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Conflict of Laws -- Intergovernmental Immunity

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It is perhaps unfortunate that the otherwise valid statute was distorted so as to include the present fact situation, but it may also be possible to reconcile the court's reasoning in view of the broad rationale in *International Shoe Co. v. Washington.*[24]

Eugene Parker

CONFLICT OF LAWS—INTERGOVERNMENTAL IMMUNITY

Plaintiff seeks damages for the alleged tortious conduct of defendant in inducing the Sovereign Republic of Peru to issue scrip certificates to the current holders. The bonds were received in exchange for an original bond issue. *Held*, defense that adjudication of claim would require court to pass upon validity of act of a sovereign foreign government, was good. *Frazier v. Foreign Bondholders Protective Council, Inc.*, 125 N.Y.S.2d 900 (Sup. Ct. 1953).

All cases agree that where the law of the situs of the transaction is statutory or involves judicial constructions of statutory law, the courts of the forum will follow such law and determine the rights of the parties by that law.[1] The earliest American judicial opinion in point was made by the illustrious authority on international law, Justice Marshall.[2] Although in *Underhill v. Hernandez*,[3] the court might have rested its decision on the ground that there is no individual liability abroad for acts performed by persons in the exercise of governmental authority within their own states, the broader rule, enunciated that international law requires each state to respect the validity of sovereign state acts, in the sense of refusing to permit its courts to sit in judgment on the legality or constitutionality of an act of a foreign state, has been followed in innumerable cases.[4]

24. 326 U.S. 310 (1945).

1. Supreme Council, C.K.A. v. Logsdon, 183 Ind. 183, 108 N.E. 587 (1915); Njus v. Chicago M. St. P. Ry., 47 Minn. 92, 49 N.W. 527 (1891); Lane v. Watson, 51 N.J.L. 186, 17 Atl. 117 (1889).

2. Hudson v. Guestier, 4 Cranch 293 (U.S. 1808).

3. 168 U.S. 250 (1897).

4. *E.g.*, Ricaud v. American Metal Company, 246 U.S. 304 (1918) (The fact that property seized and sold by the authorities of a foreign government belonged to an American citizen not residing in the foreign country at the time, does not empower a court of this country to reexamine and modify their action); Bernstein v. Van Huyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947) (New York District court had no power to determine plaintiff's claim which was: that by means of duress Nazi officials compelled plaintiff in Germany to transfer property to a Nazi designee and that defendant, a Belgian Corporation acquired property with punitive notice of duress.); Union Shipping and Trading Co. v. United States, 127 F.2d 771 (2d Cir. 1942) (Courts of another foreign power will accept as lawful official acts of another foreign sovereign and will *not* undertake to examine the validity under the local law.); Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438 (2d Cir. 1940) (Federal courts will not examine the acts of a foreign sovereign within its own borders in order to determine whether those acts were legal under the municipal

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court as to claims for damages based upon acts done in a foreign country.[5] In another 1918 case, *Earn Line v. Sutherland S.S. Co.*,[6] Judge Learned Hand, refusing to pass upon the legality of a requisition by British authorities of a vessel observed:

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law of the foreign state.); Hewitt v. Speyer, 250 Fed. 367 (2d Cir. 1918)(Courts of the United States will not adjudicate upon the validity of the acts of a foreign nation, performed in its sovereign capacity within its own territory, nor will persons involved with such government in the performance of such acts be subjected to a civil liability therefor.); The Janko (The Norsktank), 54 F. Supp. 241 (E.D. N.Y. 1944)(The courts of the U.S. will not sit in judgment on the acts of another government done within its own territory); Chemacid, S.A. v. Ferrotar Corp., 51 F. Supp. 756 (S.D. N.Y. 1943)(Recognition of foreign government by the U.S. government embodies recognition of such foreign government's law.); Eastern States Petroleum Corp. v. Asiatic Petroleum Corp., 28 F. Supp. 279 (S.D. N.Y. (1939)(The foreign sovereign power must in courts of U.S. be assumed to be acting lawfully, the meaning of "sovereignty" being that decree of the sovereign makes law.); Equitable Life Assurance Society v. McRee, 75 Fla. 257, 78 So. 22 (1918)(It is the rule, universally reiterated, that no law, statute, or otherwise has any force or effect of its own beyond the limits of the sovereignty from which its authority is derived, and conversely, every person who is found within the limits of a government, whether for temporary purposes or as a resident, is bound by its laws so far as they are applicable to him.); Weiss v. Lustig, 185 Misc. 910, 58 N.Y.S.2d 547 (Sup. Ct. 1945) (Every government is as a general rule supreme within its own territory, and its actions are not reviewable by the courts of the U.S.); Telkes v. Hungarian National Museum, 265 App. Div. 192, 38 N.Y.S.2d 419 (1st Dep't 1942)(The rule forbidding suits against foreign sovereigns without foreign sovereign's consent does not rest on comity but is applied because such suit involves claims of a political nature which are not intrusted to the municipal courts.); McCarthy v. Reichsbank, 259 App. Div. 1016, 20 N.Y.S.2d 450 (2d Dep't. 1940), *aff'd*, 284 N.Y. 739, 31 N.E.2d 508 (1940). (Our courts are powerless to review the acts of another government in dealing with its citizens within its territory or to call such acts into question, and it is legally immaterial that such acts are unjust morally.); Lamont v. Travelers Insurance Co., 281 N.Y. 362, 24 N.E.2d 81 (1939)(A foreign government, like the government of a state, or of the U.S., cannot be called to account in state courts, without its consent. Every sovereign state is bound to respect the independence of every other sovereign state, and courts of one country will not sit in judgment on acts of government of another done within its own territory.); Moscow Fire Insurance Co. of Moscow, Russia v. Bank of N.Y. and Trust Co., 161 Misc. 903, 294 N.Y. Supp. 648 (Sup. Ct. 1937)(Courts of U.S. have right to sit in judgment of acts done in U.S. or sought to be enforced therein from without U.S. boundaries, and it is only as to acts of another government done within its own territory that courts of U.S. will not sit in judgment.).

5. Oetjen v. Central Leather Co., 246 U.S. 297 (1918). The law of England is the same. In POLLOCK ON TORTS 137, Sir Frederick Pollock states the rule as follows:

> If we may generalize from the doctrine of our own courts, the result seems to be that an act done by the authority of the government of a sovereign state in the exercise of de facto sovereignty, is not examinable at all in the courts of justice of any other state. So far forth as it affects persons not subject to the government, it is not examinable in the ordinary courts of that state itself. If and so far as it affects the same state it may be and in England it is, examinable by the courts in their ordinary jurisdiction. In arriving at the conclusion we have reached, it is hardly necessary to say that this does not leave the complainant remediless, if his rights have in fact been violated.

If the government of Ecuador has violated his rights, it is within the province of another department of the government of the United States to bring the matter, if it deems justice so requires, to the attention of the government of Ecuador.

6. Earn Line S.S. Co. v. Sutherland S.S. Co., 254 Fed. 126 (S.D. N.Y. 1918), *aff'd*, 264 Fed. 276 (2d Cir. 1920).

> The act of another sovereign within its own territory is of necessity legal . . . . It is quite true that the act of any public official of a foreign state may in fact be illegal by the municipal law of that state, but no domestic court may admit such a possibility without trenching upon a prerogative of its own executive. The presupposition upon which states must deal with each other is that each is responsible for and bound by, the acts of its own functionaries.[7]

The courts have repeatedly declared that the forum will not undertake to pass upon the validity under the municipal law of another state or the acts of officials of that state purporting to act as such.[8] There are many more American authorities to the same effect.[9] One sovereign gives due recognition of the statutes of another sovereign, and in turn expects similar consideration.[10] It is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political.[11] "It rests at last upon the highest considerations of international comity and expediency."[12] To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another could certainly imperil the amicable relations between governments and vex the peace of nations.

There seems to be no contrary view on this well established priniciple of international law, but, as always, there are several exceptions to be noted. The first major one appears in the right of the states to refuse effect to foreign acts and laws which are considered contrary to the public policy of the forum and shock the court's sense of justice. This is done by the court expressing that "X" country's decrees are law, but they will not be enforced if in a given case it is against the public policy.[13] The instant case, however, said the court, does not come under this exception because Peru's acts are not so shocking in that it did not reject an obligation in toto, but they merely elected to pay one class of persons instead of another. "The current bondholders," said the court, "could just as plausibly have brought a suit had Peru given the scrip certificates to the class of bondholders plaintiff represents."[14]

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7. 254 Fed. at 129.
8. Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246 (2d Cir. 1947).
9. United States v. Belmont, 301 U.S. 324 (1937); Texas Co. v. Hogart Shipping Co., 256 U.S. 619 (1921); Ricaud v. American Metal Co., 246 U.S. 304 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909); Heine v. New York Life Insurance Co., 50 F.2d 382 (9th Cir. 1931); 1 HYDE, INTERNATIONAL LAW 734 (2d ed. 1947).
10. The Schooner Exchange v. McFadden, 7 Cranch 116 (U.S. 1812).
11. Frazier v. Foreign Bondholders Protective Council, 125 N.Y.S.2d 904 (1st Dep't. 1953).
12. Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
13. Habicht, *The Application of Soviet Law and the Exception of Public Order*, 21 AM. J. INT'L. L. 238 (1927).
14. See note 11 *supra*.

Another exception to the rule[15] is that states can refuse to give effect to foreign laws wherever they are considered contrary to legislative acts violating international law[16] or legislation enacted ultra vires of the internationally recognized jurisdiction of sovereign states.[17] States may refuse, also, to give effect to acts of unrecognized governments;[18] however, effect can be given to acts of unrecognized governments if public policy so requires.[19] It was not necessary for the court to consider this exception.

The doctrine, that private rights acquired under the laws of foreign states will be respected and enforced in our courts, enunciated in *Hilton v. Guyot*[20] has been universally accepted.[21] Thus it is seen that not only foreign acts, but also foreign judgments are respected in our courts with a few exceptions as previously noted.

It appears as though the courts here have stopped, looked and listened, and have taken the old reliable road of sacrosanctity rather than forging ahead.[22] Therefore as the law stands to date, our courts will not sit in judgment on the validity of acts done by a sovereign government within its legislative, judicial or administrative jurisdiction.

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CONFLICT OF LAWS—PENAL OR REMEDIAL STATUTES

An action was brought against stockholders of a bankrupt Arkansas corporation in a Tennessee court. Recovery was sought under the Arkansas law[1] which imposed individual liability upon defendants as partners, when articles of incorporation had not been filed with the county clerk.[2] *Held*, the Arkansas statute being penal in nature, the Tennessee court need not afford it full faith and credit. *Paper Products Co. v. Doggrell*, 263 S.W.2d 127 (Tenn. 1953).

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15. Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489 (1887). British courts refused to give effect to Peruvian laws annulling acts of the preceding Peruvian government because by the international law of government successions, plaintiff government, was bound by the acts of the preceding Peruvian government.
16. Anglo-Iranian Oil Co. v. Societá Unione Petrolifera Orientale, 47 AM. J. INT'L. L. 509 (1953).
17. Salimoff v. Standard Oil, 237 App. Div. 686, 262 N.Y. Supp. 693 (1st Dep't.), *aff'd*, 262 N.Y. 220, 186 N.E. 679 (1933).
18. Luther v. Sagor, 3 K.B. 532 (1921).
19. See note 17 *supra*.
20. 159 U.S. 113 (1895).
21. *Id.* at 233.
22. Comment, 7 MIAMI L.Q. 400 (1953).

1. ARK. STAT. § 64-103 (1947).
2. Under the decisions of the Arkansas court of last resort, as required by the Arkansas statute, stockholders of a corporation are liable as partners when the charter is not filed in the county where the principal office of the corporation is to be maintained. Whitaker v. Mitchell Mfg. Co., 219 Ark. 779, 244 S.W.2d 965 (1953); Gazette Publishing Co. v. Brady, 204 Ark. 396, 162 S.W.2d 494 (1942).