THE DOCTRINE OF POLITICAL QUESTIONS WITHIN A FEDERAL SYSTEM

The scope of the political questions doctrine is vague and uncertain. It is, of course, beyond dispute that courts of law are only concerned with legal controversies.[1] They have not been entrusted with either legislative or executive powers; they can declare the law, but cannot make it. However, there are fields where rules appear to exist, and yet the courts have refused to enforce them on the ground that matters of policy and not of law are involved. This article is concerned with this borderline situation where the courts appear to have guidelines for their determination and still voluntarily refrain from intervention.

The Supreme Court of the United States has accepted that " in determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for judicial determination are dominant considerations." [2]

But this formulation does not carry the matter much further. Respect for the executive and legislative branches of government is a rather vague notion. This criterium can justify a judicial policy of self-restraint, such as some have indeed argued for in the United States.[3] It would save the courts a great deal of embarrassment if they could say that matters which were likely to involve them in political controversy or which would entail the determination of complex facts according to vague standards, are functions belonging more properly to the other branches of government and therefore beyond the competence of the courts. At times the United States Supreme Court appears to have followed such a policy. In *Colegrove* v. *Green*[4] it refused jurisdiction in the complex matter of redistribution of electoral boundaries in order to avoid involvement in what it termed, "an essentially political contest." In

1. *South Australia* v. *Commonwealth* (1941) 65 C.L.R. 373, 409.

2. Coleman v. *Miller* 307 U.S. 433, 454, 455 (1939). Followed in *Baker* v. *Carr* 7 L. ed. (2d) 663, 682 *per* Brennan J. and see 724 *per* Frankfurter J. (1962).

3. See: M. Finkelstein (1923) 37 Harv. L.R. 338.

4. 328 U.S. 549, 553, 554 (1945).

Harisiades v. *Shaughnessy*[5] the Supreme Court refused the protection of the Constitution to aliens resident in the United States in order to leave the United States Government with a bargaining power with which to protect American citizens abroad. In these cases the political questions doctrine was obviously used as an instrument to deny jurisdiction in cases where such a self-denial was demanded in order to ensure the continued reputation of the court as an impartial and non-political tribunal or for reasons of national security.

But opposed to this policy of judicial self-restraint stand those who argue that the political questions doctrine must be viewed as an aspect of the traditional separation of powers in Anglo-American law. In their view the exclusion of the courts from certain areas of executive and legislative action is explained by the historical assignment of certain powers to each branch of government and cannot be left to depend upon a policy of convenience on the part of the courts themselves.[6]

The latter is now the view adopted by the Supreme Court of the United States. In *Baker* v. *Carr* the majority opinion stated[7]: "The doctrine of which we treat is one of 'political questions' not one of 'political cases'. The courts cannot reject as 'no law suit' a *bona fide* controversy as to whether some action denominated 'political' exceeds constitutional authority."

And the past record of the Supreme Court shows that it has not refused to adjudicate cases the outcome of which changed profoundly the lives of many Americans[8] or which served to protect the political franchise of certain minority groups.[9]

The characterisation of a question as "political" therefore does not lie in any possible effect which the decision may have on the political framework of the nation. In that sense all constitutional issues have political significance since, as Dixon C.J. has pointed out, the Constitution is a political instrument.[10] Nor is the effect of the court's decision on the political peace of the nation or on the policies of the government a relevant consideration.

5. 342 U.S. 580, 591 (1951).

6. See: M. F. Weston, (1924) 38 Harv. L.R. 296.

7. 7 L. ed. (2d) 663, 686 *per* Brennan J. (1962).

8. *Brown* v. *Board of Education of Topeka* 347 U.S. 483 (1953).

9. *Gomillion* v. *Lightfoot* 364 U.S. 339 (1960). *Cf. Ashby* v. *White* (1702) 2 Ld. Raym. 938.

10. *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31 at p. 82.

The distinction rather lies in the manner in which the litigant presents his case to the court. If he presents the issue in a form which can be tried by a court of law then the courts must do justice though the heavens may fall. [11] But in order to present the issue in such a form, it is necessary "that the litigant who would challenge official action must claim infringement of an interest particular and personal to himself as distinguished from a cause of dissatisfaction with the general framework and functioning of government — a complaint that the political institutions are awry." [12]

A political question therefore can only arise when the exercise of governmental power cannot be controlled by the assertion of a legal interest or right, but only by political action. This absence of a legal interest can arise only in cases where the executive and legislative branches of the government have been invested with wide discretionary powers or where the interests purported to have been created are not enforceable at law. This involves an investigation of the powers which municipal law has traditionally attributed to the Executive and Legislature.

II

The function of the courts is to administer the law not to make it. In constitutional issues they can only be concerned with the question whether a given power exists and not with the wisdom or desirability of its exercise. As Rich J. said in *Australian National Airways* v. *The Commonwealth :* "Now, it cannot be too clearly understood that this Court is not in the smallest degree concerned to consider whether a project is politically, economically or socially desirable or undesirable. It is concerned only with the questions whether it is within the constitutional powers of the Commonwealth Parliament to pass an Act, or for the regulation-making authority to make a regulation, of the type which has been called in question, and if so whether the Act or the regulation is, in whole or in part, a valid exercise of power." [13] So far as the legislature is concerned, these principles are well settled. But the doctrine of political questions usually finds its application with regard to the powers of the Executive. Here also the situation is similar; the courts cannot control the exercise of undoubted executive power. And there are still large areas of Executive power in the Anglo-American world which have only been loosely circumscribed.

11. *Cf. Chandler* v. *D.P.P.* [1962] 3 All E.R. 142, *per* Lord Radcliffe at p. 151.

12. *Baker* v. *Carr* 7 L. ed. (2d) 663, 726 *per* Frankfurter J. (1962).

13. (1945) 71 C.L.R. 29, 70. See also *South Australia* v. *Commonwealth* (1941) 65 C.L.R. 373, *per* Latham C.J. at p. 409.

In the 16th century the term "absolute" came to be applied to the type of prerogative which left the Crown with an unfettered discretion as to the manner of its exercise.[14] The term "absolute" as Holdsworth explains [15] related not to the extent of the royal powers themselves, but rather to the nature of the discretion which these powers conferred.

The constitutional struggles of the 17th century limited the scope of these absolute prerogatives and the extravagant claims made for them by the Stuarts, but they were not extinguished. Even up to this day the common law prerogative can still be defined as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." [16] Where that prerogative still exists, as is the case with the control of the armed forces, the court can only say as did Lord Radcliffe in *Chandler* v. *D.P.P.* [17]: "If the methods of arming the defence forces and the disposition of these forces are at the decision of Her Majesty's ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different. The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interest."

This principle, as Lord Devlin points out in the same case, is not peculiar to the exercise of the common law prerogative: "It applies wherever discretionary powers of management and control are given by statute whether to the Crown itself or to one of its ministers or to any public body." [18] Thus the courts are excluded not because the issue is political nor because the courts must accept the guidance of the Executive in such matters [19] but because the citizen has no legal right to claim that the discretionary powers of the Executive should be exercised in a particular manner.[20] It follows that in these cases of undoubted discretionary power the courts cannot question the validity of the actions of the Executive.

14. Holdsworth, *A History of English Law,* (1924), Vol. IV, 206.

15. *Ibid.* n. 4.

16. Dicey, *The Law of the Constitution,* 9th ed. 424.

17. [1962] 3 All E.R. 142, 151. *Cf. Macdonald* v. *Steele* (1793), Peake 233, 234 *per* Lord Kenyon: "His Majesty's pleasure supersedes all enquiry as he has the absolute discretion and command of the army."

18. [1962] 3 All E.R. at p. 157.

19. *Id. per* Lord Radcliffe at p. 151.

20. *China Navigation Co.* v. *A.-G.* [1932] 2 K.B. 197.

A similar situation exists with regard to the Crown's prerogative in its conduct of external affairs. The non-justiciability of the Crown's acts in this field is often explained on the ground that the transactions of the Crown performed in the exercise of this particular prerogative, are not subject to the laws of any municipal system and therefore beyond the cognisance of a municipal court.[21] But the absence of enforceable legal control can also be interpreted as the exercise of an uncontrolled discretionary power.

The validity of an act executed by the Crown in the exercise of its undoubted discretionary powers cannot be questioned. Such an act constitutes a fact the existence of which the courts must recognise.[22] Such a fact may form the basis for rights and immunities created by the law of the land, and thus affect the rights of both subjects and foreigners.

" It has remained true that what is done by the royal authority with regard to foreign powers is the act of the whole nation. But the consequences which an exercise by the Crown of this authority produces upon the rights, duties and immunities of persons under the common law vary according to the nature of the thing done. A declaration of peace or war produces definite consequences because the rules of the common law govern the conduct of the King's subjects with reference to a state of war. But a treaty, at all events one which does not terminate a state of war, has no legal effect upon the rights and duties of the subjects of the Crown and speaking generally no power resides in the Crown to compel them to obey the provisions of a treaty: *Walker* v. *Baird.*[23] On the other hand the recognition by the Crown of the sovereignty of a foreign state or government does produce under the common law immediate effects municipally. If the Crown receives a foreign sovereign the law immediately attaches to him an immunity and he is not amenable to the local jurisdiction."[24]

21. *Secretary of State for India* v. *K.B. Sahaba* (1859) 13 Moo. P.C. 22, 75.

22. One must draw a distinction, of course, between the creation of the factual situation which is within the undoubted prerogative of the Crown and the question of the conclusiveness of a declaration made on behalf of the Crown that such a situation has in fact been created by it. *Duff Development Co. Ltd.* v. *Government of Kelantan* [1924] A.C. 797, 824 *per* Lord Sumner. *Chandler* v. *D.P.P.* [1962] 3 All E.R. 142, *per* Lord Devlin at p. 159. The creation of the fact may be proved *aliter cf. Foster* v. *Globe Venture Syndicate Ltd.* [1900] 1 Ch. 811.

23. [1891] A.C. 491, 497.

24. *Per* Dixon C.J. in *Chow Hung Ching* v. *The King* (1949) 77 C.L.R. 449, 478. *Cf. Chandler* v. *D.P.P.* [1962] 3 All E.R. 142.

Executory action on the part of the Crown creates difficulties of its own. It is generally a concomitant of unfettered power that it cannot fetter its own future exercise. A declaration on the part of the Crown as to the future exercise of its discretionary powers therefore cannot confer legal rights on anyone since it cannot bind the Crown, nor can the courts take cognisance of a fact which has not as yet been created.[25] A political agreement in this sense, that is to say, an agreement whereby the Crown declares that it shall in future pursue a certain policy, does not fetter its power subsequently to pursue an opposite policy, however much this may amount to a breach of faith.[26]

In each of these two categories non-justiciability is due to the fact that the courts cannot control the exercise of executive or legislative discretionary power. It is not a question of judicial self-restraint.

One must draw a distinction between non-justiciability as a result of the political questions doctrine and non-justiciability as the result of an immunity. In the former case the exercise of an undoubted power has resulted in an act which is undoubtedly valid or conversely the promise of the exercise of such a power has created no legal interest which could fetter the future exercise of such a power. Though an immunity may produce the same practical result, it does so for a different reason. In that case the commission of an illegal act may go without redress since no sanction can be enforced against the wrongdoer, but this does not affect either the lack of power on the part of the wrongdoer to commit such an act or the validity of the legal interests which it is sought to enforce against him. The privileges of Parliament are an example of such an immunity even though sometimes they are drawn under the heading of the doctrine of political questions. These privileges, however, in essence amount to a claim to be exempt from the jurisdiction of the ordinary courts and not to a claim to absolute discretionary powers.[27] The litigant's claim will fail for lack of enforcement, but not for lack of legal interest. As Coleridge J. said in *Stockdale* v. *Hansard*[28]*:* "The order may be illegal and therefore no justification to him who acts on it without, and yet the courts of law may be unable to penetrate the walls of the House and give redress for anything done within." As the same

25. *Watson's Bay Ferry Co. Ltd.* v. *Whitfield* (1919) 27 C.L.R. 268, 277.

26. *E.g. Secretary of State for India* v. *K.B. Sahaba* (1859) 13 Moo P.C. 22 and see: Sir W. Harrison Moore, (1935) 17 Jo. of Comp. Legislation 163, 186, 187, appr. by Dixon C.J. in *South Australia* v. *Commonwealth* (1962) 35 A.L.J.R. 460, 461.

27. One must distinguish here the purely legislative powers of Parliament which do involve the exercise of discretionary power.

28. (1839) 9 Ad. & E. 1, 233. See also: *Bradlaugh* v. *Gossett* (1884) 12 Q.B.D. 271, 273, 274, 277.

judge pointed out in that case, the claims of Parliament were claims to privilege and not to arbitrary power.[29] Thus should the question of the validity of proceedings of the House on the rights of citizens outside the House arise, the courts must pass on the validity of such proceedings.[30]

III

The English example was followed in the new federations beyond the seas. In the United States the powers of the Executive and the Legislature were as much respected as they had been in England. Again it was seen as a matter of power and not of judicial self-restraint. In *U.S.* v. *Palmer,* Marshall C.J. said: "Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country . . . are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be . . ."[31] But whilst the United States Supreme Court accepted a similar relationship with its two co-ordinate branches of government as had been settled two hundred years earlier by the English courts, the federal constitution raised new difficulties.

These difficulties arose out of the co-existence of several governmental entities within the same constitutional framework. The courts were therefore faced with the problem of the relationship between those entities which all claimed to be to some extent sovereign. The attitude adopted by the United States Supreme Court has been to treat the relationship between the Federal and State Governments and between the States themselves as analogous to that existing between fully sovereign States. This analogy is best expressed in the words of Gray J. in the course of his Supreme Court opinion in *Wisconsin* v. *Pelican Insurance Co. of New Orleans*[32]: "This court has declined to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments."

On this view the relationship between the States and the Federation and the States in the exercise of their governmental powers was seen as a relationship between sovereign powers and not one determinable by

29. (1839) 9 Ad. & E. 1, 220, 221, 227, 228.

30. *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1, 144, 185, 189, 190, 226, 227, 228.

31. 3 Wh. 610, 624 (1818). *Cf. Martin* v. *Mott* 12 Wheat. 19 (1827); *Kennett* v. *Chambers* 14 How. 38, 50, 51 (1852).

32. 127 U.S. 271, 288 (1887).

courts of law in accordance with superior principles of law. Speaking of the conflict between the State of Georgia and the Cherokee Nation, Johnson J. said in *Cherokee Nation* v. *State of Georgia*[33]: "And the contest is distinctly a contest for empire. It is not a case of meum and tuum in the judicial, but in the political sense. Not an appeal to laws, but to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility: to right himself and not to appeal to any arbiter, but the sword for the justice of his cause."

The necessary corollary of this retention of sovereignty was a lack of legal protection of the constitutional rights of the States of the Union viewed as political organisations. For, as between sovereign states, the municipal courts will not enforce their purely political rights, since the recognition and enforcement of purely political claims is a matter within the external affairs prerogative of the local sovereign.[34] Applied to the states of a federation, this principle meant that no state could complain of the invasion of the field reserved to it by the Constitution even if such an invasion amounted to the complete destruction of its political autonomy.[35]

Nor could a State enforce in the courts of law those political rights which had been expressly conferred upon it by the Constitution. As *Luther* v. *Borden*[36] illustrates, the right to political representation in the councils of the Union, the right to recognition as the legitimate government of a state, the guarantee of a republican form of government and of Federal military assistance to quell domestic disturbances are all matters for the exclusive determination of Congress or the President.[37]

But the exercise of sovereign powers of which the victim States could not complain, could be restrained at the suit of an adversely affected citizen, if the constitution had been infringed.[38] For Acts of State can

33. 5 Pet. 1, 29 (1831).

34. See: *Emperor of Austria* v. *Day* (1861) 30 L.J. Ch. 690, *per* Turner L.J. at p. 711.

35. *Georgia* v. *Stanton* 6 Wall. 50 (1867).

36. 7 How. 1 (1849).

37. *Ibid,* at 42-46 *per* Taney C.J.

38. In *Worcester* v. *Georgia* 6 Pet. 515 (1832) the Supreme Court held that the courts of the State of Georgia could not exercise jurisdiction over the plaintiff, a citizen of the United States, who was resident within the territory of the Cherokee Nation which Georgia had purported to annex in defiance of treaties. *Cf. Cherokee Nation* v. *State of Georgia* 5 Pet. 1 (1931) where the Supreme Court had refused to adjudicate upon the validity of this annexation at the suit of the Cherokee Nation itself.

only prevail against foreign governments and aliens abroad[39] and not against the subject.[40] The same act which was a valid act of power against the former, could constitute a trespass as against the latter. The emphasis therefore changed from one on sovereign power to one on lack of legal interest. It was said by the Supreme Court that it could not enforce rights of a political character vested in the States. It could only protect their rights of property such as private citizens could possess.[41]

However the courts both in England and the United States have protected not merely the personal and property rights of the subject, but also his political rights conferred upon him by the Constitution.[42] Even Taney C.J. in *Luther* v. *Borden* qualified his statement that the courts have no right to determine the political privileges to which the citizens of a state are entitled with the proviso: "unless there is an established constitution or law to govern its decision."[43]

The peculiar operation therefore of the political questions doctrine with respect to the inter-federal relationships in the United States is the result of the fiction that the States of the Union still possess some of the attributes of sovereign and independent states. As such the rules are directly deducible from the ancient external affairs prerogative of the British Crown.

Since the middle of the nineteenth century the Supreme Court has narrowed this operation of the political questions doctrine by drawing more and more political rights into the sphere of property rights. After all the founding fathers had seen fit to grant the Supreme Court jurisdiction to determine inter-state conflicts. The first type of inter-state conflict in respect of which jurisdiction was assumed consisted of boundary disputes between States. This assumption of jurisdiction was justified by the majority in *Rhode Island* v. *Massachusetts*[44] by treating claims on the part of a State to the eminent domain over certain territory as analogous to claims of title rather than a political claim to sovereignty itself.[45] In the course of time this principle was extended

39. *Buron* v. *Denman* (1848) 2 Ex. 167.

40. *Walker* v. *Baird* [1892] A.C. 497.

41. *Georgia* v. *Stanton* 6 Wall. 50, 77 (1867).

42. *Ashby* v. *White* (1702) 2 Ld. Raym. 938; *Gomillion* v. *Lightfoot* 364 U.S. 339 (1960).

43. 7 How. 1, 41 (1849).

44. 12 Pet. 657, *per* Baldwin J. at pp. 733-741 (1838).

45. Note the dissent of Taney C.J. at 753 that it did amount to a claim of sovereignty and not one of property.

to cover not only conflicting claims to eminent domain, but also conflicts of jurisdiction.[46]

The Supreme Court however further narrowed the scope of the political questions doctrine by allowing the States to bring actions to defend certain public rights and interests from intervention on the part of other States or of the Union. The right of a foreign sovereign to bring an action in the English courts to protect the public property of his country was well established.[47] In the 19th century an extension of this right of action took place. In *Emperor of Austria* v. *Day* [48] the Court of Appeal in Chancery allowed the plaintiff Emperor to sue for an injunction to restrain the defendants from disturbing the monetary system of his nation for the purposes of fomenting revolution within his domains. Turner L.J.[49] saw the Emperor's suit as a representative assertion of the private rights of his subjects, Lord Campbell L.C. on the other hand saw it as the assertion of a public (but not political) right vested in the Emperor as such.[50]

Similarly the Supreme Court of the United States began to allow the Attorneys-General of the States to assert public interests in suits before it, either in a representative capacity on the part of their citizens as in *Missouri* v. *Illinois*[51] or as public rights vested in the States themselves as in *Missouri* v. *Holland.*[52] In the latter case the Supreme Court went far beyond the English practice by recognising the right of a State to control a definite subject falling within its field of exclusive competence as a legally protected right.

But further than this the Court has refused to go. The States may be able to protect definite rights of sovereignty, but not the abstract idea of sovereignty itself. The decision in *Massachusetts* v. *Mellon*[53] shows that the progress from *Georgia* v. *Stanton*[54] represents not a change of principle, but a greater readiness to find judicially enforceable rights. But this willingness stops short of a case where the court is invited to

46. *Texas* v. *Florida* 306 U.S. 398 (1938).

47. *Hullett* v. *King of Spain* (1828) 1 Dow. & Cl. 169; *King of the Two Sicilies* v. *Willcox* (1850) 1 Sim. N.S. 301.

48. (1861) 30 L.J. Ch. 690.

49. *Id.* at 711.

50. *Id.* at 703, 704.

51. 180 U.S. 208 (1900).

52. 252 U.S. 416 (1919).

53. 262 U.S. 447 (1922).

54. 6 Wall. 50 (1867).

"... adjudicate not rights of persons, or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government."[55]

And in other ways the quasi-sovereignty of the States is still recognised. The lawfulness of a State Government and its representation is still a matter for Congress and the Executive alone to determine, despite the constitutional guarantee of a republican form of government to the States.[56] Nevertheless, the recent decision of the Supreme Court in *Baker* v. *Carr*[57] in treating the existence of an unrepresentative State Assembly as a denial of the citizen's political equality granted by the 14th Amendment has created an enforceable right which effectively fills up the gap left by the non-justiciable republican guarantee.

IV

In Australia the position differs in some marked respects from that prevailing in the United States. The States do not stand in the same quasi-sovereign relationship to one another as they do in the United States. The primary reason for this is, of course, the fact that they are all emanations of the one sovereign. It is not necessary for the purpose of this argument to deal with the exact nature of the unity of the Crown as propounded in the *Engineers' Case,*[58] or to determine to what extent the various political entities are juristically separate from each other.[59] It suffices to point out the distinction between the American states where sovereignty can be said to rest in the people of each State and that prevailing in Australia where sovereignty is vested in the same Crown. The Crown in right of one State cannot deal with the Crown in right of another State as if it were in any way the sovereign of a foreign country.[60]

Furthermore since much of the relationship between the constituent parts of the Federation depends upon Imperial Law, which includes the Constitution Act itself, legal obligations are created of which the courts can judge. As Griffith C.J. said in *South Australia* v. *Victoria:* "The law of the Empire, including the Statute law, is binding as well upon the dependencies regarded as political entities, as upon individual subjects.

55. 262 U.S. 447, 484, 485 (1922).

56. Article IV para. 4; *Pacific States Telephone Co.* v. *Oregon* 223 U.S. 118 (1911).

57. 7 L. ed. (2d) 663 (1962).

58. (1920) 28 C.L.R. 129, 152, *per* Isaacs J. at p. 153.

59. See Wynes, *Legislative, Executive and Judicial Powers,* 3rd ed. p. 515; *Williams* v. *A.-G. for New South Wales* (1913) 16 C.L.R. 404, 430, 431.

60. *Commonwealth* v. *New South Wales* (1923) 32 C.L.R. 200, *per* Isaacs, Rich and Starke JJ. at pp. 209-210.

If, therefore, any dependency infringes the law of the Empire governing its relations with a neighbouring dependency it is guilty of a wrong towards that other dependency".[61] Since the *Engineers' Case* the same can be said, at least by way of general principle, of the legislation of the Commonwealth within its assigned sphere of power. "... laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States."[62] Unlike the American federation, therefore, much of the relationship between the States themselves and between the States and the Commonwealth is a legal relationship, imposing legally enforceable rights and obligations.

Finally there is the position of the High Court under the terms of the Constitution to be considered. As in the United States the High Court is invested with jurisdiction to hear and determine disputes between the States.[63] Unlike the United States Constitution, however, section 78 of the Commonwealth Constitution allows the Federal Parliament to take away the procedural immunity of the Crown in right of the States.[64] Moreover it appears that the Commonwealth has the power under pl. xxxix of section 51 and quite independently of section 105A, to provide for the enforcement of judgments against States in respect of unconditional obligations.[65]

The Constitution itself, therefore, treats the Commonwealth and the States "as politically organised bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests."[66]

Since the Commonwealth and the States stand in a relation to one another, not as sovereign States, but as common subjects of superior constitutional powers, it follows that the source of either Executive or Legislative authority in their dealings with one another must be sought

61. (1911) 12 C.L.R. 667, 676; see also *per* Higgins J. at pp. 740-741.

62. (1920) 28 C.L.R. 129, *per* Isaacs J. at p. 153.

63. *Commonwealth of Australia Constitution Act,* s.75.

64. *Commonwealth* v. *New South Wales* (1923) 32 C.L.R. 200, 219, 220 *per* Higgins J. at pp. 219-220.

65. *I.e.* obligations entered into without the implied proviso that payment is subject to Parliamentary approval. *New South Wales* v. *Commonwealth* (No. 1) (1932) 46 C.L.R. 155, *per* Rich and Dixon JJ. at pp. 176-177. In the view of these two justices the relative immunity of the States against the enforcement of conditional obligations rests upon an implied clause read into the contract by reference to constitutional practice and not upon a sovereign immunity.

66. *Per* Dixon J. in *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, at p. 363.

in those constitutional powers which relate to their internal affairs and not in any sovereign power relating to the conduct of external affairs. Conversely, the non-sovereign status of the States means that the rights which the Constitution confers upon them, even those which relate to their governmental powers, can be enforced in the appropriate court by the States themselves.

Accordingly the High Court has never insisted that the State complains of the infringement of some more or less definable right of property. To the contrary "... it must now be taken as established that the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provisions of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the States whose interests he represents." [67] But a State can complain of a violation of the Constitution which affects it or its citizens even though the acts complained of take place entirely outside its territory.[68] Moreover the States can complain of Federal action which invades their field even if such action is not strictly coercive.[69] Whilst of course a State must have an interest to defend in a court of law, the integrity of its assigned governmental field under the Constitution, provides it with such an interest which the court will protect from invasion by unlawful Executive or Legislative power.[70]

But this does not mean, of course, that all relations which might arise between States or between States and the Commonwealth are justiciable. The fact that the States do not even possess the semblance of sovereignty only means that the wide discretionary powers of the External Affairs prerogative are not available to them or against them. By the very same token, however, it does mean that like the ordinary subject, they are bound to accept the uncontrolled exercise of Federal Executive or Legislative discretion within the bounds of Federal power.[71] Again aspects of their relationships with one another may be governed not by established principles of law but be subject to the discretionary power of a higher authority.[72] Furthermore the relations into which they

67. *Per* Gavan Duffy C.J. and Evatt and McTiernan JJ. in *A.-G. (Victoria)* v. *Commonwealth* (1935) 52 C.L.R. 533, at p. 556.

68. *Tasmania* v. *Victoria* (1935) 52 C.L.R. 157.

69. *A.-G. (Victoria)* v. *Commonwealth* (1945) 71 C.L.R. 237, *per* Starke J. at p. 226 and *per* Dixon J. at p. 272. *Contra: Massachusetts* v. *Mellon* 262 U.S. 447 (1922).

70. *A.-G. for Victoria* v. *Commonwealth* (1962) 36 A.L.J.R. 104.

71. *South Australia,* v. *Commonwealth* (1942) 65 C.L.R. 373; *Victoria* v. *Commonwealth* (1956) 99 C.L.R. 575.

72. *South Australia* v. *Victoria* (1911) 12 C.L.R. 667.

themselves have entered, either amongst themselves or with the Commonwealth, may not have been intended to possess legal efficacy. It cannot be denied that even if for many purposes the States are in the same position as subjects, they are at the same time governmental entities, endowed with governmental powers.[73] Thus it may be that a purported agreement though couched in legal terms, is in fact no more than a declaration of policy.[74] However, whilst a sovereign government cannot fetter the future exercise of its political powers even if it wished to do so, it may be that a government within the Commonwealth of Australia can enter into a legally binding agreement even on the subject of its governmental powers.[75]

On the operation of section 119 of the Commonwealth Constitution Australian and American legal opinion seem to have come to agree. It appears to be the accepted opinion in Australia that the judgment of the need for federal military intervention in the domestic affairs of a State is a matter exclusively for the Federal Government and not for a court to determine.[76] But this does depend not so much on any quasi-sovereign relationship, but on the fact that the control and disposition over the armed forces of the Crown is exclusively vested in the Crown in right of the Commonwealth.

V

The preceding argument has shown that historically the doctrine of political questions is the result of the acknowledgment on the part of the judiciary of the existence of areas of unqualified power vested in either the Executive or the Legislature. Though it was originally developed in the United Kingdom, it was in this form that the doctrine was adopted both in the United States and in Australia. The latest pronouncement of the Supreme Court of the United States makes this abundantly clear. "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identifies it as essentially a function of the separation of powers. Prominent on the

73. *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31, 55, 56 *per* Latham C.J. at pp. 55-56 and *per* Dixon J. at pp. 82-83.

74. *South Australia* v. *Commonwealth* (1962) 35 A.L.J.R. 460, 461.

75. *Id. per* Dixon C.J. at p. 460. But the argument of Dixon C.J. which rests upon the existence of a common law and a common tribunal, ignores the power aspect involved in this problem.

76. Quick and Garran, *Commentaries on the Constitution,* (1900) p. 964; Nicholas, *The Australian Constitution,* 2nd ed. pp. 128, 219; Wynes, *Legislative, Executive and Judicial Powers,* 3rd ed. p. 290.

surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." [77]

Though this enumeration includes certain policy factors, these factors in reality represent a rationalisation as to why power is vested in a particular branch of government, rather than indicate a discretion in the court. Basically the court regards the non-justiciability of certain matters as a question of power and not as one of judicial policy. It has also been shown that the application of the doctrine of political questions to the relationship between the States themselves and between the States and the Union in the United States rests upon the same acknowledgment of the division of authority amongst the branches of government which are co-ordinate to the Supreme Court. Irrespective of whether the dispute in question amounted to a clash between Federal and State authority or one between State authorities themselves, the attitude to be taken towards it by the Supreme Court as an organ of the Federal Government was a question which it fell to Congress or the President to determine.

Since therefore the same basic concept underlies the political questions doctrine in all three countries the reason for any difference in operation and approach must be sought elsewhere. It is submitted that the reason lies in the origin of the American Federation. When the original States formed the Union, they were independent sovereign States. Before Federation there would have been no doubt that the Executive of each of them had inherited the full panoply of the ancient prerogative of the Crown in relation to external affairs, which could be applied not only in their relations with the outside world, but also as regards their mutual relations. Upon federation this basic sovereignty was not regarded as extinguished or transferred to the Union, but existing side by side with the new sovereignty of the Union in so far as this was compatible with the Constitution. Hence the peculiar nature of the interfederal political question arose.

77. *Baker* v. *Carr* 7 L. Ed. (2d) 663, *per* Brennan J. at pp. 685-686 (1962).

In Australia on the other hand the situation was quite the reverse. The federation there was one between colonies all subject to the same sovereign and possessing none of the trappings of independent States in public international law. There was no sovereignty to be retained since there had never been any before. Even the new federation itself could not be described as possessing an independent sovereignty until recent years. Though this did not mean that there was no application of the political questions doctrine in inter-federal relations, it did mean that the peculiarities which arose in the United States doctrine as a result of the quasi-sovereignty of the States never found a place in Australia.[78]

But, in conclusion, it must be pointed out that whilst in prinicple the quasi-sovereignty of the American States continues unimpaired, the results of this principle have been modified considerably. It may be that even today the High Court of Australia has shown itself more willing than its American counterpart to assume jurisdiction in inter-federal conflicts, but the Supreme Court has since its decision in *Missouri* v. *Holland* [79] been able to assume jurisdiction to a very wide degree. Its latest decision in *Baker* v. *Carr.*[80] has now enabled it to enter the field of the internal political organisation of the State itself, sweeping aside the claims of the States to arrange their own political affairs subject to their recognition as States of the Union by the Executive or Legislative branches of the Federal Government. The result, as one learned commentator has pointed out,[81] may mean the end of the political questions doctrine as an effective force in inter-federal relations.

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78. It would be interesting to speculate what the position would be in the Federation of Malaya, which like the United States, was established by agreement between sovereigns. *Federation of Malaya Independence Act,* 1957 (U.K.), s.l. See also, *Federation of Malaya Constitution,* s.181(l), but the question is probably of academic value only by reason of the provisions of s.130.

79. 252 U.S. 416 (1919).

80. 7 L. ed. (2d) 663 (1962).

81. R. G. McCloskey (1962) 76 Harv. L.R. 54.

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