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Power to Enforce Treaties in Australia -- the High Court Goes Centralist?

John M. Finnis

Notre Dame Law School, john.m.finnis.1@nd.edu

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NOTES

Power to enforce treaties in Australia—the High Court goes centralist?

At first glance, the decision of the High Court of Australia in *Koowarta v Bjelke-Petersen* (1982) 39 ALR 417 profoundly affects the distribution of legislative power between the States and the Commonwealth of Australia. Perhaps that first impression should be somewhat qualified. But there seems no good reason to doubt what Wilson J (dissenting) said about its possible implications for the exercise of State legislative power:

if sections 9 and 12 of the [Racial Discrimination Act (Cth.)] are a valid exercise of the power to enact laws with respect to external affairs, it would be difficult to deny a power to implement any international obligation. Certainly the entire field of human rights and fundamental freedoms would come within the reach of paramount Commonwealth legislative power. . . . The effect . . . would be to transfer to the Commonwealth virtually unlimited power in almost every conceivable aspect of life in Australia, including health and hospitals, the workplace, law and order, the economy, education, and recreational and cultural activity. . . . So broad a power, if exercised, may leave the existence of the States as constitutional units intact but it would deny to them any significant legislative role in the federation.

The Court, by four to three, did indeed uphold those provisions of the Racial Discrimination Act 1975 as valid exercises of the power of the Commonwealth Parliament, under section 51(29) of the Constitution, to make laws with respect to 'external affairs', a power whose amplitude had never been authoritatively expounded by the High Court. Three of the majority Justices, Mason, Murphy and Brennan JJ, held that the Commonwealth Parliament can give legislative effect (overriding State law) to any international agreement bona fide entered into by the Commonwealth, whatever its content.

Speaking of this view, the Chief Justice and Aickin J say

If the view . . . is correct, the executive could, by making an agreement, formal or informal, with another country, arrogate to the Parliament power to make laws on any subject whatsoever. It could, for example, by making an appropriate treaty, obtain for the Parliament powers to control education, to regulate the use of land, to fix the conditions of trading and employment, to censor the press, or to determine the basis of criminal responsibility—it is impossible to envisage any area of power which would not become the subject of Commonwealth legislation. . . . The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.

But there is a prior question. Has the view of Mason, Murphy and Brennan JJ prevailed, in principle or in effect?

As a matter of strict law, their view was rejected by a majority. For Gibbs CJ, and Aickin and Wilson JJ all hold that, to be within the external affairs power, legislative provisions must themselves have 'the character of an external affair, for some reason other than that the executive has entered into an undertaking with some other country with regard to them.' They also hold that it is 'immaterial that the agreement resulted from much international discussion and negotiation, that many nations are parties to it, and that there is international interest in it.' And Stephen J, too, holds that since the Commonwealth's head of power is not 'treaties' but 'external affairs',

an examination of subject-matter, circumstances and parties will be relevant whenever a purported exercise of such power is challenged. It will not be enough that the challenged law gives effect to treaty obligations. A treaty with another country, whether or not the result of a collusive arrangement, which is on a topic neither of especial concern to the relationship between Australia and that other country nor of general international concern will not be likely to survive that scrutiny.

In that sense, the three States which in *Koowarta* attacked the Commonwealth Parliament's purported exercise of the external affairs did win the argument.

But in a more practical sense, they lost it. For Stephen J agreed with Mason, Murphy and Brennan JJ that racial discrimination, and indeed 'human rights and fundamental freedoms' in general, is a matter of 'general international concern'. Thus any genuine treaty on human rights will, in the view of the majority, be within the scope of the external affairs power. In this view, the only limitations to this reach of the external affairs power are the classic implied restrictions necessary to preserve such constitutional fundamentals as the legal *existence* of the States, and the 'separation [not the distribution!] of powers'.

Indeed, Stephen J went so far as to give his support (though not perhaps in binding fashion) to the view that human rights are so much a matter of international concern that they are within the external affairs power *even in the absence of any international treaty on the matter* (at any rate to the extent that there is a norm of customary international law governing the matter, which is perhaps easier to show in relation to racial discrimination than in relation to some of the specific matters which are dealt with in more general human rights conventions). However, since Brennan J seems not to have expressed a view on this matter, there is no majority finding on it.

The major ruling, about treaties concerning human rights, remains. It is a serious reverse for the States, even if the Commonwealth Parliament does not find it politically expedient in the near future to carry out all the possible incursions, on fields until now occupied by the States, which we have seen Gibbs CJ, Aickin and Wilson JJ referring to as open possibilities. The Justices in the majority indulged in some speculations about what *will* happen. Mason J said:

in the light of current experience there is little, if anything, to indicate that there is a likelihood of a substantial disturbance of the balance of powers as distributed by the Constitution [as the result of the adoption of his view]. To the extent that there is such a disturbance, then it is a necessary disturbance, one essential to Australia's participation in world affairs.

This speculation about what is likely, and what is 'essential to Australia's participation in world affairs', was well answered by Wilson J's citation of McWhinney's instructive contention: the Privy Council's rigorous restriction of the Canadian Parliament's power to implement treaties has never presented 'any practical difficulties, or even mild inconvenience, in the conduct of Canada's foreign relations' (7 *Can YB Int'l L* 3, 4-5 (1969), reflecting on the hostility of Canadian judges and, above all, academics, to *A-G for Canada v A-G for Ontario* [1937] AC 326 (the *Labour Conventions* case)).

Even less satisfactory than Mason J's speculation about 'likelihood' is the central section of Stephen J's reasoning:

A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'. And this being so, *any attack upon validity, either in what must be the very exceptional circumstances which could found an allegation of lack of bona fides or where there is said to be an absence of international subject-matter, will afford an appropriate safeguard against improper exercise of the 'external affairs' power.* [Emphasis added.]

The logic is tortured. For attacks on validity will provide no real check whatsoever (and therefore will not even be made) if they are inevitably going to be defeated by demonstrations, on the lines of Stephen J's own argument in *Koowarta*, that the matter is one of 'international concern'. The sentence last quoted seems to have been Stephen J's answer to the forebodings of the three minority Justices. But it is no answer at all.

On the other hand, one must not forget that there is now a firm majority ruling that the mere fact that the Commonwealth has made a genuine treaty does not attract the external affairs power. Moreover, since Stephen J's pivotal ruling—that human rights (at least in treaty form) attract the external affairs power because they are a matter of general international concern—is not itself a binding ruling on a matter of constitutional law, it remains possible for a differently constituted High Court to follow the views of Gibbs CJ, and Aickin and Wilson JJ. Moreover, even if Stephen J had supported (as he did not) the view of Mason, Murphy and Brennan JJ on the sufficiency of any treaty as attracting the external affairs power, a reading of *Queensland v Commonwealth* (1977) 16 ALR 487 (the second *Territorial Senators* case) shows that Gibbs CJ (probably) and Aickin J (certainly) would be willing to overrule the ruling in *Koowarta* if the opportunity arose: see 16 ALR at 498 and 522. There seems little reason to think that Wilson J would not support them in so doing.

At all events, the States can still argue that no positive interpretation of the

external affairs power commanded a majority in *Koowarta*, and that the rulings or dicta on human rights in general are not definitive, and not to be acquiesced in.

Moreover, the States can still contend, at the political and administrative level, that since a majority of Justices have clearly ruled that not every treaty will attract the external affairs power, the arrangements (since 1976) for regular Commonwealth-State consultations on the negotiation of treaties are more important than ever. *Koowarta* provides no proper ground for the Commonwealth to try to scale those consultations down.

Nor does *Koowarta* provide any genuine ground for Australia to slacken its efforts to obtain 'federal State' clauses in international treaties. Nowadays, such efforts usually fall on stony ground. So a practice is emerging whereby, on accession to certain treaties, the Australian Government, after consultations with the States, makes reservations (or interpretative declarations) equivalent to federal clauses. Such reservations were made when Australia acceded, in 1980, to the International Covenant on Civil and Political Rights (see below). The States will no doubt be alert to offer political resistance to any Commonwealth claims that *Koowarta* has rendered such reservations out of date. The 'federal State' reservation agreed on for the International Covenant on Civil and Political Rights was drafted so as to be true and relevant whatever view is taken of the constitutional reach of the external affairs power. Against a Commonwealth Government of more centralist ambitions than the Government in power since 11 November 1975, such reservations, and the Commonwealth/State consultative arrangements underlying them, will doubtless be of little avail.

J. M. FINNIS
University of Oxford

Appendix

The Australian instrument of ratification, dated 13 August 1980, contains the following *inter alia*:

Articles 2 and 50

Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extend to all parts of Australia as a federal State without any limitations or exceptions. It enters a general reservation that Article 2, paragraphs 2 and 3 and Article 50 shall be given effect consistently with and subject to the provisions in Article 2, paragraph 2. Under Article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognised in the Covenant are to be taken in accordance with each State Party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.

In particular, in relation to the Australian States the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and the

implementation of those provisions of the Covenant over whose subject matter the authorities of the States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities. . . .

Hedley Byrne and the Commonwealth bank manager

Hedley Byrne [1964] AC 465 has proved a popular export throughout the common law world. Markets from Australia and Hong Kong to Swaziland and British Columbia have been penetrated. Even the highly sales resistant consumers in South Africa have succumbed to admitting its influence on the parallel development of the Aquilian action (*Administrateur Natal v Trust Bank van Africa* [1979] 3 SA 824). It would be a cause for great pride in the saleability of our creative English common lawyers, were it not for the fact that priority in developing a tort of negligent misrepresentation must be conceded to the Americans (Seavey, 52 *Harv L Rev* 372, 394-422) and perhaps to the Rabbinical scholars of the diaspora (Schonberg, 31 *Int'l and Comp LQ* 207).

Another common law area has just succumbed to the attractions of *Hedley Byrne*. In *Pampellone v Royal Trust Co* (No. 70/1977, judgment delivered 18 March 1982; the decision, alas, will not reach print in the WIR for some time) the Court of Appeal of Trinidad and Tobago has become the first West Indian jurisdiction to apply the *Hedley Byrne* doctrine. Aspects of the judgments are of particular interest to those common law jurisdictions whose banking industries, as well as their legal hierarchies, refer back to a London head office. But this note is also concerned to place the decision in the context of other recent Commonwealth decisions on the applicability of *Hedley Byrne* to the relationship between banker and customer. It is submitted that there are now enough reported post *Hedley Byrne* decisions to justify separate consideration of the different professions (see Dugdale and Stanton, *Professional Negligence* (1982)).

Mr Pampellone was a long standing customer of the Royal Bank of Canada. Having heard good things about Davies Investments, he approached the bank for more reliable advice. They referred him to Mr Kennedy, the manager of the Royal Bank Trust Co (hereafter 'RBT') which is a subsidiary of the bank, trading out of the same offices, set up to deal with investment advice to customers of the parent bank. Kennedy obtained a credit information report on Davies from Syed & Co, a London based mercantile agency, and passed it on to Pampellone who, along with his wife, invested a total of £11,713 in the company between April 1965 and April 1966. At a further meeting between them in September 1964, Kennedy recommended to Pampellone another company called Pinnock. Again a credit