EDITORIAL COMMENT

CHARTER PROVISIONS ON HUMAN RIGHTS IN AMERICAN LAW

In *Fujii* v. *California*,[1] decided on April 24, 1950, the District Court of Appeal of the second appellate district of California held that the Alien Land Law of California [2] must yield to the Charter of the United Nations as the superior authority, and was therefore unenforceable. As this holding was based upon a misconception of the human rights provisions of the Charter, it seems to call for some comment. The writer has been retained by the State of California in a case which has nothing to do with the problems here discussed; this comment is made wholly independently of any views which the State may hold.

The Human Rights Provisions in the Charter

The Preamble of the United Nations Charter states that "We the peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights." Article 1 (3) of the Charter states as one of the purposes of the United Nations:

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; . . .

This statement of a general purpose of the Organization does not impose an obligation on the United States as a Member of the United Nations to take any specific action.

Article 13 (1) provides that the General Assembly shall initiate studies and make recommendations for the purpose of

> b. promoting international cooperation in the economic, social cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

This article relates entirely to the powers of the Assembly rather than to obligations of Members, and recommendations by the General Assembly do not have a binding character.

[1] California Dist. Ct. App., 2nd Dist., April 24, 1950, reported in Los Angeles Daily Journal, April 25, 1950, p. 1; digest in this JOURNAL, p. 590. An appeal was filed on June 2, 1950.

[2] 1 Deering's General Laws of California, Act 261 as amended. This law forbids ownership of land by any alien not eligible to citizenship.

Article 55 provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
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> a. higher standards of living, full employment, and conditions of economic and social progress and development;
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> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
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> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

This statement of the ends to be "promoted" by the United Nations does not create any specific obligation for a Member of the Organization.

In Article 56, the Members "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." The French text, which gives a slightly varied emphasis, provides: *"Les Membres s'engagent, en vue d'atteindre les buts énoncés à l'article 55, à agir, tant conjointement que séparément, en coopération avec l'Organisation."* The obligation imposed by Article 56 is limited to coöperation with the United Nations. The extent and form of its coöperation are to be determined by the government of each Member.

Article 62 (2) empowers the Economic and Social Council to make recommendations "for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." This provision, like Article 13 (1), refers only to the competence of a principal organ of the United Nations, whose recommendations are not obligatory.

Article 76 provides:

> The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
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> . . . . .
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> c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; . . .

Paragraph (c) merely states an objective of the trusteeship system.

The Charter Provisions in American Law

The Constitution of the United States provides in Article 6 (2) that treaties made under the authority of the United States shall be "the supreme law of the land; and the judges in every State shall be bound thereby." [3]

[3] Corresponding provisions do not exist in the fundamental laws of some Members of the United Nations.

In consequence, a provision in a treaty may be incorporated in the national law of the United States, so as to supersede inconsistent earlier acts of Congress and inconsistent State legislation (*Bacardi Corporation of America* v. *Domenech* (1940), 311 U. S. 150; *Clark* v. *Allen* (1947), 331 U. S. 503).

It has long been established, however, that this is true only of self-executing treaty provisions, and that the result does not follow when the treaty provisions merely obligate the United States to take certain action. The classic statement of this principle was made by Chief Justice Marshall many decades ago in *Foster* v. *Neilson* (1829), 2 Peters 253, 314,[4] as follows:

> Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Of course a single treaty may contain both kinds of provisions—some which are, and some which are not, self-executing. This view was taken by Chief Justice Stone in *Aguilar* v. *Standard Oil Co. (New Jersey)* (1943), 318 U. S. 724, 738.

The Charter is a treaty to which the United States is a party; it is "made under the authority of the United States," within the provision of Article 6 (2) of the Constitution. Some of its provisions may have been incorporated into the municipal law of the United States as self-executing provisions; this has been thought to be true, for example, of provisions in Articles 104 and 105 concerning the legal capacity of the Organization and its privileges and immunities (*Curran* v. *City of New York* (1947), 77 N.Y.S. (2d), 206, 212).

Clearly, however, the Charter's provisions on human rights have not been incorporated into the municipal law of the United States so as to supersede inconsistent State legislation, because they are not self-executing. They state general purposes and create for the United States only obligations to coöperate in promoting certain ends. Insofar as the United States is concerned, they address themselves "to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the Court." Apart from action taken by Congress to implement them, the application of the Charter's human rights provisions is not for a court to undertake. The extent to which Congress has power to implement by legislation the human rights provisions of the Charter is another question, which need not be discussed here.

[4] The specific treaty under consideration in Foster *v.* Nielson was later held to be self-executing.

The "human rights and fundamental freedoms" referred to in Articles 1 (3) and 55 (c), 62 (2), and 76 (c) are not defined in the Charter of the United Nations. In the effort to promote "respect for and observance of" them, no organ of the United Nations has been endowed with legislative power. Mr. Edward R. Stettinius, Jr., who served as the Chief of the United States Delegation at the San Francisco Conference, stressed this point in the hearings on the Charter before the Senate Committee on Foreign Relations in 1945 (Hearings, Part I, p. 45):

> Because the United Nations is an organization of sovereign states, the General Assembly does not have legislative power. It can recommend, but it cannot impose its recommendations upon the member states.

The same point was emphasized by Mr. Leo Pasvolsky, one of the American draftsmen of the Charter, who gave the following explanation of the Chapter of the Charter which contains Articles 55 and 56 (Hearings, Part I, p. 133):

> The objective here is to build up a system of international cooperation in the promotion of all of these important matters. The powers given to the Assembly in the economic and social fields in these respects are in no way the powers of imposition; they are powers of recommendation; powers of coordination through recommendation.

The Universal Declaration of Human Rights

Acting under Article 68 of the Charter, the Economic and Social Council created a commission "for the promotion of human rights." This Commission drafted the Universal Declaration of Human Rights which was adopted by the General Assembly on December 10, 1948 (Official Records, 3d Session, Part I, pp. 71–77).[5] This Declaration was proclaimed by the General Assembly

> as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.

On the day before the adoption of the Declaration, the representative of the United States, Mrs. Franklin D. Roosevelt, made the following statement concerning the Declaration (Department of State Bulletin, Vol. 19, No. 494, December 19, 1948, p. 751):

> . . . my Government has made it clear in the course of the development of the declaration that it does not consider that the economic and social

[5] This JOURNAL, Supp., Vol. 43 (1949), p. 127.

> and cultural rights stated in the declaration imply an obligation on governments to assure the enjoyment of these rights by direct governmental action. . . .

Speaking in the Third Committee of the General Assembly, Mrs. Roosevelt had previously stated that "the draft Declaration was not a treaty or international agreement," and that if it was adopted it would not be "legally binding" (Official Records, 3d Committee, 3d Session, Part I, p. 32).

After these official statements, no doubt can exist as to the character of the Declaration. It is in no sense binding on the Government of the United States, and its provisions have not been incorporated in our national law.

In its opinion the California District Court of Appeal invoked Article 17 of the Universal Declaration, but it did not refer to the limited purpose for which the Declaration was proclaimed by the General Assembly. The provision in Article 17 that "everyone has the right to own property alone as well as in association with others," is so general that it could not sustain the result of the court's decision, even if it were incorporated into American law.

The Human Rights Commission of the United Nations is now engaged in drafting a second instrument—a Covenant on Human Rights. If this Covenant is signed and ratified by the United States, and if it is brought into force by a sufficient number of nations, it will be on a wholly different basis from that of the Declaration. It is designed to be a treaty between various nations. As such, depending on a text which has not yet been finalized, its self-executing provisions might be incorporated into American law; the United States is currently insisting that its provisions should not be self-executing. The California court would seem to have anticipated events which may or may not transpire in the future.

The California court may have relied on the report of a case involving certain provisions of the Alien Land Law of California which was recently before the Supreme Court of the United States. In *Oyama* v. *California* (1948), 332 U. S. 633,[6] the Supreme Court found certain provisions of the law to be discriminatory against a citizen of the United States. The question raised in *Fujii* v. *California* was not there involved; yet in a concurring opinion Justices Black and Douglas went out of their way to declare (pp. 649–650):

> There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?[7]

[6] This JOURNAL, Vol. 42 (1948), p. 475.

[7] *Cf.* Re Drummond Wren, 1945 Ontario Reports 778, [1945] 4 D.L.R. 674.

Clearly a court is not the appropriate agency to determine for the Government of the United States the particular way in which it should "cooperate with the United Nations." The fact that the United States has obligated itself to coöperate may be taken into consideration in determining the national public policy, however.

The California law applies to land ownership the same racial discriminations as the Federal law applies to naturalization. If higher courts should affirm the holding that California's Alien Land Law is unenforceable, some doubt might be cast upon the validity of the racial limitations embodied in Section 303 of the United States Nationality Law of 1940, as amended in 1946 (60 Stat. 416, 417).

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SOME THOUGHTS ABOUT RECOGNITION

In a letter of March 8, 1950, to the President of the Security Council, the Secretary General of the United Nations transmitted an originally confidential memorandum prepared by the Secretariat concerning the problem of recognition raised by the claim of the Communist government to represent China in the organs of the United Nations. This memorandum includes the following paragraphs:

> The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. It is true that some legal writers have argued forcibly that when a new government, which comes into power through revolutionary means, enjoys a reasonable prospect of permanency, the habitual obedience of the bulk of the population, other States are under a legal duty to recognize it. However, while States may regard it as desirable to follow certain legal principles in according or withholding recognition, the practice of States shows that the act of recognition is still regarded as essentially a political decision, which each State decides in accordance with its own free appreciation of the situation. . . .
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> Various legal scholars have argued that this rule of individual recognition through the free choice of States should be replaced by collective recognition through an international organization such as the United Nations (e.g., Lauterpacht, *Recognition in International Law*). If this were now the rule then the present impasse would not exist, since there would be no individual recognition of the new Chinese government, but only action by the appropriate United Nations organ. The fact remains, however, that the States have refused to accept any such rule and the United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations, would require either an amendment of the Charter or a treaty to which all Members would adhere.
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> On the other hand, *membership* of a State in the United Nations and *representation* of a State in the organs is clearly determined by a collective act of the appropriate organ; in the case of membership,