NOTES AND COMMENTS

[*Editors' Note*: The intended scope of this section of the *Review* is to bring to light points of legal interest which, though not such as to warrant an article or extended comment, should not be permitted to pass unnoticed. With this in mind the Editors invite contributions from readers. Contributions to this section of the *Review* should be approximately seven hundred and fifty words in length.]

TREATIES IN CONSTITUTIONAL LAW: A COMMENT ON FISHWICK v. CLELAND

In *Fishwick v. Cleland*,[1] one of the contentions put by counsel for the plaintiff was that the Papua and New Guinea Act 1949-1957 was invalid as inconsistent with the Charter of the United Nations and the Trusteeship Agreement—

> The power of the Commonwealth to pass [the Act] depends either upon s. 51 (xxix) of the Constitution[2] or upon s. 122.[3] Section 51 (xxix) does not grant power to pass legislation inconsistent with or contrary to a validly existing treaty. . . . Even if s. 122 does apply, the powers granted by that section are limited by the purposes and prohibitions of the Trusteeship Agreement in the same way as those granted by s. 51 (xxix). . . . [I]f the Commonwealth relies upon the external affairs power, and relies upon a treaty as feeding that power, it must confine itself, broadly, to carrying the treaty into effect.[4]

The report of the argument of the Attorney-General for the Commonwealth is very compressed, and it is not always easy to distinguish his various points, but he appears to have met this contention of plaintiff as follows—

> There is a clear distinction to be preserved between the constitutional power and the determination of its limitations on the one hand and the international obligation and its performance on the other. The former question must be decided as a domestic one; as such, constitutional power is unfettered by the Trusteeship Agreement. . . . [W]hether the *Papua and New Guinea Act* offends an international obligation is not truly one for this Court to decide. [He referred to *Polites v. The Commonwealth* (1945) 70 C.L.R. 60.] The prime question is a constitutional one.[5]

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[1] (1960) 106 C.L.R. 186.

[2] S. 51—' 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:— . . . (xxix.) External affairs '.

[3] S. 122—' The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth. . . . '

[4] (1960) 106 C.L.R. 186, 189.

[5] *Ibid.* 190-191.

No close examination of this particular issue is to be found in the joint judgment of the High Court. In a short passage their Honours seem to adopt the conclusions of the Attorney-General—' if any such inconsistency could be found we should not think that it went to the legislative validity of the enactment considered as a matter of municipal law '.[6]

It may be suggested, with respect, that the issue deserved somewhat closer attention.

Plaintiff's argument did not lack support in the cases.

In particular there is clear authority in the judgments in *The King v. Burgess*; *Ex parte Henry*[7] for the view that when an Act is passed under section 51 (xxix) of the Constitution to implement some international treaty, it is constitutionally valid only to the extent to which it conforms to that treaty. Evatt and McTiernan JJ. stated this expressly,[8] as did Dixon J.,[9] and the point may well be implied in the judgments of Latham C.J.[10] and Starke J.[11] The suggestion is that the constitutional power is commensurate with the international obligation. It is true, of course, that in that case the resolution of the issue was to affect the balance of legislative power as between Commonwealth and States, but it is hard to see why the logic of their Honours' argument should not be relevant to any exercise of Commonwealth power under section 51 (xxix).[12]

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[6] *Ibid.* 196.

[7] (1936) 55 C.L.R. 608.

[8] (1936) 55 C.L.R. 608, 687-688—' But it is a necessary corollary of our analysis of the constitutional power of Parliament to secure the performance of an international convention that the particular laws or regulations which are passed by the Commonwealth should be in conformity with the convention which they profess to be executing. In other words, it must be possible to assert of any law which is, *ex hypothesi*, passed solely in pursuance of this head of the " external affairs " power, that it represents the fulfilment, so far as that is possible in the case of laws operating locally, of all the obligations assumed under the convention. Any departure from such a requirement would be completely destructive of the general scheme of the Commonwealth Constitution, for, as we are assuming for the moment, it is only because, and precisely so far as, the Commonwealth statute or regulations represent the carrying into local operation of the relevant portion of the international convention, that the Commonwealth Parliament or Executive can deal at all with the subject matters of the convention. Doubtless this requirement does not necessarily preclude the exercise of wide powers and discretions by the Parliament or the Executive of the Commonwealth, for the international convention may itself contemplate that such powers and discretions should be exercisable by the appropriate authority of each party to the convention. Everything must depend upon the terms of the convention, and upon the rights and duties it confers and imposes. But the general requirement must be fulfilled or the Commonwealth will be exceeding its lawful domain.'

[9] *Ibid.* 668-670, and especially at 674-675.

[10] *Ibid.* especially at 642-644.

[11] *Ibid.* 657-658; at 658—'. . . the power . . . must be commensurate with the obligations that the Commonwealth may properly assume in its relations with other Powers or States '.

[12] On this point, see Evatt J. in *Ffrost v. Stevenson* (1937) 58 C.L.R. 528, 599-601. In addition to *The King v. Burgess*, counsel for plaintiff also cited *Ffrost v. Stevenson*, *Jolley v. Mainka* (1933) 49 C.L.R. 242, *R. v. Christian* [1924] S.A.L.R. (A.D.) 101 and *Jerusalem-Jaffa District Governor v. Suleiman Murra* [1926] A.C. 321. In *Jolley v. Mainka*, Evatt J. laid the foundation for the view he was to express on this matter

Hence, in so far as the argument in *Fishwick v. Cleland* was that the Papua and New Guinea Act was passed pursuant to section 51 (xxix) to implement Australia's rights and obligations under the Trusteeship Agreement, then it can be contended that the question of its consistency with the Agreement was in fact a question of domestic constitutional law.

This conclusion has now been greatly strengthened by the judgments in *Airlines of New South Wales v. New South Wales* [No. 2][13]: all members of the High Court affirmed the principle suggested in *The King v. Burgess*; *Ex parte Henry*. It will suffice to quote from the judgment of Barwick C.J.—

> [W]here a law is to be justified under the external affairs power by reference to the existence of a treaty or a convention, the limits of the exercise of the power will be set by the terms of that treaty or convention, that is to say, the Commonwealth will be limited to making laws to perform the obligations, or to secure the benefits which the treaty imposes or confers on Australia.[14]

The Court in *Fishwick v. Cleland* inclined, however, to the view that the source of the Commonwealth's legislative power with respect to New Guinea was section 122 rather than section 51 (xxix).[15] Nevertheless, as plaintiff's counsel indicated, a similar argument to that outlined above can be made in some cases with respect to legislation under section 122. For even if New Guinea is a ' Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth ', there are territories and territories, and New Guinea is plainly a territory accepted or acquired *sub modo*. This is recognized in all the cases,[16] and in the original New Guinea Act.[17] Just as the nature of the territory under international

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in *The King v. Burgess*: (1933) 49 C.L.R. 242, 284-288. He quoted, *inter alia*, an official Commonwealth communication of 1909 to the Colonial Secretary—' the law advisers of the Government have expressed the view that under sec. 51 (xxix.) of the Constitution, the Commonwealth Parliament has power to make such legislative provision as is necessary to secure the fulfilment of treaty obligations ': *ibid.* 288. His Honour again stated his views in *Ffrost v. Stevenson*: (1937) 58 C.L.R. 528, 585-586. *Jerusalem-Jaffa District Governor v. Suleiman Murra* seems relevant only to the general question of the nature of a mandated territory. In *R. v. Christian* the South African court was prepared to regard the status of South West Africa as a mandated territory as having significance for issues of municipal law, and Innes C.J. spoke of the terms of the mandate as ' incorporated in the constitution of the new territory ': [1924] S.A.L.R. (A.D.) 101, 112. The actual decision, of course, was that the Union of South Africa had sufficient internal sovereignty in the territory to sustain a charge of high treason. Reference might also have been made to *R. v. Poole*; *Ex parte Henry* (No. 2) (1939) 61 C.L.R. 634.

[13] (1965) 38 A.L.J.R. 388, 392, 393-394, 395 (*per* Barwick C.J.), 402 (*per* McTiernan J.), 408-409 (*per* Kitto J.), 412 (*per* Taylor J.), 416, 418-419 (*per* Menzies J.), 423 (*per* Windeyer J.). See also *Airlines of New South Wales v. New South Wales* [1964] Argus L.R. 876, 897 (*per* Windeyer J.).

[14] (1965) 38 A.L.J.R. 388, 395.

[15] ' On the whole it seems preferable to refer the source of power over New Guinea to s. 122 rather than to s. 51 (xxix) ' : (1960) 106 C.L.R. 186, 197.

[16] *Mainka v. The Custodian of Expropriated Property* (1924) 34 C.L.R. 297; *Porter v. The King* (1926) 37 C.L.R. 432; *Jolley v. Mainka* (1933) 49 C.L.R. 242; *Ffrost v. Stevenson* (1937) 58 C.L.R. 528; *Wong Man On v. Commonwealth* (1952) 86 C.L.R. 125.

[17] New Guinea Act 1920: No. 25 of 1920.

treaties and the terms under which it was accepted or acquired may be said to 'feed', and thereby limit, any power to legislate for it under section 51 (xxix), so they may be said to 'feed' and thereby limit the power to legislate for it under section 122. Starke J. seems to have said as much in *Jolley v. Mainka*: on the hypothesis that New Guinea had been 'otherwise acquired' within the meaning of section 122, he considered that '[t]he Commonwealth thus acquires plenary control of the territory, *subject to and during the subsistence of the mandate*'.[18] Indeed, the Court in *Fishwick v. Cleland* itself might be thought to have provided support for this view when it chose to describe what the Commonwealth had 'acquired' in New Guinea not as the territory itself, nor even as the power of government in the territory, but as 'the power of government over the Territory contemplated by the mandate and the Trusteeship Agreement'.[19]

In the reported argument of the Attorney-General, the only case cited to support the rejection of plaintiff's contentions is *Polites v. Commonwealth*.[20] But, with respect, that case seems clearly distinguishable. There it was suggested that a section of a Commonwealth statute which fell squarely within its constitutional power under either section 51 (vi) or section 51 (xix) of the Constitution—the National Security Act 1939-1943, section 13A—could be held invalid for inconsistency with an alleged rule of general international law that aliens cannot be compelled to serve in the military forces of a foreign State in which they happen to be. The Court held that the statute could not be invalidated on this ground. Latham C.J. said—

> It was not really argued, and it could not, I think, successfully be contended, that the powers conferred on the Commonwealth Parliament itself by the Constitution, s. 51 (vi.), relating to naval and military defence, and s. 51 (xix.), 'naturalization and aliens', were limited in any other manner than by the description of the subject matter. The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. ... It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law.[21]

But the situation in *Fishwick v. Cleland* was quite different to the situation in *Polites v. Commonwealth*. It was by no means clear that the Papua and New Guinea Act did fall squarely within an express power conferred on the Commonwealth Parliament by the Constitution. That was the very question at issue.

In the event the High Court in *Fishwick v. Cleland* was prepared to find that the Papua and New Guinea Act 1949-1957 was not inconsistent with the Charter of the United Nations and the Trusteeship

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[18] (1933) 49 C.L.R. 242, 250; italics added.
[19] (1960) 106 C.L.R. 186, 197.
[20] (1945) 70 C.L.R. 60.
[21] *Ibid.* 69.

Agreement. But a similar question could arise again, either in relation to New Guinea or in relation to Nauru, and if and when that happens it is submitted that the difficult points here considered warrant re-examination.

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