

TOPIC 8: External Affairs and Extraterritoriality

Summary

- Continual expansion with growth in international community:
 - For example:
 - UN est. in 1946 (due to second world war; the need for universal rights higher than sovereign government)
 - Human rights
 - Australia is a signatory to about 900 conventions (multi-lateral document) and treaties (bilateral and trilateral documents)
- *Separation of powers doctrine*: Just because the Executive signs and ratifies a treaty/convention, it doesn't mean that it becomes domestic law – it needs to be implemented with legislation by the Commonwealth Parliament: *Attorney-General for Canada v Attorney-General for Ontario* [1937]
- 4 categories (not always mutually exclusive) under external affairs power:
 - Physical externality (geographical)
 - International Relations
 - Implementation of treaties & conventions
 - Matters of international concern (e.g. terrorism or climate change)

1 Matters external to Australia

S 51(xxix) – External affairs power

- The Parliament has the power to make laws with respect to external affairs
 - This is in a geographical sense; affairs external to Australia: ***NSW v Commonwealth (the Seas and Submerged Lands case) (1975)***
 - The Act in this case gave effect to two Conventions Australia was a party to (Convention on the Territorial Sea and the Contiguous Land Zone and the Convention on the Continental Shelf)
 - ***Barwick CJ***: The power extends to any affair which in nature is external to the continent of Australia and the island of Tasmania subject always to the C as a whole

- ***Polyukhovich v Commonwealth (1991)***
 - S 51(xxxix) extends to places, persons, matters or things physically external to Australia
 - The legislation in this case retrospectively criminalised certain acts of violence committed in Europe during WWII and were punishable in Australia (Nazi war criminals emigrated to Australia)
 - Properly characterised as a law with respect to external affairs
 - It is not necessary that Australia has an interest in the matter; it is enough that Parliament's judgement is that Australia has an interest
 - This is in contrast to minority judgement of Brennan and Toohey JJ, whom concluded that it is required that Australia have a connection with the external matter
- ***XYZ v Commonwealth (2006)***
 - The external affairs power will support legislation with respect to things merely geographically external to Australia (no interest in the matter necessary)
- ***Thomas v Mowbray (2007)***
 - Legislation enacted with the purpose of preventing terrorist acts done or threatened with the intention of coercing or influencing by intimidation the government of a foreign country or intimidating the public of a foreign country is a law with respect to matter or thing which lies outside the geographical limits of Australia
 - The matter or thing is the apprehended intimidation or injury to the government or public of a foreign country

Extraterritorial competence of the States

- Can the States make laws for persons or matters situated or occurring outside their borders?

S 2 Australia Act 1986 (Cth) –

- (1) The legislative powers of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation
- (2) This includes all legislative powers that the parliament of the UK might have exercised before the commencement of this Act but nothing in this subsection

confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia

S 16 Constitution Act 1975 (Vic) – The Parliament shall have power to make laws in and for Victoria in all cases whatsoever.

Restrictions on these powers:

- Subject to Constitution and any express or implied restrictions on state power
- S 109
- The exercise of the Commonwealth of exclusive power

‘Peace, order and good government’:

- Describes plenary power (not subject to limitation or exceptions): ***Union Steamship Co of Australia Pty Ltd v King (1988)*** (s 46 valid because there was a sufficient connection with the State – registration in State)
 - However, subject to the Constitution
 - There is a **requirement for a relevant connection** (may be ‘remote and general’) between the circumstances on which the legislation operates and the State
 - Regime only applied to ships registered in NSW
 - If applied to *all* ships, would have been invalid

3 International relations

S 51(xxix) –

- Relations of the Commonwealth with all countries outside Australia (including other Dominions of the Crown) are matters which fall directly within the subject of the external affairs power to legislate: ***R v Sharkey (1949)***
- Includes extradition: *Vasilikovic v Commonwealth* (2006)
- Extends to measures to combat terrorism: *Thomas v Mowbray* (2007)

4 International treaty implementation

- The Commonwealth Executive has the power to negotiate and make international treaties under **s 61 of the C**
- The Commonwealth Parliament has the power to implement treaties into Australian law under **s 51(xxix)**

- Signing and ratifying an international treaty has no effect on the domestic law of Australia: *Victoria v Commonwealth* (1996)
- In order to become part of Australia's domestic law, legislative action is required (therefore, approval of Commonwealth Parliament is required, not just approval of the Executive): *Attorney-General for Canada v Attorney-General for Ontario* [1937]

The scope of the treaty implementation aspect of the external affairs power:

- **Precursor to *Tasmanian Dam Case: Koowarta* (1982)**
 - Australia ratified UN convention that sought to eliminate racial discrimination
 - *Racial Discrimination Act 1975* (Cth)
 - Act challenged
 - Majority found that the Act was valid: subject matter irrelevant to validity as long as there was a treaty and an obligation it was under the external affairs power
 - Minority view was that the subject matter is relevant: it had to relate to external affairs
- ***Tasmanian Dam* (1983)**
 - Australia ratifies *UN Convention for Protection of the World Cultural and National Heritage* in 1974
 - “Duty” to identify and protect areas of cultural and natural heritage within territory
 - Article 12 re nomination and listing of a particular area on World Heritage List
 - Art 34 “federal clause”:
 - Obligation on federal states the same as unitary states
 - Shall inform [State] Governments of obligations and recommend compliance
 - Tasmania requests Cth to nominate 3 parks in south west Tasmania; listed December 1982

