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1907

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Recommended Citation

Hershey, Amos S., "The Japanese School Question and the Treaty-Making Power" (1907). *Articles by Maurer Faculty.* Paper 1962.
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THE JAPANESE SCHOOL QUESTION AND THE TREATY-MAKING POWER

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The Japanese protest of October 23, 1906, against the action of the San Francisco board of education, based on a California statute requiring all children of Mongolian descent to attend the school set apart for orientals, is one of the most puzzling incidents in our recent diplomatic history. It was sufficiently perplexing to the friends and admirers of Japan to learn that her government had created an international issue out of such a trivial matter as the segregation of less than one hundred Japanese pupils in the oriental school of San Francisco. But some of the friends and supporters of the administration were still more surprised to hear that the federal government admitted that the treaty of 1894 with Japan had been violated by this action of the San Francisco board of education, and apparently believed that it had jurisdiction in the premises.

It is true that Secretary Metcalfe's report, which was published on December 19, 1906, also informed us of a considerable number of assaults on Japanese subjects by "hoodlums and roughs," and of the breaking of windows in Japanese restaurants in San Francisco. These attacks, although subsequent to the earthquake, occurred at a time of great public disorder during which there appears to have been a carnival of crime when the police were powerless to protect life and property; but they seem to

have been directed against the Japanese from motives of race prejudice, and not for the purpose of robbery.

Leaving out of question the slight boycott against Japanese restaurants during the month of October, it must be admitted that the government of Japan had ample cause of complaint, if not, indeed, for a demand for indemnity, in the attacks on Japanese property and in the assaults on Japanese subjects committed during the months of April to November, 1906.

The general principle of international law underlying this matter is that in times of riot, disorder, insurrection, or civil war, foreigners are merely entitled to the same kind and degree of protection as is afforded to a State's own citizens or subjects. But it is also now generally admitted that a government is liable for injuries to aliens resulting from attacks upon foreigners as such or upon those of a particular nationality, wherever the local authorities are unable or unwilling to use due (*i. e.*, reasonable) diligence to prevent, and whenever the courts are unable or unwilling to punish such crimes. It is true that the government of the United States has always refused to admit such liability in principle, but it is also true that in the majority of actual cases our government has granted compensation as a matter of grace and equity, or from a sense of sympathy, policy, or benevolence. This was notably the attitude of our government in the cases of the anti-Spanish riots at New Orleans and Key West in 1851; the anti-Chinese riot at Rock Springs, Wyoming, in 1885; and the Italian lynchings at New Orleans in 1891. The government of the United States has shown commendable zeal in protecting its citizens from such attacks abroad, and other nations are in the habit of requesting compensation in similar cases.

"In attempting to secure redress or justice, aliens must, however, in the first instance, have recourse to the local tribunals of the district in which they are domiciled, or, as Vattel puts it, to the 'judge of the place.' Judicial remedies should, as a rule, be exhausted before resorting to diplomatic interposition for means of procuring redress. But this rule does not apply in case of a gross or palpable denial of justice; where local remedies are wanting or insufficient; where judicial action is waived; where the action complained of is in violation of international law; or where there is certain to be undue discrimination against foreigners. It does not 'apply to countries of imperfect civilization, or to cases in which prior proceedings show gross perversion of justice.'"[1]

It will thus be seen that a diplomatic protest at such an early stage of the controversy would have been an unusual mode of procedure, even supposing that the action complained of had been an injury to person or destruction of property of Japanese subjects. But the Japanese government does not appear to have based its protest of October 23 on this ground. It claimed that the treaty rights of the Japanese had been infringed upon by the action of the San Francisco board of education in ordering the segregation of all Japanese pupils in a separate school set apart for orientals.

It may be observed in the first place that even total exclusion of aliens from school privileges would in itself in no wise onstitute a violation of international law. In the absence of treaty stipulations, a State is under no

[1] Mr. Evarts, Secretary of State, to Mr. Marsh. Wharton's Digest iii p. 695. The whole paragraph is a citation from an article by the writer on "The Calvo and Drago Doctrines" in the *American Journal of International Law* (vol. i, p. 32) to which the reader is referred for a fuller discussion of these points with a citation of authorities.

international obligation to extend to foreigners the enjoyment of civil and private rights or to place them upon an equal footing with its own nationals in these respects. Whatever rights and privileges of this sort, whether of an educational, economic, or religious nature, foreigners may enjoy, are based on convention or the principle of reciprocity, or are granted as a matter of grace and favor. All that aliens who are permitted to reside on foreign territory (and this permission is purely optional in the absence of treaty stipulation) can demand as a matter of strict right in international law is the same kind and degree of protection of person and property that nationals enjoy, and free access to the courts to secure such protection.

But it is claimed by Japan—and the claim seems to have been largely admitted in this country—that by virtue of the treaty of 1894 the Japanese were entitled, not merely to such protection, but to the same school privileges as citizens of the United States.

It is true that the treaty of 1894 grants to Japanese residing or domiciled in this country certain reciprocal rights and privileges relating to residence and travel; to the possession, succession and transfer of property, etc.; but there is no mention of school privileges. The following provisions of the treaty of 1894 have been cited in support of the Japanese contention:

ARTICLE I. The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property.

They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty

equally with native citizens or subjects to choose and employ lawyers, advocates, and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.

In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. * * *

ARTICLE II. There shall be reciprocal freedom of commerce and navigation between the territories of the two high contracting parties. * * *

It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or which may hereafter be enacted in either of the two countries.

ARTICLE XIV. The high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor, or immunity which either high contracting party has actually granted, or may hereafter grant, to the government, ships, citizens, or subjects of any other State, shall be extended to the government, ships, citizens, or subjects of the other high contracting party, gratuitously, if the concession in favor of that other

State shall have been gratuitous, and on the same or equivalent conditions if the concession shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation.

It is difficult to see how any clause in this treaty can be stretched to cover the Japanese contention. As Senator Rayner observed in his speech in the United States senate on December 12, 1906: "There is not a clause or a line of this treaty that contains by expression or intendment the slightest reference to the public school systems of any of the States of the Union, or confers any rights whatever upon the citizens of Japan to enjoy the privileges of their public educational institutions. There is not a clause or a line, although I understand that the president has been advised to the contrary, that, to the professional mind, would admit of such a construction. The most liberal interpretation of any of its terms does not allow such an interpolation or insertion to be made. The treaty does not even contain the most favored nation clause, except in reference to the particular objects that are therein specifically enumerated."

The Burlingame treaty of 1868 with China, contains an article (Art. VII.) which provides for reciprocal school privileges in all "public educational institutions under the control of the governments of China and the United States;" but it is obvious that the school privileges acquired by the Chinese in the United States as a consequence of this treaty were not extensive. At any rate, this provision in the treaty with China has not prevented the segregation of Chinese school children in the oriental school of San Francisco. Nor can it be claimed that it gives the Japanese any educational privileges by virtue

of the most favored nation clause, for that clause is specifically restricted to matters relating to residence and travel, property, and to trade and navigation. Besides, it "does not cover privileges granted on the condition of a reciprocal advantage."[2]

It has been suggested that the right of education might possibly be included under the right of residence, but this is a forced extension of the meaning of the word residence, for which, so far as the writer is aware, there is no authority whatever. It has been held that the right of residence necessarily implies the right to live and labor for a living (Baker v. City of Portland, U. S. Circuit Court, 1879, 5 Sawyer 566, 570), but it has also been held that such right to live and labor does not prevent the municipal regulation of public laundries. (Barbier v. Connolly, 1885, 113 U. S. 27.)

Special attention should be called to the fact that Article II. of the treaty provides that the previous stipulations do not "affect the laws, ordinances, and regulations with regard to trade, the immigration of laborers, police and public security" which were then in force or which might thereafter be enacted. The police powers of the State and federal government as well as the right to regulate immigration were thus expressly reserved.

But it seems to have been assumed by those who favored the Japanese contention that in some mysterious way and for some unexplained reason the treaty cited above confers school privileges in the States upon the Japanese. Even if this were the case, it by no means follows that such a provision would be constitutional or that, if constitutional, Japanese children could not be

[2] On the meaning and interpretation of the most favored nation clause, see Moore's *Digest of International Law*, v, §765.

segregated in separate schools. The children of our own colored citizens are thus separated in many localities (in the northern as well as the eastern States), and the right thus to segregate the two races has been upheld by numerous decisions of State courts and has been approved by the Supreme Court of the United States (see Plessy v. Ferguson, 1896, 163 U. S. 537, and the cases there cited). And it can scarcely be maintained that aliens enjoy greater privileges than our own citizens in these respects.

It is well known that students of the Constitution of the United States have always been divided into two opposing parties—the broad constructionists and the strict constructionists. These schools have always differed in fundamental attitude toward the Constitution as well as in mode of construction and interpretation. This difference is also manifest in their attitude toward the question of the extent and scope of the treaty-making power.

The opinion of those who hold that the treaty-making power of the United States is practically unlimited is perhaps best expressed by Charles Henry Butler (*Treaty-Making Power of the United States*, vol. i, pp. 5-6):

"*First:* That the treaty-making power of the United States, as vested in the central government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner

whatever and vested that power exclusively in, and expressly delegated it to the federal government.

"*Second:* * * * That the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign States, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions.

"*Third:* That the power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty-making power, and that acts of congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with State laws or provisions of State constitutions.

"*Fourth:* That all provisions in State statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of congress based on and enforcing the same, even if such provisions relate to matters wholly within State jurisdiction."

On the other hand, the views of the strict constructionists find their best expression in a report from the house judiciary committee bearing on the treaty of reciprocity with the Hawaiian Islands in 1887, prepared by John Randolph Tucker (see House Doc. of 49th Congress, 2d Session, March 3, 1887, Report No. 4177, pp. 4-5):

"The language of the Constitution of the United States which gives the character of 'supreme law' to a treaty, confines it to 'treaties made under the authority of the

United States.' That authority is limited and defined by the Constitution itself. The United States has no unlimited, but only delegated authority. The power to make treaties is bounded by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers by virtue of which the United States and their government exist and act. It cannot contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do. (3 Story, *Com. on Const.*, §1501.)

"It is on this principle that a treaty can not take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty cannot alien a State or dismember the Union, because the Constitution forbids both.

"In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the nexus which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all it attempts to do beyond it is *ultra vires*—is null, and cannot bind them."

The time for pronouncing upon the relative merits of the theories or doctrines of these opposing schools of constitutional construction seems to have passed, for the broad constructionists appear to have practically won the battle all along the line. Although an act of congress renders a prior inconsistent treaty null and void, it has been held again and again both by State and federal courts (including the Supreme Court of the United States) that any treaty made "under the authority of the United States," is "the supreme law of the land," and that the "judges in every State" are "bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The strongest cases in support of this contention are those in which it has been held that State laws which interfere with the rights of aliens to hold and transmit real property are null and void when such rights have been granted by treaty (see Chirac v. Chirac, 2 Wheat 259; Carmeal v. Banks, 10 Wheat. 181; Hauenstein v. Lynham 100 U. S. 483, etc.) But this is no serious invasion of the police power or reserved rights of the States, inasmuch as only a comparatively small amount of property is affected by these decisions. Besides, reciprocal privileges of this nature are very frequently the subject of negotiation, and the federal government would be greatly embarrassed by a lack of power to grant them. This is not the case with educational privileges which are seldom the subject of negotiation. Yet Secretary Bayard said in 1886: "Were the question whether a treaty provision which gives to aliens rights to real estate in the United States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional."[3]

[3] Moore, *Digest*, v, §738, p. 178.

That the treaty-making power is not absolutely unlimited is admitted by the broadest constructionists with perhaps one or two exceptions. Even Butler (*Treaty-Making Power*, ii, p. 350) admits that "the fact that the United States is a constitutional government precludes the idea of any absolutely unlimited power existing. The Supreme Court has declared that it must be admitted as to every power of society over its members that it is not absolute and unlimited; and this rule applies to the exercise of the treaty-making power as it does to every other power vested in the central government. The question is not whether the power is limited or unlimited, but at what point do the limitations begin."

The strongest opinion in favor of the unlimited extent of the treaty-making power is that of Justice Chase in the case of Ware v. Hylton (3 Dall. 236), in 1796. It is as follows:

"There can be no limitation on the power of *the people* of the United States. By their authority the State constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State constitutions, or to make them yield to the general government and to treaties made by their authority. A treaty cannot be the *supreme law* of the land, that is, of all the United States, if any act of a State legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned whether the *less* power, an act of the State legislature, must not be prostrate? It is the declared will of the *people* of the United States that every treaty made by the authority of the United States shall be supe-

rior to the *constitution* and *laws* of any *individual State*; and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only by a repeal or nullification of a State legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole. *The people of America have been pleased to declare, that all treaties made before the establishment of the national Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded.*"

This opinion of Justice Chase in Ware v. Hylton was quoted by Justice Swayne in Hauenstein v. Lynham (100 U. S. 483), in 1879, in favor of the view that a State law must give way to a treaty; but it is well to call special attention to the fact that Justice Swayne omitted the last sentence (which I have for this reason placed in italics) of the quotation given above. This omission has been the source of much misunderstanding and misrepresentation resulting in an exaggerated view of the real value and importance of the case of Ware v. Hylton as a precedent; for anyone who merely takes the trouble to read the syllabus of that case can readily see that it covers the real point of the decision. All else is *obiter*.

It is, however, only fair to Justice Swayne to point out that he explicitly stated that he did not "concur in everything said in the extract." He had declared in 1870: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." (The Cherokee Tobacco, 11 Wallace, 616. See also his opinion in U. S. v. Rhodes, U. S. Circuit Court, 1866, U. S. Rep. 28 at p. 43.) Even Justice Chase does not say that a treaty may override the Constitution of the United States.

The writer knows of no justice of the Supreme Court who states the theory of the unlimited extent of the treaty-making power in such unqualified terms as did Justice Chase in the case of Ware v. Hylton. Justice Field (in Geoffrey v. Riggs, 133 U. S., 258) did not believe that the treaty-making power of the United States extended so far as to "authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States." In the License Cases of 1847 (5 Howard 613) Justice Daniel even maintained that "treaties, to be valid, must be made within the scope of powers vested by the Constitution; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away one right of a State any citizen of a State." In the Passenger Cases of 1849 (7 Howard 466), Chief Justice Taney gave it as his opinion that "if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court would neither recognize nor enforce.'' He added: "I had supposed this question not now open to dispute.'' Although these opinions are clearly *obiter dicta*, and no treaty has ever been declared void and unconstitutional by any federal court, this is probably only because no case has arisen calling for such a decision. The courts

are naturally extremely reluctant to embarrass the federal government in the exercise of the treaty-making power,[4] and our government has been very careful to keep within the scope of its powers in the negotiation of treaties. Thus, in 1899, the Department of State declined a proposal of the British government to negotiate a treaty to prevent discriminatory legislation by the States, subjecting foreign fire-insurance companies to higher taxes than domestic companies, on the ground that the people of the United States were indisposed to permit any encroachment upon the exercise of their powers of local legislation.[5]

Among American statesmen who have placed themselves on record in favor of the principle that "the Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other" are Jefferson, Gallatin, Adams, Calhoun, Marcy, Blaine, and Bayard.[6]

In his *Treaty-Making Power*[7] Butler informs us that there are numerous cases in which both State and federal courts have refused to construe a treaty so that it renders State legislation inoperative.

"The New York court of appeals held that a statute preventing intrusions on Indian lands within the State did not interfere with the obligations of the treaty of 1842 with the Seneca Indians, but that it was within the police power of the State, and that the State could not be

[4] In Ware v. Hylton (3 Dall. 237), Justice Chase, the strongest champion of the treaty-making power in the history of the United States Supreme Court, expressly declined to give an opinion as to whether a treaty could override the Constitution. He added: "If the court possesses the power to declare treaties void, I shall never exercise it, but in a very clear case indeed."

[5] Moore, *Digest*, v, §735, pp. 164–165.

[6] Moore, v, §§735–736.

[7] §356.

barred from the proper exercise of police powers to maintain and to preserve the peace.

"The Supreme Court of the United States sustained the court of appeals in this case (Cutler v. Dibble, 21 Howard, 366).

"It was also held that the State dispensary statute of South Carolina did not interfere with the rights of Italian citzens to freely carry on business in this country under the stipulations in the treaty of 1871 with Italy. There are other cases in which State laws have been upheld, including statutes establishing quarantine and health regulations, succession taxes, punishment of crimes, and proving title to grants in States carved out of ceded territory."[8]

The extent of the police powers and reserved rights of a State may be seen by consulting the Slaughter House Cases of 1872 (16 Wallace, 36) and the Lousiana Succession Tax Cases (see Prevost v. Greneaux, 19 Howard, 1; Frederickson v. State of Louisiana, 23 Howard, 445, etc.) Speaking of these decisions, Butler, the leading champion of the unlimited extent of the treaty-making power of the United States government, says (ii, p. 56): "The Supreme Court has, in regard to treaties, as it has in regard to federal statutes, ever kept in view the exclusive right of States to regulate their internal affairs and has not allowed either treaty stipulations or federal statutes to be so construed as to prevent the proper exercise of police powers."

In People v. Gallagher (93 N. Y. Rep. 447) it was held that "the privilege of receiving an education at the expense of the State, being created and conferred solely

[8] See Butler's *Treaty-Making Power*, ii, pp. 48–56 and notes, for a digest of a number of such cases.

by the laws of the State, and always subject to its discretionary regulation, might be granted or refused to any individual or class at the pleasure of the State." This view of the question was also taken in State, *ex rel.* Garnes v. McCann (21 Ohio St. 198) and Cary v. Carter (48 Ind. 327).

The writer, although by no means a strict constructionist, does not believe that the federal government has the right, by treaty or otherwise, to encroach upon the police power or reserved rights of the States to the extent of directing or controlling their public school systems. If there are any constitutional limitations upon the treaty-making power, if the States retain any autonomy whatsoever, they surely preserve a right to the exclusive control of the schools which they maintain out of their resources. What greater trespass upon the province of self-government, what more serious violation of fundamental rights can be imagined than federal interference with a State's management of its own schools? If our federal government should barter away such fundamental rights as these, and the courts hold such action constitutional, then the double structure of State and federal government which our fathers reared will crumble into ruins, and a new centralized edifice will take its place in which the States will be reduced to mere provinces or adminstrative units.