

THE EXECUTIVE AND THE EXTERNAL AFFAIRS POWER: DOES THE EXECUTIVE'S PREROGATIVE POWER TO VARY TREATY OBLIGATIONS QUALIFY PARLIAMENTARY SUPREMACY?

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The Commonwealth Parliament is conferred legislative competence to implement treaty obligations by the external affairs power. What is the status of implementing legislation if the executive subsequently exercises its power to vary Australia's treaty obligations, and where that legislation cannot otherwise be constitutionally supported? This comment argues that the external affairs power should be understood as waxing and waning analogously to the defence power. The result is that the executive may undermine the validity of implementing legislation by varying treaty obligations. However, the sense of unease engendered by this conclusion may, to some extent, be mitigated by implying a legislative intention that implementing legislation should not endure beyond the facts that support its validity.

I INTRODUCTION

Few propositions are as well entrenched as the claim that the executive, in the exercise of its prerogative powers, cannot displace statute law or common law. This proposition is supported by an abundance of authority stretching back to the Glorious Revolution of 1688. As the Supreme Court of the United Kingdom recently observed in *R (on the application of Miller) v Secretary of State for Exiting the European Union*, 'it is a fundamental principle of the UK constitution that, unless primary legislation permits it, the Royal prerogative

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does not enable ministers to change statute or common law.¹ Similarly, in the Australian context, Isaacs J held in *R v Kidman* that the ‘executive cannot change or add to the law; it can only execute it.’² The proposition is sourced in both the legislative supremacy of Parliament and the separation of powers.³ It is, Thomas Poole argues, an axiomatic rule about the institutional allocation of public power that does not admit of balancing or deference.⁴

Yet, under the *Commonwealth Constitution*, this proposition may be subject to an intriguing qualification in the context of treaty amendment or withdrawal — an issue that has recently been the subject of considerable discussion in other jurisdictions.⁵ In terms of the *Commonwealth Constitution*, treaties are implemented pursuant to the external affairs power.⁶ The ratification of a treaty generates legislative competence on the part of the Commonwealth Parliament, with the validity of domestic legislation that implements a treaty depending upon its conformity with that treaty.⁷ But, what is the status of such legislation if the executive subsequently exercises the

¹ [2017] UKSC 5 (24 January 2017) [50] (Lord Neuberger P, Lady Hale DP, Lord Mance SCJ, Lord Kerr SCJ, Lord Clarke SCJ, Lord Wilson SCJ, Lord Sumption SCJ and Lord Hodge SCJ).

² (1915) 20 CLR 425, 441 cited with approval by French CJ in *Williams v Commonwealth (No 1)* (2012) 284 CLR 156, 187.

³ In *New South Wales v Commonwealth* (1915) 20 CLR 54, Isaacs J (at 90) referred to the proposition that the ‘legislature makes, the executive executes, and the judiciary construes the law’ as the ‘dominant principle of demarcation’ of the *Constitution*.

⁴ Thomas Poole, ‘Losing our Religion? Public Law and Brexit’ on UK Constitutional Law Association, *UK Constitutional Law Association* (2 December 2016) <<https://ukconstitutionallaw.org/2016/12/02/thomas-poole-losing-our-religion-public-law-and-brexit/>>.

⁵ In *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017), a majority of the Supreme Court of the United Kingdom held that legislation was required prior to ministers issuing a notification pursuant to Article 50 of the *Treaty on European Union for the United Kingdom* to withdraw from the European Union. Similarly, in South Africa in *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP), a Full Bench of the High Court found that a notice of withdraw from the *Rome Statute of the International Criminal Court* was invalid given that it had not been preceded by parliamentary approval and repeal of the implementation Act. This led the South African government to abandon its attempt to withdraw from the *Rome Statute*. See, eg, Max du Plessis and Guenael Mettraux, ‘South Africa’s Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability’ (2017) 15 *Journal of International Criminal Justice* 361.

⁶ Section 51(xxix) of the *Commonwealth of Australia Constitution Act*: ‘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 external affairs.’

⁷ See, eg, *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

prerogative power⁸ to vary Australia's treaty obligations, and the legislation cannot be supported by another aspect of the external affairs power,⁹ or an alternative head of power? Does the legislation endure notwithstanding variations to the treaty obligations that supported the validity of the legislation in the first place, or is the executive competent to effectively invalidate or amend legislation—contrary to the weighty authority cited above?

To the authors' knowledge, there is no express authority on this point in Australian constitutional law. To explore this unresolved issue, this comment firstly discusses treaty ratification and treaty implementation under the *Commonwealth Constitution* in broad terms. The comment then identifies the following possibilities. First, domestic legislation that implements a treaty should be presumptively understood as abrogating the executive's power to withdraw from or amend those treaty obligations. In other words, legislative assent is presumptively required whenever the Commonwealth Parliament has implemented a treaty and the executive subsequently seeks to vary those treaty obligations such that the legislation would then be outside of legislative competence. Second, the validity of legislation that implements a treaty should be determined by Australia's treaty obligations at the date of assent of the relevant Act. This would allow the executive to subsequently withdraw from or amend Australia's treaty obligations without affecting the validity of the domestic legislation implementing those obligations. Third, the validity of legislation that implements a treaty should be determined by Australia's treaty obligations at the date of challenge of the Act. On this view, the external affairs power is analogous to the defence power,¹⁰ which 'waxes and wanes' in accordance with the exigencies facing the Commonwealth.¹¹ Treaty withdrawal

⁸ It may be, and has been, suggested that the power is sourced in s 61 of the *Commonwealth Constitution* and is independent of the prerogative. This question is beyond the scope of this comment and our analysis proceeds on the conventional understanding that the power is properly understood as an incident of prerogative.

⁹ The external affairs power may also be enlivened by customary international law, extraterritorial power, relations with other countries, and possibly matters of international concern. See generally Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 4th ed, 2014) 123-50.

¹⁰ Section 51(vi) of the *Commonwealth of Australia Constitution Act*: '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 the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.'

¹¹ *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 256 (Fullagar J).

or amendment may therefore affect the validity of legislation that has implemented the treaty.

Notwithstanding the extensive authority that the executive cannot displace legislation through the exercise of its prerogative powers, the comment concludes that the third possibility is the most persuasive understanding of the relationship between Australia's treaty obligations and legislation implementing such obligations. Although arising in the specific, and possibly hypothetical, context of treaty withdrawal or amendment in respect of legislation that cannot otherwise be constitutionally supported, the executive may nevertheless possess a power generally thought to be precluded by the constitutional law of many modern democratic states. This is a surprising, and somewhat unsettling, conclusion. One response is to imply a legislative intention that an implementing statute should not endure beyond the facts that support its validity. The advantage of this approach is that legislative provision and executive action are apparently rendered consistent. Put more specifically, if such an intention is implied, withdrawal from the treaty does not displace the particular law. Rather, the operation of the law was always intended to cease with the executive's decision to withdraw. Nevertheless, while ingenious, the implied intention argument cannot obscure that Australia's federal constitutional arrangements make the validity of implementing legislation contingent upon facts that fall within the prerogative powers, thereby concentrating a potentially far-reaching power in the hands of the executive. The implied intention argument mitigates, but does not entirely dispel, the sense of disquiet generated by our conclusions.

II TREATY RATIFICATION AND IMPLEMENTATION

A *Constitutions Compared*

In Australian law, the signing and ratification of treaties are matters for the executive under s 61 of the *Constitution*. The wording of s 61 is notoriously sparse: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' Notwithstanding, s 61 is widely understood to

incorporate the prerogative powers of the Crown including the power to sign and ratify,¹² as well as withdraw from and amend,¹³ treaties.

The Australian legal system is also a dualist system. It is well-established that ‘treaties do not have the force of law unless they are given that effect by statute.’¹⁴ However, treaty ratification generates legislative competence under the external affairs power. That is, once a treaty is ratified, the Commonwealth Parliament may pass legislation that gives effect to, or incorporates, that treaty on the domestic plane. Like the defence power, the external affairs power is therefore purposive: it exists for the purpose of implementing Australia’s international obligations.¹⁵ The High Court of Australia has stipulated various criteria that must be met for a treaty to be implemented. The treaty must have been ratified in good faith;¹⁶ the treaty must be sufficiently specific to allow for implementation;¹⁷ and the legislation must conform to the demands of the treaty.¹⁸ There are also suggestions in the case law, although the point has not been settled, that the treaty provision that the Commonwealth Parliament wishes to implement must impose an obligation upon the Commonwealth.¹⁹ It is not necessary for present purposes to scrutinise more closely these various aspects of the power.

The distinctive nature of these arrangements can be appreciated by contrasting them with the British and American constitutions — two key

¹² *Barton v Commonwealth* (1974) 131 CLR 477, 498 (Mason J).

¹³ The power to withdraw from treaties is regarded as the corollary of the executive’s power to enter into treaties, albeit subject to the terms of the treaty and general international law. See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) pt V. See also, eg, *Turp v Canada* [2012] FC 893 (17 July 2012) [18] (Noel J). On amendment, G P J McGinley notes that treaty obligations may be amended directly or indirectly. Direct amendment occurs by entry into an amending treaty expressly altering the terms of the first treaty. Indirect amendment can occur in various ways, including entry into another treaty dealing with the same subject matter as the first treaty but without direct reference to changing obligations under the first treaty, and through the practice of the parties or the practice of one party and the acquiescence of the other. See ‘The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered’ (1990) 12 *Adelaide Law Review* 367, 382-3.

¹⁴ See, eg, *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ).

¹⁵ See, eg, *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 545 (Deane J).

¹⁶ See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 260 (Brennan J).

¹⁷ See, eg, *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁸ *Ibid.*

¹⁹ See, eg, *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 108 (Gibbs CJ). For contrary views, see the judgment of Mason J in the *Tasmanian Dam Case* at 129 and the judgment of Deane J at 546.

influences on Australian constitutional law. On the one hand, the dualist nature of the Australian legal system originates from British constitutional law. In *Brown v Lizars*,²⁰ the High Court of Australia adopted the rule from *Walker v Baird*²¹ that treaties do not form part of municipal law unless an Act of Parliament has incorporated them on the domestic plane. Dualism reflects a fundamental principle of British and Australian constitutional law that we have already encountered: ‘it is for Parliament, and not for the Executive to make or alter municipal law.’²² However, there is no equivalent to the external affairs power under Britain’s unwritten constitution. Instead, the British Parliament is sovereign — treaty ratification is not necessary to generate legislative competence. Likewise, treaty amendment or withdrawal does not affect the powers of the British Parliament and hence the validity of implementing legislation.²³ Following, the question of whether the executive can effectively invalidate or amend legislation by exercising its prerogative power to vary treaty obligations does not arise under the British constitution as it does in Australia.

This can be contrasted to the system in the United States of America. The status of treaties in United States law is expressly addressed in the Supremacy Clause of the *United States Constitution*: ‘...all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land...’²⁴ The effect of the Supremacy Clause is that a treaty negotiated and, with the consent of two-thirds of the Senators present ratified by the President, must ‘be regarded in courts of justice as equivalent to an act of

²⁰ (1905) 2 CLR 837, 851 (Griffith CJ).

²¹ [1892] AC 491.

²² *Simsek v MacPhee (Minister for Immigration and Ethnic Affairs)* (1982) 148 CLR 636, 642 (Stephen J). A qualification to this rule was established in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 where a majority of the High Court held that treaty ratification may create a legitimate expectation that government decisions will conform with the treaty. However, doubt has subsequently been cast upon this doctrine. See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 33-34 (McHugh and Gummow JJ).

²³ This may seem contrary to the decision in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017). However, in that case the European Communities Act 1972 gave direct effect to, or acted as a ‘conduit pipe’ for, European Union law. Departure from the European Union through the exercise of the prerogative would not have invalidated the Act; it would simply have terminated the application of European Union law via the Act. It was for this reason that Lord Reed found in his dissenting judgment that legislation was not required for the Article 50 notification of withdrawal from the European Union to be issued. In contrast, the view of the majority was that the prerogative power of withdrawal was inconsistent with the Act, and that a constitutional change of this magnitude required legislation.

²⁴ Article VI, Clause 2.

the legislature...²⁵ Under the *United States Constitution* then, treaties are self-executing unless they are drafted in such a way that they require congressional action before they have domestic legal consequences.²⁶ Whether the advice and consent of the Senators is required for the President to withdraw from a treaty is unresolved.²⁷ However, the key point for present purposes is that the question of whether the executive can effectively invalidate legislation by withdrawing from or amending a treaty does not arise, given that it is the treaty *itself* that forms part of United States law.

B *Treaty Variation and the Validity of Implementing Legislation: s 61 and s 51(xxix)*

In contrast then, we return to the problem in the Australian context that executive variation of treaty obligations could, at least hypothetically, affect the validity of domestic legislation. We first summarise the problem identified. First, the executive enters a treaty. Next, the Parliament passes legislation giving effect to that treaty on the domestic plane. For present purposes, let us assume that only the 'treaty implementation aspect' of the external affairs power supports the legislation. The executive subsequently withdraws from the relevant treaty. A conventional understanding of the relationship between s 61 and s 51(xxix) is that the scope of the external affairs power wanes with treaty withdrawal. Following, the relevant legislation would now fall outside the scope of the head of power and, at least on one view, would become invalid. This section explores the possible conceptions of the relationship between Australia's treaty obligations and legislation implementing those obligations in an attempt to resolve this problem. We have identified three potential alternatives. First, implied abrogation of the power to withdraw. Second, validity is determined at the date of assent such that subsequent withdrawal does not affect validity of implementing legislation. Third, validity is determined at the date of challenge such that withdrawal could affect the operation of the legislation.

²⁵ *Foster v Neilson*, 27 US (2 Pet) 253, 314 (1829).

²⁶ Laurence Tribe, *American Constitutional Law* (The Foundation Press, 3rd ed, 2000) 644.

²⁷ *Goldwater v Carter*, 444 US 996 (1979).

1 *Does Implementing Legislation Presumptively Abrogate the Executive's Prerogative Power to Vary Treaty Obligations?*

It must be recalled that the prerogative power to withdraw from or amend a treaty is sourced in the common law.²⁸ Following, it is well established that this power may be abrogated, modified, or regulated by the legislature.²⁹ In other words, and subject to the points that follow, it is possible for the legislature to provide that parliamentary assent is necessary where a treaty has been implemented by the legislature and the executive subsequently seeks to vary Australia's treaty obligations. There are occasional dicta in the case law that might appear to support the existence of a presumption that legislative assent is required in such circumstances.

In *Ruddock v Vadarlis*, for example, Black CJ held that an intention to abrogate a prerogative power might be established 'where the Parliament has entered a field in which Australia has assumed treaty obligations and has acted to give effect to those obligations in that field and where the asserted prerogative or executive power might be capable of exercise in a manner not conformable with the Parliament's provision for the satisfaction of those obligations.'³⁰ Black CJ did not have in mind the specific issue of treaty withdrawal or amendment in respect of implementing legislation. However, given that under the *Commonwealth Constitution*, executive variation of treaty obligations is seemingly capable of impacting the validity of domestic legislation — and in that sense is not 'conformable' with such legislation — it is at least arguable that the executive's prerogative power to make and unmake treaties is presumptively abrogated by the implementing legislation.

The existence of such a presumption would address the problem considered in this comment. The general rule would be that legislation implementing treaty obligations would preclude the executive from unilaterally varying those obligations. Legislative assent would only be unnecessary where the legislature had expressly provided that it was not required. In these circumstances, the legislature would have intended that the legislation should cease to operate, in whole or in part, in the event of variation of Australia's

²⁸ See note at above n 8.

²⁹ *Ruddock v Vadarlis* (2001) 110 FCR 491, 539 (French J).

³⁰ *Ibid* 504.

treaty obligations. Accordingly, there would be no qualification of the fundamental rule that the executive cannot change the law without statutory authorisation.

This approach is attractive in its clarity. However, there are several conceptual and practical difficulties with it. First, it runs contrary to the weight of authority on this point. For instance, it is well accepted that statutory abrogation of a prerogative power must occur through express words or by necessary implication.³¹ In other words, legislation is presumed *not* to abrogate prerogative powers. Abrogation instead arises in specific, relatively well-defined circumstances that are not typically regarded as extending to implied abrogation of the treaty-making power merely by implementing legislation.³² There is, for example, authority that where legislation wholly regulates the area of a particular prerogative power, the exercise of that power is governed by the provisions of the statute.³³ However, legislation implementing a treaty does not necessarily regulate the power to make or unmake the treaty; indeed, that is normally left unregulated by the implementing statute. There is also authority that ministers cannot frustrate the purpose of a statute by undermining its effective operation³⁴ or rendering it redundant.³⁵ These formulations might appear to be more promising but on closer inspection they likewise refer to circumstances where legislation expressly regulates the purported exercise of the prerogative power; they do not establish that legislation implementing a treaty impliedly abrogates the power to withdraw from or amend the treaty.

This raises a second issue with this approach. Recalling Black CJ's dicta quoted above, the prerogative would only be impliedly abrogated where treaty withdrawal would necessarily be 'not conformable' with the continued validity of the implementing legislation. Let us first change the hypothetical slightly. And, suppose that the implementing legislation is supportable by another aspect of s 51(xxix) or another head of power. This would mean that treaty

³¹ Ibid 501 (Black CJ), 539-40 (French J); *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017) [48] (Lord Neuberger P, Lady Hale DP, Lord Mance SCJ, Lord Kerr SCJ, Lord Clarke SCJ, Lord Wilson SCJ, Lord Sumption SCJ and Lord Hodge SCJ)..

³² See, eg, *Turp v Canada* [2012] FC 893.

³³ *Attorney-General v De Keyser's Royal Hotel Ltd* 1920 AC 508, 526 (Lord Dunedin); *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 (Black CJ).

³⁴ *Laker Airways Ltd v Department of Trade* [1977] QB 643.

³⁵ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

withdrawal is in fact entirely conformable with the continued validity of the legislation — the treaty could be withdrawn from and the legislation merely ‘rely’ on an alternative head of power. This raises serious practical difficulties. First, it would not be possible to identify whether the prerogative power would have been abrogated without first ascertaining potential alternative heads of power. Additionally, and perhaps more significantly, let us assume that at one time the legislation is supportable only by the treaty-implementing aspect of s 51(xxix). That would mean, on this approach, that the prerogative to withdraw from the relevant treaty had been impliedly abrogated. Let us now assume that, at some later time, the legislation becomes supportable by an alternative head of power — perhaps, the ‘relations with other countries aspect’ of s 51(xxix). This would, *necessarily*, mean that treaty withdrawal would no longer affect validity of the legislation — that is, it would no longer be unconformable. Does this mean that the prerogative power to withdraw would be ‘revived’? Conceptually, at least applying this approach, it would seem so. This result is irreconcilable with another fundamental principle of Australia’s constitutional system: the prerogative falls within a limited and ever diminishing field. That is, the prerogative is limited to powers that can be identified from historical use *and* which have not been subsequently abrogated.³⁶

It is also to be noted at this point the diversity of academic opinion regarding the Commonwealth Parliament’s capacity to abrogate executive power to enter treaties in the first place. For example, Sir Maurice Byers submitted to the Senate Legal and Constitutional References Committee’s 1995 inquiry, ‘Trick or Treaty? Commonwealth Power to Make and Implement Treaties’, that the Parliament could not ‘take away any power [which] the Constitution give[s] to the Executive’, and that no executive function may be discharged by the Parliament.³⁷ Consequently, while the Parliament may *regulate* the executive’s exercise of the treaty-making power, ‘[n]o law could take [it] away directly or indirectly.’³⁸ Critically, Sir Maurice considered that any law giving the Parliament power to veto treaty ratification would be

³⁶ See, eg. Anne Twomey, ‘Pushing the Boundaries of Executive Power – *Pape*, Prerogative and Nationhood’ (2010) 34 *Melbourne University Law Review* 313, 319 citing *British Broadcasting Corporation v Johns* [1965] Ch 32, 79 (Diplock LJ).

³⁷ See George Winterton, ‘The Limits and Use of Executive Power by Government’ (2003) 31 *Federal Law Review* 421, 435.

³⁸ *Ibid.*

constitutionally invalid.³⁹ This may be contrasted to submissions of Professor Enid Campbell and Henry Burmester who both considered that Parliament could, as a matter of constitutional law, pass a law of this latter kind; however, Parliament could not *itself* assume the power to conclude treaties.⁴⁰ The Committee ultimately concluded that a law regulating the executive's prerogative to enter treaties would be unlikely to impermissibly usurp the separation of powers, provided the Parliament was not itself exercising the power.⁴¹ Further, Professor Sawyer has suggested that the Commonwealth Parliament has competence to 'restrict the powers which the executive obtains from s 61, and the prerogative, for example by requiring legislative ratification of treaties.'⁴² Professor Richardson has gone further suggesting, *contra* Professor Campbell and Burmester, that 'Parliament could ... provide that, instead of ratification of treaties remaining an act of executive government, ratification should be a function of the Parliament.'⁴³ Finally, Professor Winterton has suggested that, given the executive's treaty-making power is derived from the prerogative, it is inherently subject to legislation, including making the exercise of the power entirely legislative.⁴⁴ The same considerations that speak to treaty making must, *a fortiori*, speak to the power to withdraw. As such, necessarily implied abrogation of the power to withdraw from a treaty is inconsistent with, for example, the view articulated by Sir Maurice Byers.

Finally, it is well-established that the 'greater the significance of a particular executive power to national sovereignty, the less likely it is that, absent clear words or inescapable implication, the parliament would have intended to extinguish the power.'⁴⁵ The prerogative power to conduct foreign relations through the making and unmaking of treaties is clearly central to

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See Anne Twomey, 'Comment: Treaty making and implementation in Australia' (1996) 7 *Public Law Review* 4, 7-8; see also, eg, Enid Campbell, 'Parliament and the Executive' in L Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 88, 92.

⁴² G Sawyer, 'Australian Constitutional Law in Relation to International Relations and International Law' in KW Ryan (ed), *International Law in Australia* (Law Book Co, 2nd ed, 1984) 35, 37.

⁴³ J E Richardson, 'The Executive Power of the Commonwealth' in L Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 50, 67.

⁴⁴ George Winterton, 'Limits to the Use of the "Treaty Power"' in Philip Alston and Madelaine Chiam (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty?* (The Federation Press, 1995) 29, 47.

⁴⁵ *Ruddock v Vadarlis* (2001) 110 FCR 491, 540-1 [185] (French J).

national sovereignty.⁴⁶ This likewise militates against any presumption, or implication, that implementing legislation abrogates executive power.

On reflection, this conclusion should not be especially surprising. As the majority emphasise in *Miller*, the premise of dualism is that ‘international law and domestic law operate in independent spheres.’⁴⁷ This means, on the one hand, that treaties do not form part of domestic law unless they are given effect by statute. However, dualism also entails the converse proposition: ‘treaties between sovereign states have effect in international law and are not governed by the domestic law of any state.’⁴⁸ A presumption that legislation implementing a treaty has abrogated the executive’s power to withdraw from or amend the treaty would undermine the dualist distinction. In short, to resolve the question posed by this comment, the relationship between executive variation of treaty obligations and the validity of implementing legislation needs to be more squarely confronted.

2 *Should the Constitutionality of Implementing Legislation Be Determined By the Circumstances Existing at the Date of Assent?*

An alternative possibility is that the validity of implementing legislation should be determined by Australia’s treaty obligations at the date of assent of the Act. In other words, once a treaty is implemented the executive can subsequently withdraw from or amend the treaty without affecting the validity of domestic legislation. The advantage of this approach is that it is consistent with the proposition that the executive should not be able to change the law through the exercise of its prerogative powers, as well as the proposition that the executive can nevertheless exercise its prerogative powers to the extent that these have not been impliedly or expressly abrogated by the legislature. Put differently, it

⁴⁶ For example, Murphy J, when considering the operation of ss 51(xxix) and 61 as enabling Australia to carry out its functions as an ‘international person’, suggested that applying a narrow approach to the interpretation of Acts passed under the power would result in Australia being an ‘international cripple unable to participate fully in the emerging world’: *New South Wales v Commonwealth* (1975) 135 CLR 337, 505 (the ‘*Offshore Sovereignty* case’). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 241 (Murphy J). Although considering a different issue, this dictum speaks to the significance of the power.

⁴⁷ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017) [55] (Lord Neuberger P, Lady Hale DP, Lord Mance SCJ, Lord Kerr SCJ, Lord Clarke SCJ, Lord Wilson SCJ, Lord Sumption SCJ and Lord Hodge SCJ).

⁴⁸ *Ibid.*

holds the promise of maintaining both the legislative supremacy of Parliament and the prerogative powers of the executive.

However, this conception of the relationship between Australia's treaty obligations and implementing legislation runs counter to much of the authority on the external affairs power. In case law and academic literature, an analogy is frequently drawn between the defence power and the external affairs power.⁴⁹ Both powers, it is argued, are purposive.⁵⁰ The defence power exists for the purpose of defending the Commonwealth,⁵¹ while the external affairs power exists for the purpose of giving effect to Australia's international obligations.⁵² As indicated above, both powers are also capable of waxing and waning in accordance with changing circumstances. The defence power expands and contracts depending upon the exigencies facing the Commonwealth; it is a 'fixed concept with a changing content.'⁵³ The defence power is therefore ambulatory; legislation that is valid on the basis of a particular set of facts may cease to be valid if the relevant facts change. As Dixon J held in *Hume v Higgins*, when the conditions to which a law was directed have passed, 'the statutory provision will then be spent.'⁵⁴ In *Koowarta v Bjelke-Petersen*, Stephen J found that an analogous approach should be taken to the external affairs power, whereby its content is determined 'by what is generally regarded at any particular time as a part of the external affairs of the nation' and the validity of challenged laws is tested on this basis.⁵⁵ To insist that the validity of legislation implementing treaty obligations should be determined by the facts existing at the date of assent would undermine this commonly understood operation of purposive heads of power and introduce a qualification not previously countenanced in the case law.

⁴⁹ See, eg, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217 (Stephen J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 475 (Gibbs CJ); Gunther Doeker, *The Treaty Making Power in the Commonwealth of Australia* (Springer, 1966) 190. For a contrary view, see *Richardson v Forestry Commission* (1988) 164 CLR 261, 326 (Dawson J).

⁵⁰ See, eg, George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 6th edn, 2014) 778.

⁵¹ *Stenhouse v Coleman* (1944) 69 CLR 475, 471 (Dixon J).

⁵² *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 674 (Dixon J); *Polyukhovich v Commonwealth* at (1991) 172 CLR 501, 551 (Brennan J).

⁵³ *Australian Textiles Pty Ltd v The Commonwealth* (1945) 71 CLR 161, 178 (Dixon J).

⁵⁴ (1949) 78 CLR 116, 134 (Dixon J). See also *Australian Textiles Pty Ltd v The Commonwealth* (1945) 71 CLR 161, 181 (Dixon J); *R v Foster* (1949) 79 CLR 43.

⁵⁵ (1982) 153 CLR 168, 217. See further *Commonwealth v Tasmania* (1983) 158 CLR 1, 485 (Mason J).

This approach would also seem to be a quintessential example of the legislative stream rising higher than the constitutional source.⁵⁶ If treaty ratification generates legislative competence on the part of the Commonwealth Parliament, and the implementing legislation cannot otherwise be constitutionally supported, it is difficult to identify the basis upon which legislative validity could be maintained once the treaty obligations have been amended or terminated. The problem is, fundamentally, trying to maintain the legislative supremacy of Parliament while at the same time preserving well established, and perhaps even essential, executive powers. Again, this accommodation is readily achievable in the British system where the sovereignty of the British Parliament means that treaty ratification is not necessary to generate legislative competence and, likewise, treaty withdrawal or amendment does not have repercussions for the validity of legislation that has already been enacted. However, under the *Commonwealth Constitution* treaty ratification generates legislative competence and conversely, it would seem, variation of treaty obligations may have implications for the validity of implementing legislation.

3 *Should the Constitutionality of Implementing Legislation be Determined by the Circumstances Existing at the Date of Challenge?*

The remaining possibility is that the validity of implementing legislation should be determined by the circumstances existing at the date of challenge of the Act. This approach maintains the analogy that regards both the defence power and the external affairs power as waxing and waning in accordance with changing circumstances. This approach also recognises that, unlike the British Parliament, the Commonwealth Parliament is not sovereign but instead derives legislative power to implement treaties from the external affairs power enumerated in s 51. It ensures, in other words, that the legislative stream remains true to the constitutional source.

Nevertheless, as the Honourable Robert French AC notes in his contribution to this special issue, executive power, especially non-statutory

⁵⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J).

executive power, is associated with societal anxiety.⁵⁷ It is difficult not to feel disquieted by the conclusion that the executive may be capable of effectively invalidating or amending legislation through the exercise of its prerogative power to withdraw from or amend treaties, not least because of extensive authority dating from 1688 that the executive of a democratic state should not possess this power. This anxiety is only likely to be heightened by the observation that the executive of a foreign nation may also be capable of effectively invalidating Australian domestic legislation, by, for example, withdrawing from or amending a bilateral treaty that has been implemented by the Commonwealth Parliament.⁵⁸ That is, withdrawal from a bilateral treaty by the foreign power would necessarily terminate the treaty obligation, and thus, legislative competence would wane. Following, at least in the abovementioned hypothetical, the implementing legislation would no longer be valid.

However, on closer inspection these consequences are not as absurd or unprecedented as they might at first appear. In the context of the defence power, the executive is capable of generating facts that expand and contract the scope of the power, and which may have consequences for the validity of domestic legislation. The executive can, for example, make declarations of war and peace, and deploy and withdraw the armed forces, thereby escalating or deescalating hostilities. Indeed, the executives of foreign nations may also take actions relevant to the scope of the defence power. The surrender of a foreign nation, for instance, may lead to a waning of the defence power and an eventual finding that Commonwealth legislation is no longer valid.⁵⁹ It is true, as McTiernan J held in the *Communist Party Case*, that the *Commonwealth Constitution* does not permit the legislature — and by extension the executive — to ‘recite itself’ into power.⁶⁰ But this proposition entails that the branches of government cannot assert facts that do not exist; it does not mean that they cannot generate facts relevant to the scope of Commonwealth legislative power.

⁵⁷ ‘Executive Power in Australia – Nurtured and Bound in Anxiety.’ As Dixon J notes in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (at 187): ‘History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding executive power.’

⁵⁸ See McGinley, above n 13, 381.

⁵⁹ In *Australian Textiles Pty Ltd v The Commonwealth* (1945) 71 CLR 161, Dixon J (at 176) took judicial notice of the surrender of Japan, noting that the ‘whole aspect of things had, of course changed.’

⁶⁰ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 206.

One response to the sense of unease generated by these observations might be to imply a legislative intention that an Act should not endure beyond the facts that support its validity. In *Hume v Higgins*, for example, in the context of the defence power, Dixon J held that the principles of statutory interpretation ‘enable the Court to imply in a statutory provision obviously addressed to a particular set of facts a restriction upon its operation confining it to those facts.’⁶¹ Similarly, it may be possible to imply a legislative intention that legislation implementing treaty obligations should not endure beyond the existence of those obligations, assuming that the Act cannot otherwise be constitutionally supported. This accords with the rule of statutory interpretation articulated by Isaacs J in *Federal Commissioner of Taxation v Munro*⁶² that ‘there is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds.’ The advantage of this approach is that it is apparently consistent with the proposition that the executive cannot change, or dispense with, the law without statutory authorisation. This is because, by implying the legislative intention, Parliament would have in effect provided for the cessation of the particular provision. Similarly, unilateral withdrawal from a bilateral treaty by a foreign power would not *invalidate* the legislation — rather, the legislation would cease to operate in accordance with Parliament’s (implied) intention. The approach is supported by s 15A of the *Acts Interpretation Act 1901 (Cth)* which provides:

‘[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.’

By operation of s 15A, an Act that cannot be constitutionally supported beyond the existence of treaty obligations is to be construed as not ‘intended’ to endure beyond those obligations, so as not to exceed the legislative competence of the Commonwealth Parliament. Therefore, executive withdrawal (or, again, withdrawal by the foreign power) is not inconsistent with the relevant legislation. Put another way, applying this approach, treaty withdrawal merely ‘concludes’ legislation that must be read subject to the *Commonwealth*

⁶¹ *Hume v Higgins* (1949) 78 CLR 116, 133.

⁶² (1926) 38 CLR 153, 180.

Constitution and in accordance with the implied legislative intention. This recognises that the validity of an implementing Act is contingent upon facts that change from time to time — here the existence of the treaty obligation.

Nevertheless, the implied intention argument, while consistent with principle and authority, cannot obscure that the external affairs power makes the validity of implementing legislation contingent upon facts that fall within the executive's prerogative powers to withdraw from or amend treaty obligations — unless these have been expressly abrogated by the legislature. The external affairs power therefore concentrates a potentially far-reaching power in the hands of the executive. This aspect of the *Commonwealth Constitution* sits uneasily with the separation of powers and the legislative supremacy of Parliament as these principles are understood in the constitutional law of most modern democratic states, even if the implied intention argument has the effect of apparently rendering it consistent. The sense of anxiety generated by our conclusions is therefore assuaged, but not entirely dispelled, by implying an intention that implementing legislation that cannot otherwise be constitutionally supported should not endure beyond the existence of the relevant treaty obligations.

III CONCLUSION

It is possible that the scenario considered in this comment — the executive withdrawing from or amending a treaty, thereby raising the question of the validity of implementing legislation that cannot otherwise be constitutionally supported — will remain entirely hypothetical. It has been noted that 'very few treaties to which Australia is a party have been implemented through legislation based solely on the external affairs power.'⁶³ Given the breadth of Commonwealth legislative powers, it is likely that implementing legislation will often find support in another aspect of the external affairs power or an alternative head of power. Still, it is possible to find counter-examples. In *Koowarta v Bjelke-Petersen*,⁶⁴ for example, the validity of the relevant parts of the *Racial Discrimination Act 1975* (Cth) was found to turn entirely upon the valid implementation of the *Convention on the Elimination of All Forms of*

⁶³ Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 436.

⁶⁴ (1982) 153 CLR 168.

Racial Discrimination.⁶⁵ In other words, if the executive were to withdraw from the *Convention*, the Act would, in the words of Dixon J, be ‘spent.’⁶⁶

Of course, it is possible to imply a legislative intention that the *Racial Discrimination Act 1975* (Cth) should not endure beyond the facts that support its validity, here the continuing treaty obligations. This approach has the apparent advantage of addressing important concerns relating to the separation of powers and the legislative supremacy of Parliament. Nevertheless, given that the relevant facts fall within the prerogative powers of the executive, the sobering conclusion remains that the executive could exercise these powers to undermine the validity of a cornerstone of Australia’s human rights protections. Notwithstanding that result, it is difficult to see what other conclusion is available under Australia’s distinctive constitutional arrangements. Indeed, it would appear — as argued in this comment — that this conclusion is, indeed, the most coherent understanding of the relationship between s 51(xxix) and s 61, parliamentary supremacy and the separation of powers.

⁶⁵ By a majority of six to one, the High Court found that the relevant parts of the Act were not valid under the ‘race’ power in s 51(xxvi) of the Constitution.

⁶⁶ *Hume v Higgins* (1949) 78 CLR 116, 134.