

Polyukhovich v Commonwealth (1991) 172 CLR 501

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Facts

- Section 9 of the *War Crimes Act 1945* (Cth) (**the Act**) provided that any person who committed war crimes between 1939 and 1945 was guilty of an indictable offence.
- Ivan Polyukhovich was convicted of committing war crimes in Ukraine during the German occupation between 1942 and 1943.
- Polyukhovich submitted that the Act was beyond the scope of the Constitution, specifically the defence power (section 51(vi)) and the external affairs power (section 51(xxix)).
- Polyukhovich further submitted that making past criminal conduct an offence is an invalid attempt to usurp the Commonwealth's judicial power because it effectively enacted a "bill of attainder" (an Act of Parliament that declares a person or people guilty without a trial).

Issues

- Was the Act a valid exercise of the external affairs power?
- Was the Act a usurpation of Commonwealth judicial power?
- Was section 9 of the Act invalid?

Held

External Affairs Power

- The majority of the High Court held that the Act was a valid exercise of the external affairs power.
- Mason CJ, Deane, Dawson, Gaudron and McHugh JJ all agreed that, because the subject matter of World War II war crimes was external to Australia, the Act was sufficiently connected to the external affairs power.
- Mason CJ stated that "it is not necessary that the Court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation" in order for the Act to be valid.
- Toohey J considered it insufficient for a subject matter to be merely external to Australia, but it had to "touch and concern" Australia, though his Honour still considered the subject matter connected to the external affairs power.
- Brennan J dissented, stating that there must be a "nexus" between Australia and the external affair subject matter. War crimes in 1939-1945 was not an "external affair" to Australia at the time and Polyukhovich attaining citizenship did not change this.

USURPATION AND VALIDITY?

- The majority rejected the argument that the Act purported to usurp the judicial power of the Commonwealth.

- While the majority accepted that a bill of attainder would offend the Commonwealth separation of powers, just because a law operated retrospectively did not necessarily make the law a bill of attainder.

Quotes

"...It is not necessary that the Court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation in order that its validity be sustained. It is enough that Parliament's judgment is that Australia has an interest or concern. It is inconceivable that the Court could overrule Parliament's decision on that question."

(Mason CJ at pages 530 and 531)

"I do not understand the phrase "external affairs" to sweep into Commonwealth power every person who exists or every relationship, set of circumstances or field of activity which exists or occurs outside Australian territory. The "affairs" which are the subject matter of the power are, in my view, the external affairs of Australia; not affairs which have nothing to do with Australia. Although affairs which exist or occur outside Australia may be described as "external" in a geographical sense, I would not hold that the Constitution confers power to enact laws affecting affairs which, though geographically external, have nothing to do with Australia. **There must be some nexus, not necessarily substantial, between Australia and the "external affairs"** which a law purports to affect before the law is supported by s. 51(xxix)."

(Brennan J in dissent at pages 550 and 551)

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