D.P. O'Connell, The Law of State Succession

would apply.[1] Such a provision is ineffective until it becomes part of the municipal law of the successor State, and even then does not fetter the latter's constitutional competence to abrogate or alter the whole or part of the adopted law.

II. Private Law and Private Law Relationships

The law of a community regulating the relations of its members one to another is not *ipso facto* affected by change of sovereignty.[2] Various theo-

nearly as possible be the law of both Dominions: 10 & 11 Geo. VI, c. 30, ss. 8 (2) and 16. The second schedule to the Ceylon Independence Act, 1947, specified the acts and regulations of the previous administration which were to remain in force: 11 & 12 Geo. VI, c. 7. The Philippines Independence Act of the United States Congress enacted that the laws in force in the Philippine Islands were to continue in force in the Commonwealth of the Philippines until repealed: *United States Statutes at Large*, 73rd Congress, 1933–4, vol. XLVIII, pt. 1, Public Laws, no. 127. By virtue of the British North America Act, 1949, laws operating in Newfoundland were to continue so to operate until repealed or altered by the Parliament of Canada or that of the new province, and Canadian statutes were only to come into force in the province when extended by Act of the Canadian Parliament, or by Proclamation of the Governor-General in Council: s. 18. The Palestine Act, 1948, provided that all enactments of the United Kingdom Parliament relating to Palestine were to cease so to relate: 11 & 12 Geo. VI, c. 27, s. 3. The Knesseth of Israel enacted legislation prescribing that the law which existed in Palestine on 14 May 1948 was to remain in force subject only as modified by the establishment of the new State, and the termination of the mandate: Statute Book 14 of the 23rd day of Tamuz, 5909 (20 July 1949), p. 72. In *Kuk* v. *Minister of Defence*, *Annual Digest*, 1948, Case no. 15, it was held that the Palestine Defence (Emergency Regulations) Order, 1945, had been kept alive by this provision. See also *Leon* v. *Gubernik*, *Pessakim*, vol. 1, 1948–9, p. 14. Certain statutes were repealed in so far as they related to Burma: Schedule to the Burma Independence Act, 1947, 11 & 12 Geo. VI, c. 3.

1 The extension of French constitutional law to Alsace-Lorraine was proclaimed on 1 June 1924. See the decision of the Tribunal des Conflits of 27 February 1933, in the case of *Cie d'assurances Rhin et Moselle*, *Rev. gén. de droit int. pub.* vol. XLII (1935), p. 220. See also Fauchille, vol. 1, pt. 1, p. 372. The Law of Reunion of Austria to the Reich of 13 March 1938, proclaimed in Article 2 that 'the law now prevailing in Austria remains in force until further notice. The introduction of Reich law into Austria will be effected by the Leader and Reich Chancellor, or by the Reich Minister empowered by him to do so': R.I.I.A., *Docs. on Int. Aff.* 1938 (1943), vol. II, p. 74. In a case concerning the liability of a servant of the Reich who was involved in a collision during the *Anschluss*, the Supreme Court of the Reich held that Austrian law had continued in effect after the annexation, and that Article 131 of the Weimar Constitution, which the defendant had pleaded, had not been extended to Austria and did not apply to it automatically; *R. and G.* v. *H. Hochbahn A.G.*, *Annual Digest*, 1941–2, Case no. 24.

2 Kaeckenbeeck, *op. cit.* p. 31; Kelsen in *Hague Recueil*, vol. XLII (1932), p. 328; Hyde, vol. 1, p. 397. French Civil Code remained in force in Alsace-Lorraine until 1900: Audinet, *Répertoire de droit international privé et de droit pénal international*, vol. v, no. 163, p. 453. The doctine of the survival of private law was accepted in English jurisprudence by Lord Mansfield in the famous case of *Campbell* v. *Hall* (1774), 1 Cowp. 204, in which he stated that 'the laws of a conquered country continue in force until they are altered by the conqueror'. A long series of cases has established the doctrine

retical attempts have been made to reconcile this doctrine of the survival of private law with the concept of absolute sovereignty. It is argued, for example, that private law derives its authority exclusively from the will of the sovereign, and that a successor State, in its own interest, and to preserve the absorbed territory and its population from anarchy, tacitly maintains such law in being.[1] That view is not shared here. The validity

likewise in American jurisprudence. In one of the earliest it was said: 'All those laws which were in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States'; *American Insurance Co.* v. *Canter*, 1 Pet. 542. See also *U.S.* v. *Power's Heirs*, 11 How. 570; *U.S.* v. *Heirs of Rillieux*, 14 How. 189; *Leitensdorfer* v. *Webb*, 20 How. 176; *Shapleigh et al.* v. *Mier*, 83 F. (2*d*) 673 at p. 676; *The Philippine Sugar Estates Development Co. (Ltd.)* v. *U.S.*, 39 Court of Claims (1904), 225 at pp. 244–7; *Ortega* v. *Lara*, 202 U.S. 339 at p. 342; *Vilas* v. *City of Manila*, 220 U.S. 345 at p. 357; *Chicago Rock Island and Pacific Railway Co.* v. *McGlinn*, 114 U.S. 542; *State of Washington* v. *Rainer National Park Co.* 192 Wash. 592. The Attorney-General of the United States advised in 1899 that 'upon the cession of territory by one nation to another, either following a conquest or otherwise, those internal laws and regulations which are designated as municipal continue in force and operation for the government and regulation of the affairs of the people of the said territory until the new sovereign imposes different laws and regulations....Such laws as are not dependent on the will of the former sovereign remain in force': 23 *Op. A.-G.* 527. In the case of *People* v. *Perfecto*, a majority of the Supreme Court of the Philippines held that a Spanish law rendering it a criminal offence to abuse a minister of the government had survived the transfer of the islands to the United States. The minority, however, held that the law was to be classed with those laws of a political character which cease upon a transfer of sovereignty: *Annual Digest*, 1919–22, Case no. 50. See also *Occupation of Crete Case*, *Annual Digest*, 1925–6, Case no. 69. In the *Rizcallah Gazale Case*, the Syrian Court of Appeal held that the law of the Ottoman Empire relating to the rights of Christians had continued in force in Syria: *Annual Digest*, 1927–8, Case no. 65. The Reichsgericht decided in 1882 that French law did not lose its validity in Alsace-Lorraine, through the transfer of these provinces to Germany: *Fontes Jur. Gent.* ser A, sec. 2, vol. 1, p. 117. More recently, an Italian court held that the enactments of the Italian Social Republic, as a *de facto* government, retained their validity even after the legitimate government had recovered the territory administered by the Republic, unless such enactments were of a purely political character: *Galatioto* v. *Ochoa*, *Foro Italiano*, 1946, vol. 1, 217.

1 Cavaglieri in *Hague Recueil*, vol. XXVI (1928), p. 378. The Attorney-General of the United States advised that Colombian laws in the Panama Canal Zone continued in force after the cession of this territory to the United States by Panama only by consent of the succeeding government, implied from its failure to modify or repeal it: 22 *Op. A.-G.* 113, 118. Lapradelle, subscribing to this theory, states that 'the effect of this act of will, express or tacit, of the new sovereign, is necessarily to confer on legislation a national character. The law of the old state ceases, and after the annexation is maintained in the territory by a different title': *loc. cit.* p. 395. Mosler considers that such law is maintained in being, not on a basis of international law, but on the right of the acquiring State to make or abrogate laws: p. 23. See also Briggs, *Law of Nations Cases and Documents* (1952), p. 237; Feilchenfeld, p. 617. A similar basis seems to underlie Kelsen's doctrine of promulgation in *Hague Recueil*, vol. XLII (1932), p. 327. Rosenne asserts that the law of the precedessor State ceases to be the law of the former sovereign and becomes that of the new sovereign. It follows that

of private law is independent of the personality of the State exercising sovereignty over the community. 'The laws of a people', as Piédelièvre states it, 'are the living expression of its character and customs.'[1] They come into existence, not by an act of sovereign will, but by the consensus of the community. They continue to govern the life of the community despite changes in the sovereign authority. Hence they can only be abrogated or modified by a subsequent act of the legislature of the successor State.[2]

For this reason, the private law of the successor State can only be extended to incorporated regions by specific decree.[3] The English common law has

the matter is entirely one of domestic jurisdiction, and that international law has nothing to say on the subject: *B.Y.* vol. XXVII (1950), pp. 277 *et seq.* He quotes in support the American case *Porto Rico Railway, Light and Power Co.* v. *Amador* (*Annual Digest*, 1919–22, Case no. 49), a case involving the grant of licences to operate as common carriers. In this case it was held that the use of public places in Porto Rico was to be decided according to the principles of the freer common law prevailing in the United States, although private rights and civil law were retained 'by will of the American Government'.

1 Vol. I, p. 128. See also 448 *H.C. Deb.* 5 s. c. 1322.

2 Kaeckenbeeck, *op. cit.* p. 31. Rosenne asserts that there is an intimate connexion between law *per se* and sovereignty *per se* (*loc. cit.* p. 278). This means that law is nothing but the expression of sovereign will. Change of sovereignty therefore involves a definite break in what he calls 'the chain of legal continuity' (p. 279). If the new sovereign did not clarify the law he would be subject, he says, to the 'law-making acts of another sovereign'. If law is the result of a specific 'law-making act' then there is no quarrel with Rosenne's thesis. If law is regarded, on the other hand, as the crystallization of a people's pattern of life into norms of conduct, then Rosenne's conclusions cannot be admitted. Acts of a sovereign legislature do not derive their legal existence, it is believed, from their mode of promulgation, but from the *ordre juridique* which has its substantial basis in the ethico-juridical consciousness of the community. Rosenne, in asserting that 'the silence of the new sovereign has to be regarded as an act of sovereignty which produces effects of a law-making character', it is believed, is erecting into a dogma what is really a fiction.

3 Rosenne (*loc. cit.* at p. 276) appears to consider that the private law of the predecessor State cannot survive the change of sovereignty, precisely because there is no international obligation on the successor State to maintain such law in being. He quotes a Belgian case which assumed that Czechoslovakia had substituted its own financial law for that of Austria in the district of Marienbad (*Lipschutz* v. *Boehmische Esconto Bank and Credit Anstalt*, *Annual Digest*, 1933–4, Case no. 41), and a Polish case in which it was stated as follows: 'Neither generally binding principles nor any single rule of international law can be found which oblige a State which takes a territory under its sovereignty to take over at the same time laws which until then had been in force there. Such an obligation would, therefore, have to result in each case from special agreements concluded between the States in question. Such agreements, as forming special and exceptional law, must be interpreted most restrictively' (*Strusek* v. *District Appeal Committee for War Cripples in Lódź*, *Annual Digest*, 1931–2, Case no. 42). No one can deny that the successor State is entitled to change the law but that does not imply that the law of the predecessor State is maintained as an act of sovereignty by the successor. The latter may, in fact, be obliged in international law to maintain private rights which have arisen under the predecessor's private law.

been held to take effect in territories ceded to Great Britain only when promulgated.[1] In many of the territories acquired by the Crown the private law which operated under the old sovereign has been permitted to continue to regulate the relations of the inhabitants. Thus, Roman Dutch law remained the law of South Africa and of Ceylon, French that of certain Canadian provinces and of Mauritius, and native law in many other regions. Included in this private law is the competence of public corporations established under charter or act of a supreme legislature to continue their operations. Local authorities are thus entitled to continue to levy rates and prosecute under by-laws, and trust corporations, public utility undertakings, and all bodies constituted for purposes other than political maintain their function.

Relationships which have arisen under private law are equally unaffected by change of sovereignty. The claims of one man against another, whether founded on contract, quasi-contract or tort, or on enforceable judgments of competent courts, constitute acquired rights which the successor State must respect.[2] They are 'property' no less than rights to the ownership of land, and their abrogation by the successor State is only legitimate when accompanied by a payment of reasonable compensation. The cancellation of claims possessed by foreign nationals, or the failure to provide machinery for their settlement, is not an unjustified enrichment on the part of the successor State, it is true, but it does constitute a denial of justice for which redress may be demanded through the appropriate diplomatic channels. The doctrine of acquired rights, which was discussed in connexion with interests of mixed public and private character, applies *a fortiori* to interests which are governed entirely by private law.[3]

2. THE JUDICIAL SYSTEM

I. Civil Proceedings

The jurisdiction accorded to courts of justice is a matter of public law, and the judicial system is part of the structure of government. When a State loses sovereignty over a territory, the courts established under its public law suffer the fate of the law itself. They lose their competence.[4] The effect of change of sovereignty on proceedings which are pending, in process of being heard, subject to appeal, or in respect of which judgment has not been entered, is of considerable importance in the law of State succession.

1 *Calvin's Case* (1608), 7 Co. Rep. 1a; 77 E.R. 377. *Blankard* v. *Galdy* (1693), 2 Salk. 411; 4 Mod. 215. 2 Feilchenfeld, pp. 617 *et seq.*

3 *Co-operative Farmers in Tarnów* v. *Polish Treasury*, *Annual Digest*, 1923–4, Case no. 32. 4 Phillipson, p. 311; Keith, *State Succession*, p. 34.