External Affairs
Supplementary Paper

No. 53/71 Inclusion of a Federal-State Clause in the Covenant on Human Rights

The following are three statements made in the Third Committee of the eighth session of the United Nations General Assembly by Mrs. A.L. Caldwell, Canadian Representative, on agenda item 12 - "Report of the Economic and Social Council", with reference to inclusion of a federal-state clause in the Draft Covenants on Human Rights. The first statement was given on November 11, 1953 and the other two on November 12.

NOTE - Resolutions Nos. 157, 158 and 159 relating to human rights were adopted by the General Assembly on November 28, 1953.

Statement made on November 11, 1953

This morning the distinguished Representative of Egypt spoke to the resolution requesting the Commission on Human Rights not to include provisions relating to Federal States in the draft International Covenants on Human Rights.

The arguments which are contained in the preambular paragraphs of the resolution of our Egyptian colleague, the arguments which Dr. Azmi used himself in his opening statement in this debate are the same with very few exceptions as those which were presented and rejected in 1950.

It is true of course that since 1950 one of the most important federal states, the United States of America, has announced that it does not plan to sign the covenants. That announcement, that decision, no doubt, has greatly influenced the Egyptian representative's decision to introduce this resolution. Whether that be true or not, may I say to the distinguished representative of Egypt with great respect, and in all earnestness, that there are other federal states in the United Nations besides the United States of America. They are not so important, perhaps, but they do nevertheless exist, and these other federal states have constitutional arrangements and problems of divided jurisdiction between federal authority, and state or province, which are just as clear-cut and inflexible as in the United States of America, - in some cases much more so. I hope that our distinguished colleague from Egypt will realize this. I hope other members of the Committee will not jump to the erroneous conclusion that the federal state clause was intended only for the United States of America, and that, now that the United States has announced its intention not to sign the covenants, there is no longer any need for the federal state clause. I hope that the Egyptian representative and the members of the Committee will recognize that, while one federal state, the United States, has announced its position in the way it has, this does not mean that there is no need for other federal states to sign the covenants. There may in fact be other federal states which intend to do so if these constitutional positions are safeguarded.

It seems to me, that the adoption of the Egyptian resolution can have only one possible result, - and that will be to force all federal states which face this difficult constitutional problem to force them, whether they like it or not, into the same position that has been taken by the U.S.A., - that they will not, because they cannot, sign the covenants in the absence of a federal state clause.

Now I know, that this is not in any way what our Egyptian colleague wishes to see happen. I accept without reserve the fact that he genuinely and sincerely believes that the federal state clause is not necessary. He has told us of his studies at Yale and at Harvard, and the conclusion he has reached that so far as the United States in concerned the federal state clause is not a sine qua non. That may very well be the case. I do not happen to be an expert in U.S. constitutional law. But we do know something about our constitutional position in Canada. That constitution is like the law of the Medes and the Persians. I invite Dr. Azmi to come to Canada, visit our Canadian universities, consult with the heads of the law faculties, and our great constitutional experts there, and to come to his own conclusions in this matter. If he accepts my invitation I guarantee him two things - (1) that he will receive a warm and hospitable welcome in my country and (2) that he will return completely convinced that in the absence of a federal state clause in the Human Rights covenants, it would be absolutely impossible, short of a drastic overhaul of its basic constitutional arrangements, for Canada to ratify the covenants.

This same difficulty does not, I should point out, apply to all international covenants or conventions. It depends entirely on the subject matter involved. Canada was able to sign and ratify the Genocide convention for example, because genocide is internationally recognized as a crime, and criminal matters under our Canadian constitution come within federal jurisdiction. Matters relating to property and civil rights however fall under our constitution exclusively within provincial jurisdiction: in accordance with this, our highest courts have already ruled that it is beyond the power of the federal authority, under our constitution, to enact legislation to implement certain ILO conventions back in the 1930's relating to legislation in the field of minimum wages and hours of work. Standards in such fields are maintained and guaranteed at a high level in Canada under provincial law. But the courts have ruled that they cannot be guaranteed by the federal authorities through an international instrument, since provincial fields of jurisdiction are sacrosanct and cannot be invaded under any pretext whatsoever by the federal authority.

If what I have said is true about the inviolability of provincial jurisdiction in the field of property and civil rights in Canada, it is even more true when we consider a matter such as education. This is an area of exclusive provincial jurisdiction in my country: the federal authority has no jurisdiction whatsoever. To this field above all others, the provincial governments attach supreme importance; they guard most jealously their exclusive jurisdiction in this field. How then can the federal authority of my country take upon itself the solemn international obligations which are contemplated by the covenants with respect to such matters as education and these others I have mentioned, when it is possessed of only partial or in some cases no constitutional authority to implement these undertakings.

The issues raised by our Egyptian colleagues' resolution concerning the federal state clause are not new; they have been considered on a number of occasions in this Assembly, in the Economic and Social Council and in many of the subordinate organs of the United Nations. In fact the General Assembly expressed its opinion very clearly on the federal-state clause in relation to the covenant on human rights when it approved resolution 421(V) on December 4th, 1950.

Section C of that resolution requests the Human Rights Commission

> "to study a federal State article and to prepare, for the consideration of the General Assembly at its sixth session, recommendations which will have as their purpose the securing of the maximum extension of the covenant to the constituent units of federal States, and the meeting of the constitutional problems of federal States."

The paragraph which I have quoted constitutes the clearest possible direction and authority to the Human Rights Commission to work on the preparation of a federal state clause. Three years ago the General Assembly pronounced itself in favour of this in no uncertain manner. In this third Committee for example, only 3 votes were cast in opposition to the paragraph relating to the federal state clause, out of a total of 48 members present and voting. 31 votes were cast in Committee in favour of the inclusion of a federal state clause: only 3 were opposed: and there were 14 abstentions.

When the paragraph on the federal state clause was voted on in plenary, the result was equally decisive: 37 votes in favour: 7 opposed and only three abstentions.

The official records of the debates in 1950 do not show the names of the 37 delegations who voted in plenary for the federal state clause. The records of the Third Committee do show, however, the names of the 31 delegations who in plenary voted for it. Here they are:-

> "In favour: Argentina, Australia, Belgium, Bolivia, Brazil, Canada, China, Cuba, Dominican Republic, El Salvador, Ethiopia, France, Greece, India, Iran, Israel, Lebanon, Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Sweden, Thailand, Turkey, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela."

These 31 delegations, as well as the additional delegations who voted in favour of the federal state clause in plenary in 1950 must ask themselves the question as they look at the Egyptian proposal now before us: - "What has happened since the debates of 1950, what new factors or arguments have emerged, what changes have taken place which would justify us now in reversing the position we took in 1950, together with the overwhelming majority of members, and in supporting now the Egyptian proposal."

The answer to this question is very simple. The answer is "None". Nothing has happened since 1950 which could possibly justify a change in the position which the majority of this

Committee and of the Assembly took in 1950. No changes have taken place: no new factors have emerged.

My country attaches the highest importance to the signature which it places on an international instrument. When we place our signature on such a document we want to be able to stand behind it: we want it to mean what it says: we do not want it to promise more than we can deliver. That is why we are convinced, from our own intimate knowledge of our Canadian constitutional position, that a federal state clause is absolutely indispensable. That is why we have no alternative, regretfully, but to oppose the Egyptian resolution.

In our statement, we have concentrated our remarks on the draft resolution submitted by the distinguished Representative of Egypt, because it has some direct bearing on the Canadian position with respect to the draft covenants on human rights. We reserve our right to offer our comments on the Australian draft resolution at a later stage, if necessary.

Statement made on November 12, 1953:

Before speaking in reply to the question raised yesterday regarding reservations, I would like to thank the Representative of Afghanistan for what is, in our view, a genuine and constructive effort to find some middle ground. We would like to be in a position to accept both these amendments and we can accept his first amendment. Unfortunately, we cannot accept the second amendment proposed by our Afghanistan colleague, for while preferable to the Egyptian proposal, it has the effect of reversing the earlier decision of the General Assembly contained in resolution 421 C (V). We cannot, for our part, support an amendment which has the effect of questioning the soundness of the earlier decision of the General Assembly, though we can naturally understand why the majority of this Committee may feel that the Afghanistan resolution offers a suitable compromise between the positions taken by Egypt, on the one hand, and Australia, India and Canada on the other.

The other reason why we cannot support the proposal is that, by reversing the earlier decision of the General Assembly and referring to this question for the decision of the Human Rights Commission, we would, in effect, be laying down our arms and surrendering unconditionally to the redoubtable Dr. Azmi. Dr. Azmi is a member, and a very influential member, of the Commission on Human Rights. Canada is not represented on that Commission. We would just as soon take our chance on being able to convince this Committee of the merits of our case, where both we and Dr. Azmi can meet face to face than to postpone the issue, - to refer it to the Human Rights Commission, and to leave it to Dr. Azmi in our absence to convince the Commission that the General Assembly's earlier resolution was wrong, and that a federal clause is unnecessary. For this reason, and with genuine thanks to our colleague from Afghanistan for this conciliatory effort, we must associate ourselves here with Dr. Azmi and others in opposing the second Afghanistan amendment.

Statement made on November 12, 1953.

The representative of Saudi Arabia asked a very pertinent question yesterday which I believe deserves an adequate reply. He requested a number of us who represent federal states to express our opinion on the suggestion advanced by the representative of Egypt that the "reserve" or "reservation" clauses in the covenants can meet all the legitimate concerns of the federal states.

I can assure you that if we were convinced that our difficult problem of divided jurisdiction between the federal and provincial authority in matters relating to human rights could be satisfactorily met by any "reserve" clause, we would not be persisting as stubbornly as we are in our contention that this Committee should not shut the door in our face and bolt it, on the federal state clause.

May I ask, first of all, what "reserve" clause? Is there any such clause in the draft convenants at the present time? Is there any assurance that there will be a reserve clause in the covenants when they are completed? Is it not the fact that the position of the "reserve" clause in the covenants at the present time is very much the same as the position of the federal state clause itself? At the present time the draft covenants contain no such clause.

There are no doubt a number of draft texts in existence and these will no doubt be considered in good time by the Human Rights Commission, unless in the meantime the General Assembly decides to give a directive to the Commission not to include a reserve clause. But up to the present moment, the federal state clause and the reserve clause are to all intents and purposes in exactly the same position. Both of them are on the plate of the Human Rights Commission, - part of its unfinished business. But what assurance can we have that before these covenants are completed, some other equally zealous, devoted, and eloquent advocate of the principles of universality and 100 per cent equality of obligations will not come along, as our Egyptian colleague has done on this occasion and shout "Away with this reserve clause! On guard! Beware of this trap! It is nothing more than a booby-trap to ensnare unwary idealists! It is nothing more than an escape hatch for the mischievous colonial powers, for irresponsible conscienceless federal states like Australia and Canada, and for the unitary states themselves, to welch on the responsibilities which the covenants impose on them!"

I expect, of course, that my Egyptian colleague will instantly assure me that he has no intention of proposing that the reserve clause should be eliminated. The Government of Egypt may well be anxious to have a reserve clause for reasons which, in its view, are entirely justifiable. That may be equally true of every government represented around this table. But I would point out with great respect that on every occasion when the reserve clause is invoked by any state, it will by that very fact be diminishing and weakening that principle of universality and 100 per cent equality of obligations on which the representatives of Egypt and of Yugoslavia have laid such great emphasis. I will go further than that and state that every time a unitary state invokes the reserve clause, it will be deliberately refusing to accept an obligation laid down in the covenants which it is constitutionally perfectly capable of assuming but which it does not choose to assume for reasons of domestic policy. Those reasons of domestic policy may be understandable; but, to use again the arguments of our Egyptian colleague, why inject

these problems into an international instrument? Why weaken the force and effectiveness of an international covenant by making concessions, either by way of reserve clauses or federal state clauses or any other clauses, to the legitimate concerns of the various states? Why not persist in our zealous adherence to the principle of 100 per cent equality of obligation, and in that way achieve a covenant or covenants that will be 100 per cent perfect, absolutely airtight, that will contain no compromises, no concessions, no escape clauses,--- and that will, in consequence, be signed by no one.

The Government of Canada for its part does not insist on a federal state clause for the purpose of enabling it to escape from any obligations or responsibilities under the draft covenants which are constitutionally within the jurisdiction of the Government of Canada. In that respect, an important distinction should in our opinion be drawn between the reserve clause and the federal state clause. The reserve clause is clearly an escape clause by which states can declare their intention not to assume certain obligations which they are constitutionally quite capable of assuming. The federal state clause on the other hand would not relieve the Government of Canada of a single obligation under the covenants which it is constitutionally capable of assuming.

It might, of course, be argued that it would be perfectly possible under the reserve clause for a federal state like Canada to enter what might be termed a blanket reservation, an over-all jurisdictional reservation with respect to all clauses of the covenants to the extent that the subject matter of the covenants lies within provincial and outside federal jurisdiction. What this amounts to is giving permission to a federal state to write a federal state clause into the covenants by way of its own unilateral reservation. I doubt very much that this "back-door" solution of the problem would be regarded as a happy or honest one, either by the unitary states or by the federal states themselves.

We are asking for no such back-door solution. We are not asking the Committee to mix oil and water by burying the problems of federal states in the reserve clause, or by offering them a devious and doubtful way out from their problem, - a means of escape which clearly was not originally intended for them.

I would emphasize again, that unlike the reserve clause we are not insisting on the federal state clause for the purpose of enabling us to escape from a single obligation which is constitutionally within the power of the Government of Canada. We are not asking for the federal state clause for the purpose of enabling us to apply the covenants in certain provinces of Canada and not in others, as our Egyptian colleague seems to think. We are not asking for the federal state clause for the purpose of helping out the colonial powers. The colonial powers can take care of themselves.

The Delegation of Canada is asking for the rejection of the Egyptian resolution for only one reason, and that is I believe a worthy one whose motives all members of the Committee, most of all the Egyptian representative will understand. We do not want the door to be closed forever on the possibility of federal states like our own signing, ratifying and implementing the covenants. Yet that, I must state in all seriousness to the Committee, is exactly what will be the consequences of the

adoption of the Egyptian resolution.

I ask each member of this Committee to remember, as we take the vote on this important resolution, that a vote in favour of the Egyptian proposal is a vote to slam the door in the face of certain federal states: for in the absence of a fair and reasonable federal state clause these states are consitiutionally debarred from accepting the responsibilities and obligations set forth in the covenants.

Because of the importance of this question the Canadian Delegation requests a roll-call vote in this Committee. It will also ask for a roll-call vote in plenary: for, if, by the adoption of this resolution the door is to be shut in the face of federal states who have this problem, the Delegation of Canada wishes to have the record show whose hands were on the door.