Wales which recommended the deletion of the words 'and treaties' in that provision;[71] the argument for deletion simply referring to the discussion on Covering Clause 5. Although this recommendation was mentioned by Barton at the Sydney session of the 1897-1898 Convention,[72] it was not discussed until January 21, 1898 when the Convention was sitting in Melbourne. Before the Melbourne Convention agreed to the proposed amendment to delete the words 'and treaty', the only debate was a very short exchange between Mr Glynn, who said that he saw 'an objection to striking out these words in reference to treaties' but did not say what was his objection, and the Chairman who replied '[w]e must be consistent' with what was done in omitting the word treaties from Covering Clause 5.[73]

It does not, however, follow that consistency with Covering Clause 5 required the deletion of the word 'and treaties' from the external affairs provision. The amendment of the latter provision narrowed the scope of the Commonwealth Parliament's legislative power,[74] for there seems to be no doubt that if those words had been retained there would be less controversy over the constitutional validity and scope of federal treaty implementing legislation.[75]

In the other direction, the effect of the amendment has not been to curtail the Federal Executive's treaty making power. If, as seems likely from the scanty evidence, the reason for the deletion was the desire to retain the Crown as the sole treaty making authority and

---

71 NSW DEB 1897 at 1052.

72 CONV DEB SYD 1897 at 238.

73 OFFICIAL RECORD OF DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION, THIRD SESSION MELBOURNE January 20 to March 7, 1898 at 30 (1898) (hereinafter cited as CONV DEB MELB 1898).

74 Mr Deakin perhaps understood that this would be the effect of the amendment when he subsequently commented 'I understand that the leader of the Convention will look at the words "and treaties", with a view to see how far, by omitting them, we would limit the powers of the Federal Parliament within the range of the powers that the Canadian Parliament already enjoys.' id, 31.

75 This possibility is suggested by Connell *International Agreements and the Australian Treaty Power* (1968-1969) Aust Y B Int'l L 83, 85-86.

to forestall any claim by the Australian Commonwealth of the power to make treaties,[76] then subsequent events have nullified these efforts.[77]

Although the wording of the external affairs power has not varied since January 21, 1898, speculation as to its meaning and content has continued to produce widely different conclusions. Even before the Commonwealth of Australia Bill was introduced into the United Kingdom Parliament, there was disagreement amongst legal scholars as to these matters. One writer saw the proposal to give the Commonwealth Parliament power to legislate with respect to external affairs as marking an important new departure, in that it constituted an invasion of what had previously remained in the domain of the British government. To him it looked 'as though the Imperial Parliament intended so long as the Commonwealth Bill should remain unrepealed, to divest itself of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament'.[78] Taking an opposite view of previous Imperial enactments, another writer concluded that '[t]he power to legislate upon external affairs is a new departure of doubtful significance. The Bill appears to aim at providing a general power which will apply to such future emergencies as may come within the principle which the home authorities have already sanctioned in the matter of the Pacific Islands'.[79] Professor Harrison Moore was more cautious in suggesting that the power was 'a somewhat dark one', although he did conceive that it established a power in the Commonwealth to give its legislation extra territorial effect.[80]

This uncertainty is reflected in the speech made by Joseph Chamberlain, the Secretary of State for the Colonies, when he introduced the Bill into the House of Commons on May 14, 1900:[81]

> '[E]xternal affairs' a phrase of great breadth and vagueness, which, unless interpreted and controlled by some other provision, might easily, it will be seen give rise to serious difficulties.

---

76 Se de Garis supra note 65; J Quick & R Garran supra note 29, 770.

77 See supra notes 14 and 15.

78 Lefroy *The Commonwealth of Australia Bill* (pts 1-2) (1899) 15 Law Quarterly Rev 155, 281, 291; In view of the application of section 2 of the Colonial Laws Validity Act of 1865 28 & 29 Vict c 63 it is doubtful whether an argument that complete divestment was intended could be sustained.

79 Jethro Brown *The Australian Commonwealth Bill* (1900) 16 Law Quarterly Rev 24, 26-27.

80 Harrison Moore *The Commonwealth of Australia Bill* (1900) 16 Law Quarterly Rev 35, 39.

81 83 PARL DEB HC (4th ser) 54 (1900) [1892-1908].

The question was again raised in the House of Lords on the third reading of the Bill by Lord Stanmore:[82]

> I wish, first of all, to call attention to the words 'external affairs.' How are these words to be interpreted? They may be interpreted in a vastly extended sense or in a very restricted one. I wish to know what interpretation Her Majesty's Government place on them and what interpretation the Governments of the Australian Colonies put upon them. Do these words mean that the Legislature of the Commonwealth may, if they like, appoint consuls and diplomatic agents in different parts of the world? It would be satisfactory to know to what extent the external affairs of the colonies are to be placed under the control of the Legislature and Government of the Commonwealth, because it may be held by some to be a power which I do not think your Lordships intend to confer. This is not altogether a speculative question, because I can remember very well many years ago . . . there were many very distinguished Australian public men who held that it was the right of the colonies that they should conduct their own external affairs, and who were eager to attain that object, and I do not believe that that wish has altogether died out.

Taken at its face value, the reply given by the Earl of Selborne indicated that the provision was to be narrowly construed:[83]

> I am advised that 'external affairs' in this connection means neither more nor less than the right of dealing with that which has hitherto been dealt with by the Australian Colonies, which in future will become the Australian States. It is certainly not intended by the authors of this Bill that these words should be stretched so as to invest Australia with the paraphernalia of consuls and ambassadors separate from the British Empire.

Thus the external affairs power was not conceived as a treaty implementing power. But despite this absence of historical foundation, post-federation treatises on the Australian Constitution have seized upon this power as a source of constitutional authority for the Commonwealth Parliment to enact legislation giving domestic effect to treaties.[84] And subsequently, the High Court adopted the same view of the content of *placitum* xxix.[85] In reaching this conclusion, the court relied upon the changing international status of Australia since January 1, 1901.[86] This is also true of the court's approach to the

---

82 85 PARL DEB HL (4th ser) 578 (1900) [1892-1908].
83 Id, 579.
84 See supra note 29.
85 The King v Burgess ex parte Henry supra note 14.
86 Id, 683-684; Ffrost v Stevenson supra note 4, 601, 669 (Evatt J).

treaty making power which has been found in the words of Section 61 of the Constitution, a provision where it was never remotely intended or imagined by the Founding Fathers to reside. The unarticulated premise of this method of constitutional interpretation is the recognition given to the notion of inherent adaptability of the Constitution to an uncertain future and resolution of problems not foreseen by its draftsmen. In this respect, the High Court's attitude to the external affairs power can be seen as containing seeds of expansion, rather than a retreat from the practical order of the real world into the realm of abstract and technical 'legal' distinctions.

(C) *Original Jurisdiction of the High Court—'Matters Arising Under Any Treaty'—Section 75(i)*

The 1891 Constitutional Committee proposed in its draft Constitution Bill that the Parliament of the Commonwealth should have power to confer on federal courts exclusive jurisdiction in respect of 'cases arising . . . under any treaty made by the Commonwealth with another country'.[87] Insertion of this provision was in all probability due to the work of Inglis Clark, who was both Chairman of the Committee on the Establishment of a Federal Judiciary which made a report to the Constitutional Committee,[88] and a member of the Constitutional Committee's drafting subcommittee. In fact, both Clark's personal draft constitutional bill[89] and the report of the Judiciary Committee contain almost identical clauses, thus making it certain that the proposal was taken from the Judiciary Article of the United States Constitution.[90] The full Convention at Sydney on April 6, 1891 agreed to the provision without discussion.[91]

At the conclusion of the Adelaide session of the 1897-1898 Convention, however, the clause was modified[92] and appeared in two sub-sections:[93]

> 73. The judicial power shall extend to all matters:—
> III Arising under any treaty

And

---

87 OFF REC PROC and DEB SYD 1891 CXLIII.
88 Id, CLXIII.
89 Supra note 47, 72.
90 US Const art III s 2.
91 OFF REC PROC and DEB SYD 1891 at 381.
92 CONV DEB ADEL 1897 at 962, 967, 989.
93 Id, 1235, 1236.

77. In all matters:—
II Arising under any treaty
the High Court shall have original as well as appellate jurisdiction.

There was no discussion during the convention debates regarding these provisions nor are there any details of the reasons why the Adelaide Judiciary Committee, under the chairmanship of Symon, proposed such changes to the 1891 draft Constitution Bill. Perhaps they were simply designed to achieve conformity with the American phraseology, but the simpler phrase does increase the jurisdiction of the Federal Courts, especially in view of later amendments which were intended to ensure that no treaty would be made by the Commonwealth.

It is somewhat surprising that the New South Wales Legislative Council, which recommended deletion of the term treaties where it appeared elsewhere in the 1897 draft Constitution Bill, did not consider or suggest any amendments to these judiciary provisions.[94] If the Council thought that the court would and should be given jurisdiction over matters arising under treaties made by the Crown then, apart from self-executing treaties, it is difficult to envisage a matter arising under a treaty which does not at the same time arise under a Commonwealth or State law,[95] because, in general, treaties do not of their own force apply to or affect private rights in English and Australian law.[96] This point was also overlooked by the Convention in Melbourne which approved the provisions as they stood.[97] The brief discussion which ensued when one member moved to have

94 Speaking with reference to the third class of matters in the 73rd clause Mr Dangar stated that 'he presumed that the part of the clause would be eliminated, because the Committee had refused to recognise anything in the shape of treaties'. NSW DEB 1897 at 1086.

95 The High Court possesses jurisdiction in respect of these matters Aust Const s 73 (iii), s 75, s 77. There are two possible situations in which it might be proper for the High Court to have original jurisdiction in all matters 'arising under any treaty' even if the Commonwealth had not been given power in 1900 to enter into treaties. Firstly, Imperial treaties implemented by Imperial legislation made applicable to Australia. Secondly, Commonwealth legislative implementation, for example via s 51 (xxxix) if not s 51 (xxix) of treaties entered into pursuant to a power delegated by the United Kingdom through s 2 of the Aust Constitution (see Quick & Garran supra note 29, 768).

96 Supra notes 24 and 25. Mr Dixon (as he then was) adverted to this difficulty in his evidence before the Royal Commission on the Constitution:

> No one yet knows what is meant by the expression 'matter arising under a treaty'. The word 'matter' refers to some claim the subject of litigation. It must, therefore, be a claim of legal right, privilege, or immunity. Under

clause 73(3) struck out on the ground that '[t]he court cannot decide upon a treaty, otherwise it might abrogate the Imperial law or polity upon the question at issue',[98] once again indicates that the Australian Founding Fathers were not very sure of what they were doing.[99]

In view of the operation in the Australian legal system of the general rule that if treaty obligations are to become part of the domestic law legislative action is required, it is difficult to postulate what matters, other than the very small range of exceptions to the general rule, will arise under a treaty within the terms of this constitutional provision. Thus to a large extent, this head of judicial jurisdiction is the result of a continuing adherence to the American precedent after it had been rendered inappropriate as a model, by deletion of the term treaties in Covering Clause 5.

THE AUSTRALIAN CONSTITUTION

As a consequence of the evolution of Dominion competence with respect to treaty making,[100] the Executive Government of the Commonwealth of Australia is constitutionally free to negotiate and enter into any international obligation it wishes.[101] Its authority in this

---

a British system, the executive cannot, by making a treaty, regulate the rights of its subjects. A state of war may be ended or commenced and the rights and duties of persons may be affected by the change from one State to another, but this results from the general law relating to peace and war, and not from the terms of the treaty. If a treaty is adopted by the legislature and its terms are converted into a statute, it is the statute and not the treaty which affects the rights and duties of persons.

ROYAL COMMISSION ON THE CONSTITUTION, MINUTES OF EVIDENCE 785 (1929).

97 CONV DEB MELB 1898 at 320, 349.

98 Id, 320 (Mr Glynn).

99 An explanation of the treaty jurisdiction offered by Latham CJ in The King v Burgess ex parte Henry supra note 14, 643-4 has been correctly criticized as based on historical hindsight by Z Cowen supra note 32, 27; See also Bluett v Fadden [1956] SR (NSW) 254 (1956) which is also criticized by Z Cowen supra note 32, 29-30 and W Wynes supra note 41, 452.

100 For an historical analysis of this legal development see eg O'Connell *The Evolution of Australia's International Personality* in INTERNATIONAL LAW IN AUSTRALIA 1-34 (D O'Connell ed 1956); G Doeker supra note 12, 1-69.

101 The King v Burgess ex parte Henry supra note 14, 644; 'The Commonwealth of Australia has unlimited power to negotiate and to ratify international agreements and understandings of all descriptions.' Sawer, *Execution of Treaties by Legislation in the Commonwealth of Australia* (1955) 2 Uni Qld L Rev 297, 298; But cf The Commonwealth and Central Wool Committee v Colonial Combing, Spinning and Weaving Co Ltd (1921) 31 CLR 421; see also infra note 12.

regard is equivalent to that possessed by the British Crown.[102] Yet despite this plenary power, the Commonwealth Government may not be able to carry a concluded treaty into effect, insofar as action within Australia is required, if such action is subject to the limitations embodied in the Constitution.

The High Court has found no difficulty in concluding that legislative authority of the Australian Parliament, to incorporate treaty provisions into the law of the land, 'must be exercised with regard to the various constitutional limitations express or implied in the Constitution, which restrain generally the exercise of federal powers'.[103] Several factors have had bearing on this conclusion. Most obvious is the actual wording used in the Constitution to confer such legislative authority on the Commonwealth Parliament. The relevant section reads:[104]

> 51. The Parliament shall, *subject to this Constitution,* have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—
> (xxix.) External Affairs.

Even without that prefix it seems as though the Court may arrive at the same result by use of general principles of construction and interpretation. Thus, sections of the Constitution are 'read not *in vacuo* but as occurring in a single complex instrument, in which one part may throw light on another'.[105] Furthermore, like congressional treaty implementing legislation, it is not the treaty but the Australian Parliment's implementing legislation which is the law of the land. And the High Court, exercising its powers of judicial review has, on one

---

102 'In the United Kingdom the constitutional organ in which the treaty making power resides is the Crown . . . There is a distinction between the Crown and the Monarch. For more than two centuries the monarch has had no power, except upon the advice of his ministers to bind his country by treaty.' A McNair, THE LAW OF TREATIES 1 (1938).

103 The King v Burgess ex parte Henry supra note 14, 658, 642 (noting SS 113, 116) 687 (noting SS 6, 28, 41, 80, 92, 99, 100, 116, 117); Airlines of New South Wales Pty Ltd v State of New South Wales [No 2] (1964) 113 CLR 54, 85 ('constitutional prohibitions express or implied') 87, 118, 165 (all noting S 92); Ffrost v Stevenson supra note 4, 601, 669.

104 Aust Const S 51 (xxix) (emphasis added); The same phrase appears in S 52; 'The legislative power in sec. 51 is granted "subject to this Constitution" so that treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained.' The King v Burgess ex parte Henry supra note 14, 687.

105 James v The Commonwealth (1936) 55 CLR 1, 46 (1936) (PC); see also Lamshed v Lake (1958) 99 CLR 132, 145, 154.

occasion, invalidated regulations made under legislation giving domestic effect to a treaty.[106]

The question of whether those narrow range of treaties which may be invoked by litigants in an Australian Court without a showing of legislative implementation[107] are also subject to constitutional limitations has not been answered by the High Court. Resolved upon general principles and analogies in relation to the position under the Constitution of the United States of America, the issue would seem to warrant an affirmative decision. To hold that self-executing treaties attain the status of laws of the land while violating constitutional prohibitions, would constitute authority to amend the Constitution in a manner not hitherto recognized by the Australian Founding Fathers, courts or the Constitution itself.[108] In this situation the close adherence in the Judiciary chapter of the Australian Constitution to the American model may prove to be of assistance. By vesting the High Court with original jurisdiction in all matters arising under any treaty, the Constitution may contemplate that the court should have the power to determine whether the provisions of any treaty, involved in litigation, can take effect as the law of the land without the aid of implementing legislation.[109] Also the fact that the Australian Parliament has assigned to the High Court exclusive original jurisdiction in 'matters arising *directly* under any treaty' may add some weight to the foregoing line of argument.[110]

EXPRESS CONSTITUTIONAL LIMITATIONS UPON THE TREATY POWER

At the outset it should be noted that legislation implementing a treaty pursuant to the external affairs power may circumvent the carefully defined limitations in other placita of Section 51 of the

106 The King v Burgess ex parte Henry supra note 14.

107 Cf A McNair supra note 102, 338.

108 The formal amendment procedure is contained in S 128 of the Australian Constitution; The possibility of direct legislative action by the United Kingdom Parliament seems remote, see Statute of Westminster 1931 22 Geo 5 c 4 and Statute of Westminster Adoption Act 1942 (Clth) No 56 of 1942.

109 Aust Const S 75 (i); Mr Latham (as he then was) argued before the High Court that 'sec 75 (i) of the Constitution regards treaties as being sources of legal rights and duties which may come within the jurisdiction of the High Court'. Meyer v Poynton supra note 31, 438 (arguendo); also see supra note 99; the word 'matters' performs a somewhat similar task to the word 'cases' in the US Const art III. See In Re Judiciary and Navigation Acts, (1921) 29 CLR 257.

110 Judiciary Act 1903 as amended (Clth) S 38 (a) (emphasis added).

Australian Constitution.[111] This is a result of the inter-independence which the High Court has attributed to the heads of Commonwealth legislative power contained in that section.[112] That is, each subject mentioned in Section 51 must be construed as an independent express legislative power without being limited by reference to all or any of the other powers conferred by that provision.[113] For example, the fact that the Commonwealth Parliament's legislative power with respect to labor legislation is restricted to conciliation and arbitration for the preventional and settlement of industrial disputes extending beyond the limits of any one state by Section 51 (xxxv.), may be disregarded when that Parliament seeks to give domestic effect to an international labor convention. And an enactment in compliance with Section 51(xxix) may completely ignore the distinction between interstate and intra-state trade and commerce which must be observed if reliance were placed on the Commerce Clause.[114] But this ability to by-pass limitations embodied in the series of enumerated Commonwealth legislative powers does not extend to prohibitions contained in other sections of the Constitution.

Despite the volume of discussion on the relationship between treaties and the Constitutions in both countries, there appears to have been comparatively little mention made of specific prohibitions and the extent to which they impinge upon treaties as law of the land. Insofar as treaties are implemented by federal legislation, principles

---

111 The King v Burgess ex parte Henry, supra note 14; cf Sawer, *Australian Constitutional Law in Relation to International Relations and International Law* in INTERNATIONAL LAW IN AUSTRALIA 35, 41 (D P O'Connell ed 1965).

112 Johnson Fear & Kingham & The Offset Printing Co Pty Ltd v The Commonwealth (1943) 67 CLR 314, 317 (Latham CJ); Pidoto v The State of Victoria (1943) 68 CLR 87, 123, 127; Attorney-General for the State of Victoria v The Commonwealth (1962) 107 CLR 529, 560, 572.

113 The King v Burgess ex parte Henry supra note 14, 639 (Latham CJ); Chief Justice Latham has also advanced in another context, the proposition that 'no single power should be construed in such a way as to give the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution'. Bank of New South Wales v The Commonwealth (1948) 76 CLR 1, 184-185. See also Russell v Russell (1976) 9 ALR 103.

114 Airlines of New South Wales Pty Ltd v State of New South Wales [No 1] (1964) 113 CLR 1, 27 (Dixon CJ); Airlines of New South Wales Pty Ltd v State of New South Wales [No 2] supra note 103, 82, 85-86, 87 (Barwick CJ) 117 (Kitto J); Narcotic Drugs Act 1967 (Clth) No 53 of 1967 implementing the Single Convention on Narcotic Drugs 1961, 520 UNTS 95.

similar to those governing the interaction of other types of statutes and the particular constitutional prohibition being considered are applicable. An illustration may be taken from Section 92 of the Australian Constitution which, under the guidance of judicial interpretation, has assumed a substantive due process quality in its protection of interstate private business.[115] Under this provision, Commonwealth legislation based on treaty provisions requiring the creation of an interstate airline monopoly would not have changed the High Court's decision in *Australian National Airways Pty Ltd v The Commonwealth*.[116] But this principle may not necessarily be the same where treaty provisions become law of the land without the assistance of implementing legislation.

As constitutional prohibitions play a much smaller part in the Australian document than its closest exemplar, the Constitution of the United States of America, it is unlikely that the High Court will be required to express an opinion on many of these matters.[117] This is especially so in the field of constitutional guarantees of personal liberties and rights. Here the Australian Founding Fathers felt no need to include in their proposals a comprehensive 'Bill of Rights'. Nineteenth century history and experience in the Austrailan colonies, unlike the occurrences in the American colonies during the eighteenth century, did not evince a need for constitutional restraints on the exercise of governmental power.[118] Thus there are only a few provisions scattered throughout the Australian Constitution which may be characterized as

---

115 See eg Bank of New South Wales v The Commonwealth supra note 113; The Commonwealth v Bank of New South Wales (1949) 79 CLR 496 (PC).

116 Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29, where the High Court interpreted Section 92 as denying the Commonwealth power to create an interstate airline monopoly.

117 The prohibitions most likely to restrict the external affairs power are the guarantee of freedom of interstate trade and commerce, Aust Const S 92, the prohibition of federal commercial and fiscal preferences to States, id S 99, the prohibition of certain intergovernmental taxes, id S 114, the guarantee of religious toleration, id S 116 and a restriction on discriminatory laws id S 117.

118 The King v Federal Court of Bankruptcy ex parte Lowenstein (1938) 59 CLR 556, 580 (Dixon and Evatt JJ); Another contributing factor to this distinction was the different historical setting at the birth of each nation. 'The Constitution of the United States was born in the aftermath of revolution and war. No comparable pressures attended the founding of the Australian Commonwealth.' Cowen supra note 11, 155; A proposal to add to the Australian Constitution a guarantee of freedom of expression was defeated in 1944.

having a 'Bill of Rights' flavour.[119] Furthermore, as a result of the general treaty implementation rule adopted by the Australian courts, questions relating to self-executing treaties and constitutional prohibitions will most probably never arise in the course of litigation. Even if such questions are required to be resolved, the term 'the Commonwealth,' as used in several of the prohibitions and guarantees, is susceptible to an interpretation which would include such treaties.[120]

* * *

The concluding portion of this article, to appear in the next issue, will examine the constitutional capacity of the Commonwealth Parliament to use the external affairs power to regulate or 'trench' upon States and matters falling outside sections 51, 52 and 122 of the Constitution and whether the High Court, in the name of federalism, can remind the central government that there exist constituent States which are not to be so eliminated.

JAMES A THOMSON*

---

119 See eg Aust Const S 80, S 116, S 117; For a comparative analysis of these sections and their counterparts in the United States Constitution see aricles by Pannam, *Trial by Jury and Section 80 of the Australian Constitution* (1968) 6 Sydney L R 1; *Travelling Section 116 with a US Road Map* (1963) 4 Melb ULR 41 and *Discrimination on the Basis of State Residence in Australia and the United States* (1968) 6 Melb ULR 1.

120 The Commonwealth of Australia Constitution Act of 1900 supra note 8, Covering Clause 6; Elliot v The Commonwealth (1936) 54 CLR 657, 682; Bank of New South Wales v The Commonwealth supra note 113, 362 (Dixon J); Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth (1943) 67 CLR 116, 156.

* B.A., LL.B (Hons) (W.A.), LL.M (Harvard).