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PART I

INTERNATIONAL LAW IN GENERAL

II.—Sources

[*See also* PART X: A, I, ii.]

International law—Sources—Custom—Local custom—Whether possible for legally binding custom to be based on relations between two States alone—Whether necessary to look to general international custom or general principles of law recognized by civilized nations in support of existence of local custom—Whether in absence of binding local custom State may rely on general customary law or general principles of law—Circumstances in which particular practice prevails over general rule.

See p. 23 (*Case Concerning Right of Passage over Indian Territory* (*Merits*)).

IV.—Relation to Municipal Law

[*See also* PART VIII: B, VII; *and* PART VI: A.]

International law — Relation to municipal law — Statute of component entity of federal State inconsistent with treaty—Most-favoured-nation clause—Right of aliens to inherit, own, and dispose of property—The law of the United States of America.

GUISEPPE *ET AL.* *v.* COZZANI *ET AL.*

United States, Supreme Court of Mississippi. February 22, 1960.

THE FACTS.—This was a suit in equity seeking recognition of the alleged rights of the complainants as tenants in common with the defendants of property passing under the will of Frank Toney. Toney had left the balance of his estate to his wife for life and then " to my nephews and nieces, share and share alike, and to my sister, Lucretia, she to take an equal share with them." Toney's wife died in 1933.

The complainants, all of whom were residents of Italy, alleged that they were nephews and nieces or descendants of nephews and nieces of Toney, and descendants of Lucretia. They alleged that the defendants had represented to the Chancery Court that Mary Cozzani (her husband having died) was the only survivor of the remaindermen mentioned in Toney's will and that she had, on the basis of that representation, been permitted to take possession of

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the property left by Toney, even though the decedent was survived by 10 nephews and nieces in Italy. The defendants alleged that the statute of limitations had run, and that, under the law of Mississippi, aliens were precluded from holding land. The Chancery Court gave judgment for the defendants, and the complainants appealed.

Held: that the judgment of the Court below must be reversed and the case remanded. The statutory prohibition against the ownership of land by aliens was inconsistent with the Treaty of Commerce and Navigation of 1871 between the United States and Italy, which included a most-favoured-nation clause securing to Italian nationals the right to inherit and hold property which was recognized by the Treaty of 1782 between the United States and the Netherlands. In the event of a conflict between a statute of a state of the United States and a treaty, the latter prevailed.

The Court said: [**118 So. 2d 191**] " Section 842, Miss. Code of 1942, provides, among other things, that ' Non-resident aliens shall not hereafter acquire or hold land, ...' However, every treaty made by the authority of the United States is superior to the constitution or laws of any individual state. If the law of a state is contrary to a treaty, it is void. This was so held in the case of *Hauenstein* v. *Lynham*, 100 U.S. 483, 25 L.Ed. 628.

" There are two pertinent treaties involved in this case: (1) ' Treaty between the United States of America and the Kingdom of Italy, Commerce and Navigation,' dated February 26, 1871, 17 Stat. 845. That Treaty in Article 22 thereof reads as follows:

> ' As for the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation.'

The meaning and effect of the ' most favored nation ' clause is discussed in 87 C.J.S. Treaties § 12*b*, p. 936. In this connection there should be considered the Treaty of 1782 between the United States and the Kingdom of the Netherlands, 8 Stat. 33, 36. (2) The ' Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic ' dated February 2, 1948, 63 Stat. 2255,[1] provides among other things that:

> ' Property of nationals . . . of either High Contracting Party shall not be taken . . . without due process of law.' Article 5, paragraph 2.

" See also paragraph 2 of Article 7 of the said Treaty in which it is provided in substance that a non-resident alien shall be allowed a term of three years in which to sell or otherwise dispose of property, and that this term is to be reasonably prolonged if circumstances render it necessary.

" It is contended by the appellees (1) that this Treaty is not to be construed as being retroactive, and (2) that the war between the

[1 *T.I.A.S.* No. 1965; *U.N.T.S.*, vol. 79, p. 171.]

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United States and the Republic of Italy, which began in 1941, had the effect of abrogating any treaties between the two countries. This point is not briefed. But assuming that the Treaty in question was not intended to have a retroactive effect, then the three-year provision for selling or otherwise disposing of the property of a non-resident alien would have no effect on the instant case since the rights of the complainants, if any, accrued as owners of vested remainder estates on the death of Frank Toney in 1906, and their rights to possession of the property accrued at the death of Emma Toney in 1933. . . ."

[The Court then proceeded to a consideration of several issues of the municipal law of the United States.]

[Reports: 238 Miss. 273, 118 So. 2d 189.]

NOTE.—The provision of the Treaty of Amity and Commerce between The Netherlands and the United States, signed at The Hague on October 8, 1782 (8 Stat. 32, T.S. No. 249), to which the Court referred was apparently Article VI, the pertinent portion of which reads:

> " The subjects of the contracting parties may, on one side and on the other, in the respective countries and States, dispose of their effects by testament, donation, or otherwise; and their heirs, subjects of one of the parties, and residing in the country of the other, or elsewhere, shall receive such successions, even ab intestato, whether in person or by their attorney or substitute, even although they shall not have obtained letters of naturalization, without having the effect of such commission contested under pretext of any rights or prerogatives of any province, city, or private person: . . ."

In Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers 1776-1909*, vol. 2 (1910), p. 1233, the text of the Treaty is accompanied by a note that " This treaty was abrogated by the overthrow of the Netherlands Government in 1795."

The Treaty of Commerce and Navigation between the United States and Italy, signed at Florence on February 26, 1871 (17 Stat. 845, T.S. No. 177), was abrogated by Article 44 of the Treaty of Peace with Italy, signed at Paris on February 10, 1947 (61 Stat. 1245, T.I.A.S. No. 1648, *U.N.T.S.*, vol. 49, p. 1), since it was not amongst the treaties which the United States stated it desired to have revived (Note from the American Ambassador at Rome to the Italian Minister for Foreign Affairs, February 6, 1948, in *Department of State Bulletin*, vol. 18 (1948), p. 248). However, the Treaty of 1871 was in force at the time when the interests of the remaindermen vested and when their right to possession accrued. The Treaty of 1948 could have had no relevance except in so far as it protected the plaintiffs from the taking of their property without due process of law after the coming into force of the treaty.

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International law—Relation to municipal law—Treaty as political decision—Whether rules of international law will be applied in municipal courts—The law of India.

M/s. Tilakram Rambaksh v. Bank of Patiala.

India, High Court of Punjab. March 6, 1959.

(Bhandari C.J.; Dulat J.)

The Facts.—This was a petition challenging the validity of certain proceedings instituted on behalf of the Patiala State Bank against the petitioners, a Hindu joint family firm, under the Patiala Recovery of State Dues Act. The proceedings, initiated in January 1956, were for recovery of a large sum of money borrowed by the petitioners from the Bank in 1953.

The petitioners argued, *inter alia*, that the Patiala Recovery of State Dues Act " had ceased to be law long before the transactions between the parties took place ". This argument was based on certain events connected with the formation of the Patiala and East Punjab States Union (Pepsu), formed in 1948. On May 8, 1948, the rulers of eight Indian States, including Patiala, and the Secretary to the Government of India, Ministry of States, signed a Covenant to evidence the formation of the Union. For the period from then until a separate constituent Assembly was to be called to frame a Constitution for the Union, Article X, paragraph 2, of the Covenant provided:

> " The Rajpramukh shall have power to make and promulgate Ordinances for the peace and good government of the Union or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Constituent Assembly, but any such Ordinance may be controlled or superseded by any such Act."

On August 20, 1948, the Rajpramukh (the Ruler of Patiala) promulgated an Ordinance which provided, *inter alia*:

> " As soon as the administration of any Covenanting State has been taken over by the Rajpramukh as aforesaid, all Laws . . . [and] Rules, . . . having force of law in Patiala State on the date of commencement of this Ordinance shall apply *mutatis mutandis* to the territories of the said State and with effect from that date all laws in force in such Covenanting State immediately before that date shall be repealed."

One of the laws made effective in the Union by this Ordinance was the Act questioned by the petitioners.

Subsequently, it became clear that a separate Constituent Assembly for the Union would not be necessary; and since the law-making authority of the Rajpramukh was limited to six months under the original Covenant, some provision had to be made for its extension. Thus, on April 9, 1949, the rulers of the eight uniting

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States and an officer of the Government of India signed a Supplementary Covenant, amending Article X, paragraph 2, of the original Covenant by deleting the words " for the space of not more than six months from its promulgation ". In consequence, the laws promulgated by the Rajpramukh became permanently effective.

In September 1956, after the proceedings against the petitioners had been brought, the States Reorganisation Act, 1956, was passed, which joined the State of Pepsu with the State of Punjab.

The petitioners submitted that the Supplementary Covenant was invalid and that only the original Covenant was in force. Under that Covenant, Ordinances promulgated by the Rajpramukh, which included the Ordinance giving effect to the Patiala Recovery of State Dues Act, were in effect only up to six months from their promulgation. Therefore, that Act no longer had effect when the transactions giving rise to the petition occurred. In support of this submission, the petitioners referred to parts of the original Covenant, which provided that from August 20, 1948, when the administration of each of the Covenanting States was to be taken over by the Rajpramukh,

> " all rights, authority and jurisdiction belonging to the Ruler which appertain, or are incidental to the government of the Covenanting State shall vest in the Union and shall hereafter be exercisable only as provided by this Covenant or by the Constitution to be framed thereunder," [and that] " all duties and obligations of the Rulers pertaining or incidental to the Government of the Covenanting State shall devolve on the Union and shall be discharged by it." (Article VI.)

From these provisions the petitioners argued that each of the Covenanting States had completely surrendered its sovereign powers to the Rajpramukh, so that no power was left in the original rulers to make any agreement concerning the government of the States, including the Supplementary Convention.

Held: that the petition must be dismissed. The Courts were not competent to pronounce on the validity of political decisions, since there was no basis for determining their legality; moreover, despite arguments based on international law and concepts of sovereignty, the eight State rulers still had the power to agree to the Supplementary Covenant. The Courts of a country will not administer rules of international law unless the rules are sanctioned by the laws of that country.

The Court said: [**443**] " Learned counsel's whole approach to these transactions is as if these Covenants were legal documents conveying rights and titles in property and it is in this very approach that error lies. The decisions recorded in these documents were political decisions and their legality cannot be tested by reference to any municipal law any more than the validity of the political revolution, which led to these various decisions, could be tested in terms of law.

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" These, in my opinion, are matters with which the Courts can have no concern. Our Constitution in Article 363[1] contains a broad hint about this matter, but quite apart from that I feel that it would be impossible for any Court to pronounce on the validity or the invalidity of a transaction of the kind made by the rulers either on May 5, 1948, or April 9, 1949.

" The reason is that there is no frame of reference against which the legality of such a transaction could be judged. When we asked Mr. Aggarwal [Counsel for the petitioners] against what known law of the country the Supplementary Covenant of April 9, 1949, is supposed to have offended, he had to wander into the realm of political theory and urge that if sovereignty is once surrendered nothing is left with the previous possessor of sovereignty to exercise. The argument at once leads us to the very debatable concept of sovereignty, which, however interesting in itself, is not a matter of settled law but merely an arguable theory.

" It seems to me, therefore, clear that as far as political decisions are concerned the Courts have to accept them as such without being able to pronounce on their validity, there being no method open to the Courts to test the matter. As Bose J. put it in *Virendra Singh* v. *The State of Uttar Pradesh*, 1955, S.C.R. 415 (A.I.R. 1954, S.C. 447),[2] all that the Courts have to do is ' to register the fact '. On this ground alone, therefore, Mr. Aggarwal's argument must, in my view, be rejected.

" Nor do I find any logical force in the submission that although the Rulers of the Covenanting States were competent to authorise the Rajpramukh of the Union to make valid laws for a period of six months, the same Rulers became subsequently incompetent to extend that authority so as to authorise the Rajpramukh to make valid laws for a longer duration. If these Rulers had the legal capacity to hand over their authority for making laws to the Rajpramukh and did so only to a limited extent, then quite obviously the power of making laws effective for longer than six months must have remained with the Rulers themselves, and it is this power which they obviously handed over at the time of the Supplementary Covenant.

" When we pointedly asked Mr. Aggarwal where the remainder legislative power lay after the execution of the original Covenant,

[1 This Article provides in part: " (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, *sanad* or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, *sanad* or other similar instrument."]

[2 *International Law Reports*, 22 (1955), p. 131.]

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if it did not still lie with the Rulers, he could only say that by the peculiar nature of the Covenant such legislative power was perhaps lost to everybody, the only other suggestion being that the Rajpramukh of Pepsu could perhaps by resorting to the questionable device of repeating an Ordinance every six months continue to make valid laws. Neither of these is a satisfactory answer.

" The entire confusion, in my opinion, arises because of a futile attempt to explain political events in terms of legal concepts. The Covenants under discussion merely recorded these events, and just because they employ legal-sounding language they do not become legal documents and I do not think any Court can determine the legal capacity of the Rulers of the Indian States to perform the kind of acts they were performing when the original Covenant or the Supplementary Covenant was signed . . . . [The Court here mentioned two cases which had dealt with the Supplementary Covenant, and continued:]

" Mr. Aggarwal adopted the argument employed by the learned Single Judge [in the case of *Daulat Ram Jiwan Lal* v. *The Bank of Patiala*, Civil Writ No. 941 of 1957], the argument again being that all powers were surrendered by the eight Rulers to the Rajpramukh at the time of the original Covenant of May 5, 1948, and because of [**444**] such surrender those eight Rulers were incompetent to do anything about that matter subsequently. Support was found for this argument in some rule of international law. With great respect to the learned Judge, it is, I think, sufficient to point out that the so-called rules of international law are merely opinions of jurists and political thinkers, and, however weighty they may be, they are not to be administered by the Courts of a country unless sanctioned by the laws of that country."

[Report: A.I.R. 1959 Punjab 440.]

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See p. 410 (*Talbot et Al.* v. *Atlantic Steel Company*).

International law — Relation to municipal law — Statute of component entity of federal State inconsistent with treaty—Treaty granting aliens national treatment as to workmen's compensation benefits—Effect of illegal entry of alien—The law of the United States of America.

See p. 344 (*Testa* v. *Sorrento Restaurant, Inc.* (*Tagminco Corp.*) *et Al.*).

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PART II

STATES AS INTERNATIONAL PERSONS

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

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See p. 141 (*United States* v. *Louisiana et Al.*).

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COLLECTOR OF SABARKANTHA *v.* SHANKARLAL KALIDAS PATEL AND ANOTHER.

India, High Court of Bombay. September 29, 1959.

(Mudholkar and Patel JJ.)

THE FACTS.—This was an appeal by the Collector of Sabarkantha on behalf of the State of Bombay from an order of the District Court made under the Indian Companies Act, 1913. The facts leading to the appeal were as follows:

A limited company, Himatnagar Glass and Ceramic Industries Ltd., was established in the former State of Idar. That State purchased preference shares of the company worth Rs. 100,000, which it paid in full, and ordinary shares, also worth Rs. 100,000, of which it paid only half. The State also lent Rs. 10,000 to the company. Subsequently, the company ran into difficulties, and the State decided to sell its shares. An agreement was accordingly made between the company and another concern, M.D. Industries Ltd., under which the latter was to be appointed sole selling agent for the company; and, as consideration for its agreement to render financial aid to the company, M.D. Industries were also to take over

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