EDITORIAL COMMENT

INTERNATIONAL LAW IN NEW NATIONAL CONSTITUTIONS

The continuing practice of making reference to international law in national constitutions has not produced any one form of wording that has found general adoption. More than a decade ago a leading article pointed out that after each World War of the present century there was a wave of effort to include in national constitutions provisions whereby the law of nations would be made a part of municipal law. The author noted that some of the provisions were hortatory rather than incorporative.[1]

The seven-year period beginning with 1957 has seen no cessation of effort to relate international law to municipal law, as wording in some twenty-five constitutions coming into force in this period will illustrate. The list of states includes not only new ones, such as those emerging in Asia and Africa, but also some older members of the family of nations (as, for example, France and Turkey) which have adopted new constitutions during the period. Among the more novel types of clauses are those in constitutions of some of the newer members of the Commonwealth,[2] but these states are by no means the only ones that have introduced innovations. The most obvious examples to be noted consist of express wording in the constitutions, although it is possible that, even where there is not such express mention, there may be implications that are of some significance for those who apply the law.[3]

[1] David R. Deener, "International Law Provisions in Post-World War II Constitutions," 36 Cornell Law Review 505–533 (1951). See also, for a comparative study of practice, L. Erades and Wesley L. Gould, The Relation between International Law and Municipal Law in the Netherlands and in the United States (1961); and for discussion of the "transformation" as compared with the "adoption" method, Ignaz Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law," 12 International and Comparative Law Quarterly 88–124 (1963).

[2] In a Commonwealth state such as New Zealand, which does not have a written constitution, there may be application of international law by judges on the same basis as British judges might apply it. See the statement in In re Heyting, N.Z.L.R. [1928] 233, to the effect that the New Zealand Court occupied a position in New Zealand similar to that of the High Court of Justice in England and was largely guided by the principles and conventions of that Court; the same view is expressed by J. McGregor in the case of In re Scholer, N.Z.L.R. [1955] 1190.

[3] Possible illustrations are to be found in provisions for the transition of Jamaica and of Trinidad and Tobago to the status of independent states and to full membership in the Commonwealth. By the fourth section of the Jamaica (Constitution) Order in Council, 1962, "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force. . . ." There is a comparable provision in Sec. 4 of the Trinidad and Tobago (Constitution) Order in Council, 1962. The body of law in each case would presumably include the common law applicable before independence.

Some new states in Africa have in their constitutions provisions looking to federation with other states. Some of these mention possible relinquishment of sovereignty. In

Provisions of constitutions to be considered here are (1) those of a type that has become fairly familiar and that is designed to establish a general relationship of the law of nations with municipal law; (2) those having to do with power to carry out decisions of international public organizations; (3) those setting a standard for the treatment of aliens; (4) those giving to treaties an authority greater than that of national statutes—on condition of reciprocity; and (5) a miscellaneous category touching war declaration, extradition and "offenses against the law of nations."

Of the new constitutions adopted since the beginning of 1957, apparently only that of South Korea (1960) contains a clearly "incorporative" clause of the type that with relative frequency appeared in the period between the first and second World Wars and after the second one. By Article 7, the generally recognized rules of international law (as also ratified and promulgated treaties) shall have the same effect as that of the laws of Korea. Some of the new states have constitutions that might perhaps be described as something more than "hortatory," for they set out that the states shall "conform to the rules of international law."[4] In each case the statement is followed by provisions concerning the conclusion of treaties and the force of the latter in relation to municipal law.

Constitutions of several states in Africa and Asia have provisions concerning relationships of these states, respectively, with international public organizations. One of these states, in the part of its constitution relating to the treaty-making power, mentions the "creation of international organizations"; treaties for this purpose, among others, may be ratified or approved only by means of a law.[5] Two Commonwealth states, Malaya (now Malaysia) and Pakistan, in their constitutions refer to legislative power to carry out decisions of international organizations in which these states, respectively, are members.[6] In the case of Malaysia, the power is clearly conferred upon the national legislative body. In the case of Pakistan the same objective is apparently achieved through the statement that the Central Legislature shall have power to make laws concerning, *inter alia*, "international organizations . . . and the implementation of their decisions."

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the case of Ghana the wording envisages only an African federation. Preambular language in the Constitution of Guinea indicates support for any policy designed to establish a "United States of Africa," and wording in Art. 34 envisages unity with "any African state." Other constitutions, such as those of Congo (Brazzaville) and Dahomey refer to free co-operation with other states. In still other constitutions (for example, those of Mauritania (Sec. 44), Mali (Sec. 38) and Gabon (Sec. 52), respectively) there are clauses which have as their object to permit cessions or changes of sovereignty only with the consent of the people concerned or by referendum. On the point that the type of clause here noted is not peculiar to African entities, there being similar provisions in constitutions of Arab states, see Egon Schwelb, "The Republican Constitution of Ghana," 9 American Journal of Comparative Law 634–656 (1960).

[4] Guinea, Constitution of 1958 (Art. 31); Mali, Constitution of 1960 (Art. 38).

[5] Togo, Constitution of 1961, Art. 56.

[6] Malaya's Constitution of 1957, Art. 76 (1) (a); Pakistan Constitution of 1962, Art. 132(b) and Third Schedule. Malaysia's Parliament has constitutional power to enforce "any decision taken by an international organization and accepted before Merdeka Day by the Government of the United Kingdom on behalf of the Federation or any part thereof."

Without incorporating international law in its entirety or in general terms in municipal law, some of the new constitutions specifically mention that part of international law that is applicable to aliens. Thus Article 32 of the basic law of Cyprus provides that nothing in its Part I (General Provisions) shall preclude the Republic from regulating "in accordance with international law" any matter relating to aliens.[7] By Section I, Part II, of Turkey's Constitution of 1961, aliens' rights and duties are to be defined according to the provisions of international law. The Korean Constitution sets out that such rights are to be "*guaranteed* within the scope of international law and treaties."[8] While the Sierra Leone Constitution does not make specific mention of international law in connection with the measure of treatment to be accorded aliens, paragraphs 1 and 2 of Article 170 (in Part II) refer to fundamental rights and freedoms of individuals in terms that are applicable to "any" person. Some new states of the Commonwealth, notably Sierra Leone and Nigeria, have included in their constitutions detailed provisions concerning British subjects and Commonwealth citizens, but similar wording does not appear in the constitutions of certain other Commonwealth states wherein the concept of a common status in the matter of citizenship (without assurance of complete reciprocity) has found less favor.[9]

The force which treaties should have, as compared with legislative enactments, is basic in constitutional law. Clarification on this point would seem to be a proper task for constitution-makers. In the period under review France has adopted, as have a number of new states in territory that was formerly French, a formula designed to fix the relationship.[10] It provides that duly ratified treaties shall be superior to laws on condition of reciprocity, *i.e.*, if the treaty in any particular case is likewise observed by the other party state. Under France's 1946 Constitution, its treaties were to be superior to statutory law of France, and there was no specifica-

[7] Cmd. 1093 (July, 1960), Appendix A. Another passage, which refers, not directly to international law, but to a standard frequently employed in treaties, is that part of the Cyprus Constitution which binds the Republic to accord "by agreement on appropriate terms" most-favored-nation treatment to Greece, Turkey and the United Kingdom, respectively, for "all agreements, whatever their nature . . ."; specifically excepted from the rule are the Treaty for the Establishment of the Republic of Cyprus and the treaty with the United Kingdom concerning bases and military facilities. Cmd. 505, pp. 97–103. The provisions concerning most-favored-nation treatment are understandable in light of the history of the period of several years just before the Cypriots gained independence.

[8] Art. 7, par. 2 (emphasis added).

[9] Robert R. Wilson and Robert E. Clute, "Commonwealth Citizenship and Common Status," 57 A.J.I.L. 566–587 (1963).

The reference to the Nigerian Constitution is to that of 1960, which has now been replaced by a new Constitution.

[10] Constitutions of Gabon (Art. 54); Central African Republic (Art. 39); Chad (Art. 65); Dahomey (Art. 56); Republic of Cameroun (Art. 40); Malagasy (Art. 18); Mauritania (Art. 46); Niger (Art. 56); Senegal (Art. 58); Togo (Art. 57); Tunisia (Art. 58). The last-mentioned country does not have in its provision a requirement of reciprocity. Cyprus, in Art. 169(3) of its Constitution, specifies reciprocity as a condition on which treaties will have force superior to that of any municipal law.

tion of reciprocity as a condition.[11] Wording in the new French Constitution, and in the constitutions of the new states which have contained similar provisions, raises questions as to how reciprocity is to be defined and who is to decide whether it exists "*dans chaque cas,*" in the sense of the wording in the constitutions. There is also the question of whether evidence of reciprocity would be adequate if it were based upon executive acts or, if the other party state is one in which the courts interpret and apply treaties, in the form of decisions by municipal courts. There seems to be sound basis for the opinion that the new constitutional formula was not intended to be contrary to what one observer has called "international common law."[12] For the purpose of national law, reciprocity would not necessarily be an *implied* condition in the absence of an express constitutional provision. There is possible precedent in a decision of the United States Supreme Court to the effect that non-performance by a foreign state with which the United States had concluded a treaty (of extradition) would not of itself permit the judiciary in the United States to declare the treaty void, although it might, for the reason indicated, have become voidable so that the Executive could take steps to terminate it.[13]

A provision which would appear to be a novel one is that in the new Turkish Constitution (1961) whereby that country's Grand National Assembly has power to declare a legal state of war in cases considered to be legitimate by international law. Any application of the provision would presumably take into account general commitments in universal or nearly universal form, such as the Kellogg-Briand Pact for the Renunciation of War as an Instrument of National Policy, and the Charter of the United Nations.[14] A provision that is not novel is that in the 1959 Constitution of Tunis whereby, without referring in words to international law, there is a rule that political refugees shall not be extradited.[15] (There is here no implication, of course, that, apart from such a rule as that in the Tunisian Constitution, such extradition might be required under international law; the apparent effect is to emphasize rather than to make a new rule.)

[11] The 1946 Constitution of France provided that treaties should have force superior to that of statute law, but did not include provisions concerning reciprocity. The more recent constitution apparently makes a distinction between "treaties" and "international agreements"; while the President negotiates the former, in the case of the latter he is merely informed. On the point that under the 1946 Constitution the President was only informed of the conclusion of international agreements, see A. deLaubadère, "La Constitution Française de 1958," 20 Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht 506–561, at 549–551 (1960). On the 1958 Constitution generally, see Dorothy Pickles, The Fifth French Republic (1960).

[12] Nruen Quoc Dinh, "La constitution française de 1958," 75 Revue de Droit International Public et de Science Politique 515–564, at 549–551 and 561 (1959). The writer raises the question of whether the state could denounce the treaty; if not, he submits that the treaty would remain binding in the international sense.

[13] Charlton *v.* Kelly, 229 U.S. 447 (1913).

[14] *Cf.* Hamza Eroğlu, "La constitution turque et les relations internationales," 1961 Turkish Year Book of International Relations 62–90, at 85.

[15] With this may be compared Art. 15 of the Mexican Constitution of 1917, by which "No treaty shall be authorized for the extradition of political offenders. . . ." 2 Peaslee, Constitutions of Nations 418 (1950).

Still another type of reference to the general law is that in the 1962 Constitution of Pakistan authorizing the Central Legislature of that country to make laws concerning "offenses against the law of nations."[16] There is comparable wording in Article I, Section 8, paragraph 10, of the United States Constitution. This clause was utilized to sustain an indictment under a statute in a situation where the power of Congress to enact a criminal law was questioned.[17]

International law is of course applicable *between* states even without any express constitutional provisions making it a part of national law. Such provisions may have utility in situations where more than one construction of municipal enactments might reasonably be followed, or where (as in cases affecting aliens) the limits of national legislative power are in question. The device of relating international law in general (or some part of it) to municipal law through express wording obviously does not relieve tribunals or legislatures from the continuing task of determining what the rules of international law are. Direct or indirect references in constitutions to such an international organization as the United Nations underline the increasing prominence which the principal organization has come to have in the international legal system.

In general, the newly emergent states of Asia and Africa whose constitutions have been examined do not therein *explicitly* challenge the body of rules that comprise international law on the ground that these rules are the product of imperialism or colonialism. Much, obviously, depends upon those who interpret the provisions which make reference to international law or some parts of it. A realistic view would seem to be that the "international law habit" will not necessarily be effectively promoted through mere wording in national constitutions. What is accomplished under the types of clauses that have here been noted seems more likely to depend upon the constructive approach, vision and good faith of rulers and judges rather than upon the skill of draftsmen.

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LEGAL ASPECTS OF THE PANAMA CASE

On February 4, 1964, the representative of Panama on the Council of the Organization of American States presented a request for a Meeting of Consultation of Foreign Ministers under the Treaty of Reciprocal Assistance. The basis of the invocation of the Rio Treaty was alleged to be "an unprovoked armed attack" on January 9–10 against the territory and civil population of Panama, made by the armed forces of the United States stationed in the Canal Zone, leaving several Panamanians dead and more than a hundred wounded and creating "a situation that endangers peace in America."

[16] Art. 132 and Third Schedule, par. (f). The paragraph immediately following lists foreign and extraterritorial jurisdiction, admiralty jurisdiction, and offenses committed on the high seas and in the air.

[17] United States *v.* Arjona, 120 U. S. 479 (1887).