Some Recent Developments in Commonwealth Treaty Practice

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Treaty practice in the Commonwealth comprises those forms and usages, in the criteria and application of agreements, which are shaped by the fact that they are adopted by Commonwealth countries. By "recent" is meant the years since 1949, for in that year the first British Commonwealth, as a group of independent nations associated in common allegiance to the Crown, came to an end with the decision to establish India as a republic. Two topics will be considered: changes in the form of participation of dependent territories in treaties; and the character of certain arrangements between the dependent territories of the Commonwealth.

Traditionally, a treaty or agreement, unless it contained some provision uniting it to a particular area, extended to all the territory of a contracting party, whether metropolitan or not. But the growth of self-government in the countries of the Commonwealth has meant that matters, falling at least within administrative or technical fields, have been progressively brought within the exclusive competence of their legislatures. This has led to two developments: the extension of treaties or agreements to dependent territories has come to be made conditional upon their consent; and dependent territories have themselves become responsible participants in international agreements and organizations. The first development has come by way of the "colonial application clause". It has been the function of this clause in treaties and agreements to provide for their extension to dependent territories, by stating either that the treaty or agreement should apply only in those dependent territories indicated by the metropolitan government, or that it should apply in all territories except those indicated by it. In this way the conflict between the dependent status internationally of dependent territories in the Commonwealth and the measure of their internal self-government was, for the purpose of operating the treaty, resolved.

The use of the colonial application clause has itself undergone an evolution. The old description in the clause of dependent territories by categories—colonies, protectorates, mandates, trust territories, and so on—has given way to a general description of them as territories "for whose international relations the [metropolitan] government is responsible". A recent example is to be found in the International Agreement on Olive Oil Production (1955), article 41 (1) of which provides for the extension of the Agreement by a contracting party to

"non-metropolitan territories which it represents in international affairs". This accentuates the representative or diplomatic character of the extension of an agreement to a dependent territory under the clause; it suggests that the consent of the dependent territory to participation in the agreement is the primary condition, and that the function of the metropolitan government is almost that of diplomatic postman. But this conclusion would be premature, at least in the relations between the United Kingdom and its overseas territories, for it raises an issue of the scope of the constitutional convention, given statutory form in the Statute of Westminster 1931, s. 4.[1] Two questions may be asked about this convention: (a) Is it effective in law, if it is not cast in statutory form in the case of a particular dependent territory? (b) Does it extend to the application in the territory of an international agreement accepted by the United Kingdom?

The Statute of Westminster, s. 4 is regarded as being declaratory of the common practice that had already come to be accepted between the United Kingdom and the Dominions before 1931.[2] But the position of Rhodesia has shown that, as a matter of law, this constitutional convention does not apply, unless it is cast in statutory form, to a Commonwealth country not covered by the Statute of Westminster or by an independence pact. So in a joint declaration by the United Kingdom Government and the Government of the Federation of Rhodesia and Nyasaland on 27 April, 1957, it was said: "The United Kingdom Government recognise the existence of a convention applicable to the present stage of the constitutional evolution of the Federation, whereby the United Kingdom Government in practice does not initiate any legislation to amend or repeal any Federal Act or to deal with any matter included within the competence of the Federal legislature, except at the request of the Federal Government." But at the Southern Rhodesia Constitutional Conference in February, 1961[3] a request by the Rhodesian Government that the convention[4] be embodied in legislation was "noted by the Secretary of State of Commonwealth Relations without commitment", an attitude suggesting that the embodiment of the convention in statute would be more than a formal declaration. So it seems that on major issues at least the convention can, as a matter of law, be set aside.

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1 "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

2 The Preamble to the Statute describes it as part of the "established constitutional position".

3 Report of the Conference, Cmnd. 1291.

4 "The Constitution of 1923 conferred responsible government on Southern Rhodesia. Since then it has become an established convention for Parliament at Westminster, not to legislate for Southern Rhodesia on matters within the competence of the Legislative Assembly of Southern Rhodesia, except with the agreement of the Southern Rhodesian Government" (Cmnd. 1399, p. 3).

The convention has in practice been applied to the extension of international agreements to dependent territories of the United Kingdom, self-governing in respect of the subject-matter of the convention, so that agreements have been extended only with the consent of the territory. But the increase in the number of international treaties and conventions, humanitarian or regulatory, which are regarded as calling for the widest possible application, has tended to restrict the use of the "colonial application clause" and even bring it under suspicion as an obstacle to the extension of the benefits of such conventions to dependent territories. So the latest form of the Constitution of the International Labour Organisation (ILO) provides in article 35 (4) that, if the subject-matter of a convention drafted by the ILO is "within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory shall bring the Convention to the notice of the Government of the territory as soon as possible with a view to the enactment of legislation or other action by such Government. Thereafter the Member, in agreement with the Government of the territory, may communicate to the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory". Again the Traffic in Persons Convention 1949, article 23 provides that the word "State" in the Convention shall include "all the colonies and Trust Territories of a State signatory or acceding to the Convention and all territories for which such state is internationally responsible".[5] Such provisions do not of course make the extension of a convention to dependent territories automatic[6] but they are moving in that direction by limiting the discretion of the metropolitan government, and outflanking, in the case of the United Kingdom, the constitutional convention.

Another development, by which dependent territories have themselves become responsible participants in international agreements, has taken the form of the delegation or enlargement of treaty-making power.[7] So in an international agreement concluded in 1959 between Hong Kong and Burma,[8] the Government of Hong Kong was described as acting "with the consent of the Government of the United Kingdom". An agreement was made between Saudi Arabia and Bahrein in February 1958 for the purpose of defining the limits of their offshore areas according to the continental shelf principle. The

5 See article 23 of the Convention for the suppression of the Traffic in Persons, and of the Exploitation of the Prostitution of Others, *U.N.T.S.*, No. 1342, vol. 96, at p. 286.

6 See, for example, the refusal of the United Kingdom to ratify the Convention on Political Rights of Women 1953: *British Practice in International Law*, 1963, p. 144.

7 For example the *Federation of Rhodesia and Nyasaland Order in Council* 1953, S.I. 1199 (1953), gave the Federal Parliament exclusive right to legislate on (a) such external relations as may from time to time be entrusted to the Federation by Her Majesty's Government in the United Kingdom; (b) the implementation of certain classes of treaty.

8 The Hong Kong-Burma Agreement on Cotton Textiles of 1959.

treaty-making power of the Ruler of Bahrein, defined in Agreements with the Crown in 1880 and 1892, could be exercised only, among other conditions, with the consent of the United Kingdom. In regard to the 1958 Agreement, Her Majesty's Government in the United Kingdom declared itself prepared "formally to waive" the consent provisions.

What then is the character of a delegation of enlargement of treaty-making power in these cases? Bahrein as a protected State had not lost its treaty-making power, though its exercise may have been limited or controlled by the treaties of protection. So, the International Court of Justice pointed out that, notwithstanding the severe restrictions imposed on its sovereignty by the Treaty of February 1912, Morocco had "retained its personality as a State in international law".[9] Therefore, the waiver of consent by the United Kingdom to the 1958 Agreement between Bahrein and Saudi Arabia merely lifted a restriction on the treaty-making power of Bahrein. But if we accept the premise that a colonial dependent territory has no treaty-making capacity in international law, then we say that the United Kingdom can confer it merely by indicating its consent to the conclusion of a treaty by the government of the territory; nor is it realistic to regard the consent as constituting the government an agent of the United Kingdom, where the government is in fact the principal having exclusive legislative competence over the execution of the treaty.

The solution may be that there is no essential difference between certain kinds of dependent territory for the purpose of the conclusion and performance of international agreements; that the government of a dependent territory may have capacity to conclude such agreements, provided that it has the full internal authority necessary to perform them; and that the consent of the United Kingdom constitutes it a guarantor of performance in the exercise of its international responsibility for the territory.[10]

Certain arrangements made with or between dependent territories of the Commonwealth raise a question whether our treaty categories are adequate. These are administrative or constitutional arrangements cast in the form of an international agreement. Some examples may be cited. In 1955 an agreement was concluded between the Governor of the Uganda Protectorate on behalf of the Queen, and the Kabaka, Chiefs and People of Buganda, and incorporated in internal legislation. The East African Court of Appeal held[11] that the agreement was a treaty and therefore an act of state not questionable by

9 *Rights of U.S. Nationals in Morocco* [I.C.J.] Reports, 1952, at p. 22.

10 Compare the passage, *Mavrommatis Palestine Concessions Case,* [1924] P.C.I.J. Series A No. 2: "The obligations resulting from these engagements [the provisions of the Mandate] are therefore obligations which the Administration of Palestine must respect; the Mandatory is internationally responsible for any breach of them since, under article 12 of the Mandate, the external relations of Palestine are handled by it."

11 *Katikiro of Buganda v. Attorney-General of Uganda,* [1959] *E.A. Law Reports,* p. 382.

the Court, but that in its incorporated form it must be interpreted like any other piece of legislation. In 1961 the United Kingdom Government entered into an agreement with the Government of Sarawak dealing with a number of matters, such as pensions and removal pay, covering members of Her Majesty's Overseas Civil Service. The agreement was incorporated in the Government of Sarawak (Services) Ordinance, which became effective in July 1961. In December 1961 the Governments of Tanganyika, Kenya and Uganda signed an agreement for setting up the East African Common Services Organisation. The preamble to the agreement stated that "Her Majesty's Government in the United Kingdom has entrusted the Governments of Kenya and Uganda[12] with authority to enter into the agreement." Further authority was conferred upon them by identical despatches to enter into agreements for the execution of the main agreement.[13]

There are at least three ways of characterizing agreements of this kind: as agreements governed by international law; as agreements governed by rules of law other than international law; or as agreements not creating in themselves any legal obligations at all. Since in all the instances described one or more of the parties to the agreements in issue were dependent territories, it could be said that they were incapable of concluding international agreements; further, there do not appear to be any rules of constitutional law or procedure by which the Government of Sarawak, for example, could enforce its agreement with the United Kingdom; and the incorporation of agreements into internal law by legislation suggests a belief that, without that step, no legal obligations are created at all. But the stubborn fact remains that the form, context and purpose of these agreements show that the parties intended to assume obligations; their conclusion would be otherwise pointless. It is suggested that they do import legal obligations; that they are governed by that part of international law called the general principles of law;[14] that, in cases of "entrustment", they have the character of international agreements proper, in which the dependent territory is principal and the metropolitan government guarantor; and that they are enforceable in national courts to the extent that they are incorporated in municipal law.

12 Tanganyika was at that time an independent state.

13 See *British Practice in International Law 1962*, pp. 234-5.

14 Some have a federative function, for example, the agreements setting up the East African Common Services Organisation, and are analogous to the agreements, international in form and constitutive in purpose, by which states enter into a federation.