

MALAYSIAN LEGAL SYSTEM

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4.1 INTRODUCTION

This chapter explains the concept of reception that was devised and used by the British empire and the introduction and application of its laws into the territories which it colonised. During the 17th to early 20th centuries, British empire, following an expansionist policy, colonised America and most of the countries in Asia and Africa, plundered the raw materials from these territories which were in high demand in the era of Europe's Industrial Revolution, enriched itself at the expense of other nations' right to self-determination, proclaimed itself as the lord of the newly acquired territories,² subjugated other people,³ brought European ideas, introduced its language and most importantly paved the way in the colonised territories for the reception of its laws. The colonisation of other nations' territories by the British colonial power effectuated within the purview of ancient international law through the modes of 'conquest', 'cession' or 'occupation.' Cession and occupation are still recognised as modes of acquisition of territory in contemporary international law — a law that governs, *inter alia*, the relations among the states. This chapter also explains the modes of acquisition of territories in international law and link them with the doctrine of reception.

1 This chapter is contributed by Mohammad Naqib Ishan Jan.

2 "Europeans have entered their borders uninvited, and when there, have not only acted as if they were the undoubted lords of the soil, but have punished the natives as aggressors if they evinced a disposition to live in their own country. If they have been found upon their own property (and this is said with reference to the Australian Aborigines) they have been hunted as thieves and robbers—they have been driven back into the interiors as if they were dogs or kangaroos." Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009), at 15.

3 Colonialism is a practice of domination, which involves the subjugation of one people to another. <http://plato.stanford.edu/entries/colonialism/>

4.2 ACQUISITION OF TERRITORY IN INTERNATIONAL LAW

The British colonial power often justified its 'colonisation' (which in reality, resulted from invasion and takeover) as an expansion by international law mode of acquisition of territory, including occupation of a '*terra nullius*'. In international law, *terra nullius*, which is a Latin phrase, describes a territory that nobody owns so that the first nation to discover it is entitled to own it. *Terra nullius* is a territory which is either entirely vacant or is inhabited by an indigenous people who belonged to no state.⁴ Occupation of *terra nullius* would be effective in international law if two requirements are fulfilled, namely (a) an intention to occupy (*animus occupandi*), and (b) the adequate exercise of sovereignty over the territory so occupied (*factum*).⁵ As King Victor Emmanuel III of Italy, the Arbitrator in *Clipperton Island Case (France v. Mexico)*⁶ stated:

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual and not the nominal taking of possession is necessary condition of occupation ... [and actual occupation] only takes place when the state establishes in the territory herself an organization capable of making her laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if territory, by virtue of the fact that it was completely uninhabited is, from the first moment when the occupying state makes her appearance

4 J. Simsarian, 'The Acquisition of Legal Title to Terra Nullius', *Political Science Quarterly*, 53 (1938), 111-128. See also Akerhurst's *Modern Introduction to International Law*, Routledge, London, (7th rev. edn, 2000), 148-150.

5 See *Island of Palmas Arbitration Case (Netherlands v. United States of America)*, 2 RIAA, 829 (1928); *Clipperton Island Case (France v. Mexico)*, (1931) 26 AJIL (1932); *Eastern Greenland Case (Norway v. Denmark)*, PCIJ Rep. Ser. A/B (1933) No. 53 and *Minquiers and Ecrehos case (France v. United Kingdom)*, (1953) ICJ Rep. 47. For a detailed discussion on the doctrine of *terra nullius*, see Chapter 5.

6 (1931) 26 AJIL (1932).

there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished and the occupation is thereby completed.⁷

Terra nullius is, however, only one of several bases for the takeover of territory by a state under the international law. Other bases include 'conquest' and 'cession'. As Justice Brennan in *Mabo v. The State of Queensland* observed:

International law recognized conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty. No other way is presently relevant ... The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. ... To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognized the sovereignty of the respective European nations over the territory of 'backward peoples' and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest.⁸

Conquest, which refers to the taking of territory by military force⁹ and its subsequent annexation, was a recognised mode of acquisition of territory in early centuries as there were no rules of international law restricting a State's use of armed force or takeover of a territory by such mode. This was, however, the law in the past and presently is no longer valid.¹⁰ At present, international law does not recognise conquest as a lawful mode of acquisition of territory.¹¹ This mode has

7 This important portion of the Court's judgment is cited by Abdul Gafour Hamid, et al, *Essential Cases and Materials on International Law: Malaysian Perspective Version*, vol. 1, Law Centre, IIUM, Malaysia, 2000, 76.

8 *Mabo v. The State of Queensland (No 2)* (1992) 175 CLR 1, 32–33.

9 Akerhurst's *Modern Introduction to International Law*, Routledge, London, (7th rev. edn, 2000), at pp. 151–152.

10 *Ibid*, p. 152.

11 The Declaration on Principles of International Law concerning Friendly Relations and Corporation among States in Accordance with the Charter of the United Nations, passed by the UN General assembly in 1970, provides in its Para. X that: 'The territory of State shall not be the subject of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.'

lost its validity¹² because under the Charter of the United Nations, member States cannot now acquire territories of each other by use of force or annexation. The use of force or even the threat thereof against the territorial independence of any State is now prohibited under Art. 2(4) of the United Nations Charter.

Unlike conquest, cession was and still is a recognised mode of acquisition of territory in international law. Cession is the transfer of territory, normally through treaty, by one State or ruler to another.¹³ In *Berubari Union and Exchange of Enclaves* case,¹⁴ the Supreme Court of India has observed: "[I]t is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede a part of her territory in favour of another sovereign State, and this can be done in the exercise of her treaty-making power. Cession of national territory in law amounts to the transfer of sovereignty over the said territory by the owner-State in favour of another State."¹⁵ The owner state must be the legitimate sovereign itself, with title to the affected territory, for otherwise the transfer is invalid. The legal basis for this is expressed in the maxim *nemo dat quod non habet*, that is, no one can give that which he does not have.¹⁶

12 The principle that any annexation by the use of force is illegal and is not to be recognised as valid finds support in recent developments in connection with the annexation of Kuwait by Iraq. In Resolution 662/1990 of 9 August, the United Nations Security Council unanimously declared the annexation null and void and called upon States and institutions not to recognise it and to refrain from action that might be interpreted as indirect recognition. Based on this, no State or institution either expressly or by implication recognised the validity of the annexation of Kuwait by Iraq and the sovereignty and territorial integrity of Kuwait has remained intact.

13 Transfer of territory under the international law looks similar to the transfer of property under municipal law. There are situations where two States have exchanged some part of their territories with one another. For instance, India and Pakistan exchanged certain territories under an agreement reached on 10 September 1958. There are also situations where a State has sold some portion of her territory to another State. For example, France sold Louisiana to the United States for 60 million francs in 1803. Likewise, in 1867, Russia sold her Alaskan territory in America to the United States for 7,200,000 dollars and in 1899, Spain sold the Carolinas to Germany for 25,000,000 Pesetas.

14 AIR 1960 SC 845.

15 *Ibid.*

16 David H. Ott, *Public International Law in the Modern World* (Pitman, London, 1987), p. 106; Akerhurst's *Modern Introduction to International Law*, Routledge, London, (7th rev. edn, 2000), p. 148.

A cession treaty must be based on the free will of the contracting parties in order to be valid. If the transferring State signs the agreement under coercion the agreement would be void and of no effect. Although in the ancient time and even up to early 20th century an aggressor could have acquired territory by conquering another State and forcing it to sign a treaty of cession, now under contemporary international law, it is not possible to do so. Article 52 of the Vienna Convention of the Law of Treaties 1969 provides that: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of United Nations.'

The modes of acquisition of territory described above were relied on by the British colonial power to justify its invasion and takeover of other nations' territories. To prove its intention of taking over those territories, to show its commitment or to display that it was in effective control as required by the international modes of acquisition of territory, the colonial power had to display its sovereignty over the said territory by administering it and making sure its laws were received and applied there.

4.3 THE DOCTRINE OF RECEPTION

The doctrine of reception is a common law doctrine devised by the British colonial legal minds to explain the methods of introducing and applying English law in a colonised territory. It refers to the process in which the English law becomes applicable to a British Crown Colony, protectorate, or protected state. Sir William Blackstone in Commentaries on the Law of England described the doctrine of reception in the following terms:

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which

they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force ... But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain ...

The above statement clearly suggests that the British common law rules on reception depended on whether a territory was 'settled' as a colony or was 'conquered/ceded'. In the so-called 'settled' territory the law of England was perceived to be inherited at birth by the people of that territory, while in the territory which was either 'ceded' or 'conquered', the law of England could only be acquired by legislation.

4.4 SETTLED OR CEDED TERRITORY: THE DISTINCTION

A comprehensive discussion on the doctrine of reception of English law into a territory colonised by British necessitates the determination whether that territory was a 'settled' territory or 'ceded' one and in terms of the application of law to a colony, did common law make distinction between the two concepts and if so, what is the distinction?

In terms of application of law to a colonised territory, common law made distinction between a settled and ceded territory. Settled territories were those acquired by occupation or discovery and they, regardless of whether they were genuinely uninhabited or already inhabited, were treated as *terra nullius*.¹⁷ In such territories, British settlers took with them all the laws of England that were applicable to their situation. These laws could be changed by the British Parliament, or local legislature, when it was established.

Conquest basically refers to the takeover of a territory by use of arm force while cede is generally used to designate the transfer of territory from one state to another normally by treaty. The conquered and

17 A settled territory was one claimed by 'right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country.' – Sir William Blackstone.

ceded territories already had their own laws but the conqueror reserved for itself the right to abrogate the former laws and institute new ones. Until such new laws were promulgated, the old laws and customs of the country remained in full force to the extent that they were not contrary to morals. This principle was explained in the case of *Chicago, Rock Island and Pacific Railway v. McGlinn*:¹⁸

It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced.¹⁹

The distinction between settled and ceded territories has been confirmed by judicial decisions of various nations. In *Blankard v. Galdy*²⁰ it was held that while in an 'uninhabited country newly founded out by English subjects, all laws in force in England are in force there,' in the case of Jamaica, 'being conquered, and not pleaded to be parcel of the kingdom of England, but part of the possessions and revenue of the Crown of England, laws of England did not take place there, until declared so by the conqueror or his successors.' This means in a settled territory, which is acquired through occupation or discovery of *terra nullius* it was assumed that the British settlers brought British institutions and practices of governance and the principles and rules of English law with them.

18 114 U.S. 542 (1885).

19 *Ibid.*

20 4 Mod. 223 (b).

The distinction between settled and conquered or ceded territory was further confirmed in *Campbell v. Hall*²¹ where Per Lord Mansfield, CJ, observed:

A country conquered by British arms becomes a dominion of the Sovereign in the right of his Crown, and, therefore, subject to the Parliament of Great Britain. The conquered inhabitants, once received under the Sovereign's protection, become British subjects, and are to be universally considered in that light, not as enemies or aliens. The articles of capitulation on which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning. The law and legislative government of every dominion equally affects all persons and all property within the limits thereof, and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman has no privilege distinct from the natives. The laws of a conquered country continue in force until they are altered by the conqueror. If the Sovereign without the concurrence of Parliament has power to alter the old and introduce new laws in a conquered country, this legislation being subordinate to his own authority in Parliament, he cannot make any new change which is contrary to fundamental principles, e.g., he cannot give any individual privileges not granted to his other subjects.

In *Cooper v. Stuart*²² it was reaffirmed that 'there is a very great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract or territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.'²³

²¹ [1558-1774] All ER Rep 252.

²² (1889) 14 App. Cas. 286.

²³ *Ibid*, at 291.

Territories which had inhabitants but were under no sovereign authority were called *territorium nullius* — a term which is used interchangeably with the term *terra nullius*. Thus, 'if a tract of country were inhabited by isolated individuals who were not united for political action, so that there was no sovereignty to exercise there, such a tract would be *territorium nullius* ... As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever 'rudiments of a regular government' subsequent research may have revealed among the Australian tribes, occupation was the appropriate method of acquisition.'²⁴

4.5 MODERN INTERNATIONAL LAW NO LONGER FAVOURABLE TO COLONIALISM

The British colonialist power traditionally used divergent legal terminology often with twisted facts to justify its forcible takeover of other nations' territory. Modern international law attempts to reverse this tradition. Now, the Charter of the United Nations in its art. 2(4) requires its member nations not to threaten, or use force, against other nations. One of the fundamental principles of international law, as enshrined in the UN Charter and other multilateral treaties, is the right to self-determination.²⁵ This means that now people everywhere are entitled to choose their own political status and to develop their own social, economic and legal destiny.

24 Lindley, M. F., *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion*, (Longmans Green, 1926), p. 23.

25 See generally Mohammad Naqib Ishan Jan 'Right to Self-Determination, and Rights of Indigenous Peoples and Minorities' in *Human Rights Law International, Malaysian and Islamic Perspectives*, ed. Abdul Ghafur Hamid @ Khin Maung Sein (Sweet & Maxwell Asia, 2012).

4.6 CONCLUSION

The discussion above clearly demonstrates that the British common law rules on reception depended on whether the colony in question was settled as a colony or was conquered/ceded. For settled colonies, the rules deemed the law of England to have been brought to the colony with the settlers, unless, of course, English law was unsuitable for the colony. For conquered/ceded colonies the general rule was to leave the existing law in force to the extent possible until the authorities changed them. Until early part of the 20th century international law not only failed to prohibit colonisation but in fact facilitated its process. However, now, under contemporary international law, colonialism is not only dissuaded but instead, it entitles people everywhere to determine their own socio-economic, cultural and legal destiny.