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TREATIES AS LAW IN NATIONAL COURTS WITH ESPECIAL REFERENCE TO THE UNITED STATES

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In discussing this problem we must accept the dualist view that international courts apply international law and national courts apply national law. Because the sources of these two branches of law are different, the rules may be in conflict. Unless appropriate processes exist to deal with such conflicts, serious situations may develop.[1]

Dualism implies that treaties, the object of which is to establish a relationship in international law, are applicable in national courts only in so far as incorporated in national law. The same is true of customary international law. International monists hold that such incorporation is automatic, that national courts must apply international law in case of conflict. This theory, however, has little support in practice.[2]

International tribunals are not concerned with the problem of incorporation. It is their function to apply international law, anything in the national laws of the states before them to the contrary notwithstanding. For them, states are bound by international law and the treaties they have concluded. Failure to incorporate the rules of international law and treaties in its national law, failure to pass the legislation necessary to implement obligations established by these rules, or passage of national legislation in violation of these rules, offer no defense in international tribunals against a state's liability under international law.[3]

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1. See MASTERS, INTERNATIONAL LAW IN NATIONAL COURTS 12 (1932).

2. National courts will often seek to avoid a conflict by interpretation. Thus, in Murray v. Schooner Charming Betsy, 6 U. S. (2 Cr.) 64, 118 (1804), Chief Justice Marshall said, ". . . an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." See also Wright, *Conflicts of International Law With National Laws and Ordinances,* 11 AM. J. INT'L L. 1 (1917).

3. ". . . the Government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed. . . ." *The Alabama Claims, United States—Great Britain, Claims Arbitration,* 1872, EXEC. Doc. No. 1, 42d Cong., 3d Sess. (1872).

After examining the jurisprudence of the Permanent Court of International Justice, Georg Schwarzenberger concluded that the court "maintains the overriding character of international law." 1 SCHWARZENBERGER, INTERNATIONAL LAW 20 (1945).

National courts, however, under the dualist theory, are necessarily concerned with methods of incorporation and the extent to which the rules of a particular treaty or of general international law have been incorporated. Such incorporation may be effected by general constitutional mandate such as that in Article VI of the United States Constitution which declares that treaties are the supreme law of the land, or it may be accomplished by specific legislation, dealing with a particular treaty or a particular body of customary law. In Great Britain, for example, treaties are concluded by the Crown in Council. Normally, they are not directly applicable as law in national courts except in the case of prize courts.[4] Thus, it is necessary for Parliament to pass legislation incorporating the rules of a treaty into national law. The government usually lays draft treaties before Parliament and obtains such legislation before ratifying the treaty so there is seldom any difficulty. Continental European constitutions usually require the participation of the legislature in the making of treaties affecting individual rights, and then authorize the courts to apply such treaties as law.[6]

In the United States, it is the general principle, deduced from the Constitution, that both treaties and customary international law are parts of the law of the land, directly applicable by the courts. But there are exceptions to this broad principle. Customary international law has been regarded as part of the common law, and is therefore directly applicable by both federal and state courts. This is true, however, only if there is no specific treaty, legislation, executive order, or authoritative judicial precedent to the contrary.[7] Furthermore, it has been held that federal courts lack jurisdiction to deal with crimes under customary international law or treaty except as recognized by congressional legislation.[8]

In regard to treaties, it has been held that they are, like all other acts of the federal government, subject to the Constitution. They must be concluded in accord with constitutional procedures and, in substance, they must deal with a matter of genuine international interest.[9] They

4. PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND THE UNITED STATES OF AMERICA 26 (1915).

5. *Id.* at 63.

6. Wright, *The Legal Nature of Treaties,* 10 AM. J. INT'L L. 706 (1916); Preuss, *The Execution of Treaty Obligations Through International Law,* 1951 PROC. AM. SOC'Y INT'L L. 82.

7. The Paquete Habana, 175 U.S. 677 (1900).

8. United States v. Coolidge, 13 U.S. (1 Wheat.) 415 (1816); The Estrella, 16 U.S. (4 Wheat.) 298, 311 (1819); In re Sheazle (The British Prisoners), 21 Fed. Cas. 1214, No. 12,734 (C.C.D. Mass. 1845); WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 196 (1922).

9. Geofroy v. Riggs, 133 U.S. 258 (1890).

cannot be a subterfuge for achieving domestic legislation. Doubtless, should such an issue arise, the courts would usually treat it as a political question, to be decided by the political organs of government.[10] Furthermore, treaties cannot violate specific prohibitions of the Constitution, such as those included in the Bill of Rights and in the guarantees to the States of their territorial integrity and republican form of government.[11] The problem of conflict with the Bill of Rights might arise judicially. In one case, where a treaty with France had reciprocally given consuls immunity from subpoena as witnesses in criminal cases, it was said by Secretary of State Marcy that this immunity conflicted with the constitutional right of an accused to subpoena witnesses in his behalf.[12] There can be little doubt that a treaty which clearly encroached upon constitutional rights would be regarded as unconstitutional and would not be applied by national courts.

Even in such a case, however, a problem of the international validity of the treaty would remain. Foreign governments have maintained that they cannot be expected to anticipate how the courts of the United States will interpret constitutional guarantees, and that their only access to American constitutional limitations is through the President and the Secretary of State, the only persons with whom they can deal. Consequently, if these officials, by signing and obtaining ratification of a treaty, assert, directly or by implication, that it accords with the Constitution, foreign governments assume that they are entitled to consider the treaty valid and to hold the United States bound, even though American courts subsequently hold that the treaty is inapplicable nationally.[13] This argument, which has usually been supported in international law, means that responsibility for maintaining constitutional guarantees in relation to treaties, necessarily belongs to the President and the Senate, in conducting the process of treaty-making. Congressional or judicial action after the treaty has been concluded may nullify the treaty in national law, but cannot relieve the United States of international obligations it has assumed.[14] This has been clearly recognized in the case of congressional legislation in violation of a treaty such as the Chinese Exclusion Act of 1888. The Supreme Court held that the act was applicable even though in violation of a treaty with China. But subsequent

10. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 247, 251 (1922).

11. *Id.* at 76, 86.

12. 5 MOORE, DIGEST OF INTERNATIONAL LAW 167 (1906); WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 81 (1922).

13. *Ibid.*

14. *Harvard Research in International Law, Draft Convention on Treaties,* 29 AM. J. INT'L L. SUPP. 992, 995 (1935).

diplomatic experience indicated that in international law, the United States remained bound by the treaty.[15]

From this it flows that if there is a conflict between congressional legislation and a treaty, the most recent will be applied by national courts. Since Article VI declares that both treaties and acts of Congress are supreme law of the land, the Supreme Court has not felt itself justified in giving a priority to either so far as national law is concerned.[16]

Another exception to the judicial application of treaties lies in the distinction, originally made by Chief Justice Marshall in *Foster v. Neilson,*[17] between *self-executing* and *non-self-executing* treaties. The latter refers to treaty obligations, the execution of which is specifically vested in the Congress. Such treaties can not be carried out until Congress acts. This has been held true of treaties requiring an appropriation. The same has been held in regard to treaty obligations concerning criminal punishment. They can not be executed without congressional action which defines the crime and confers jurisdiction on a court. The line between self-executing and non-self-executing treaties is, however, a vague one, and has been drawn only by judicial precedents. In general, treaties specifying rights of aliens have been held self-executing and courts have on numerous occasions enforced them, even though contrary to State legislation.[18]

This is a matter of particular importance because it indicates that the treaty-making power in some respects goes beyond the specifically delegated powers of Congress. One of the important objects of treaties is to assure protection of American citizens abroad, and, obviously, this implies a reciprocity whereby citizens of another nation will be protected in the United States. The protection of individual rights is, however, normally within the domain of the States. Consequently, if this treaty function is to be carried out, the treaty-making power must go beyond the explicitly delegated powers of Congress. It is clear that it was intended to do so, because Article VI of the Constitution was designed to resolve precisely such issues. Under the Articles of Confederation, the States had consistently violated rights assured to English subjects under the Treaty of Peace of 1783, with the result that the national government was seriously hampered in the conduct of foreign relations. This

15. Chae Chan Ping v. United States (The Chinese Exclusion Cases), 130 U.S. 581, 589, 600 (1889). See also WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 17, 260 (1922); 4 MOORE, DIGEST OF INTERNATIONAL LAW 198 (1906); 5 *Id.* at 357.

16. WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 260, 345 (1922).

17. Foster v. Neilson, 30 U.S. (2 Pet.) 253 (1829); WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 207 (1922).

18. *Id.* at 89. See also Wright, *National Courts and Human Rights—The Fujii Case,* 45 AM. J. INT'L L. 62 (1951).

situation accounts for the terminology of Article VI, making treaties supreme law of the land if made "under the authority of the United States," while this is true of the laws of the United States "only if made in pursuance of the Constitution." After the Constitution was in effect, the courts had no hesitancy in applying those treaty provisions concluded before the Constitution.[19]

It is to be noted that the principle making most treaty provisions self-executing applies only to treaty obligations and not to treaty permissions. If, for example, the United States entered into a treaty permitting it to take measures contrary to the Bill of Rights, it is clear that this would give neither the courts nor the Congress power to take advantage of such permission. The permission is valid under international law, not under constitutional law. It precludes objections from other states party to the treaty but not from individuals claiming a constitutional right. It is important to emphasize this, because some adherents to the Bricker amendment have suggested that an international human rights covenant might not afford the protection of civil liberties found in our Constitution, and that such a covenant would permit Congress to violate the Bill of Rights. There is no authority for this position. Only treaty obligations, not treaty *permissions,* can be regarded as self-executing. The human rights covenant would oblige states not to fall below the standard it established, but it would not oblige them to refrain from surpassing that standard.[20]

It is clear, however, that a treaty obligation, such as that imposed by the migratory bird treaty with Canada, justifies Congress, the courts, and other organs of the government in utilizing their powers to enforce the obligation by punishing poachers, even though it goes beyond the explicitly delegated powers of Congress. This was the issue raised in *Missouri v. Holland.*[21] The normal powers of the states are not prohibitions against treaty making. The power to make treaties is delegated to the federal government by the Constitution, and the protection of migratory birds is a matter of genuine international interest. Under the necessary and proper clause, Congress has power to enforce treaty obligations, which have been assumed in a constitutional manner, which are within the proper orbit of treaty making, and which do not conflict with a positive prohibition of the Constitution.

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19. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Wright, *National Courts and Human Rights—TheFujii Case,* 45 AM. J. INT'L L. 62 (1951).

20. WRIGHT, PROBLEMS OF STABILITY AND PROGRESS IN INTERNATIONAL RELATIONS 282 (1954); Wright, *Congress and the Treaty-Making Power,* 1952 PROC. AM. SOC'Y INT'L L. 43, 49.

21. 252 U.S. 416 (1920).

Furthermore, a treaty obligation is not self-executing unless it is sufficiently precise to be applied as a rule of law. This issue was raised in connection with Article 56 of the United Nations Charter, by which the member nations "pledge themselves" to take joint and separate action in cooperation with the organization, for the achievement of the purposes set forth in Article 55. According to the latter, the United Nations shall promote higher standards of living, full employment, and other economic and social objectives, as well as universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language, or religion. In the *Fujii* case, a lower California court held that this treaty provision constituted an obligation which would be violated if the California Land Act were enforced.[22] The act discriminated against Japanese in the ownership of land, and the right to own land was considered a "human right." The Supreme Court of California, however, held that Articles 55 and 56 of the charter were too vague to be applied as rules of law.[23] Undoubtedly, these articles do imply some obligation, but the obligation may be only to negotiate covenants of human rights and other instruments through the United Nations. On this particular matter the Supreme Court of the United States has not yet expressed its opinion, though the dicta of some Justices in other cases suggest that the Court may eventually regard at least some of the provisions of Article 55 and 56 as constituting self-executing obligations.[24]

To be applicable in the courts, a treaty must, of course, have been made in accordance with the procedure established by the Constitution. For most important instruments, this means the President acting with consent of two-thirds of the Senate. It is clear, however, that the constitutional powers of the President as Commander-in-Chief, as chief administrative officer of the federal government, and as representative of the United States in international relations, give him authority to make executive agreements essential for the exercise of these powers. It is also clear that Congress can, within the orbit of its delegated powers, authorize executive agreements to carry out its expressed legislative policies. The line between presidential executive agreements, congressional executive agreements, and treaties in the strict sense of the word, has not been clearly drawn.[25] It would seem, however, to depend upon

22. Fujii v. California, 218 P.2d 595 (1950); 217 P.2d 481 (1950).

23. Fujii v. California, 38 Cal. 2d 718, 242 P.2d 617 (1952). See also Hudson, *Editorial Comment,* 44 AM. J. INT'L L. 543, 545 (1950).

24. Fairman, *Editorial Comment,* 46 AM. J. INT'L L. 682, 687 (1952); Wright, *National Courts and Human Rights—The Fujii Case,* 45 AM. J. INT'L L. 62 (1951).

25. WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 234 (1922); Wright, *The United States and International Agreements,* 38 AM. J. INT'L L. 341 (1944).

the authority to execute the obligations undertaken. Insofar as the President, under his constitutional powers, can carry out such obligations without support from any other organ of the federal government, or without encroaching upon the normal powers of the States, it would seem that he can constitutionally make the instrument under his sole authority.[26] It is true that the *Belmont* and *Pink* cases seem to have suggested a somewhat wider scope of executive agreement making. The conclusion reached in these cases can be justified, however, on other grounds. It can be generally said that an executive agreement which encroaches upon the normal powers of the States, and which is not within the normal powers of the President, would not be applied as law by the courts.[27]

The complexity of our problem lies in the dilemma arising because of the unified responsibility of the United States under international law, and the limitation of the powers of all governmental organs under the Constitution. The United States may be responsible and yet the President, as the sole representative organ in international relations, may lack power to discharge the responsibility.[28] To solve the dilemma every organ of the government should, on the one hand, use its powers to assure that international responsibilities which have been undertaken will be fulfilled, but on the other, should not exercise its powers to accept national responsibilities which are not likely to be discharged, or can only be discharged by violating the principle of democratic consent to major decisions. These principles are flexible and political. They lie in the realm of constitutional and international understanding, rather than of law. They call for a spirit of cooperation among President, Senate, House, courts, and States, in the process of making and fulfilling treaties and other international commitments, rather than in a spirit of self-centered legalism, which has too often animated these organs to the detriment of a sound foreign policy.[29]

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26. Wright, *The United States and International Agreements,* 38 AM. J. INT'L L. 341 (1944).

27. United States v. Belmont, 301 U. S. 324, 331 (1937); United States v. Pink, 315 U.S. 203, 220 (1942); Wright, *The United States and International Agreements,* 38 AM. J. INT'L L. 341 (1944).

28. WRIGHT, CONTROL OF AMERICAN FOREIGN POLICY 3 (1922).

29. *Id.* at 368; Wright, *Congress and the Treaty-Making Power,* 1952 PROC. AM. SOC'Y INT'L L. 43, 56.