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International Political Questions in the National Courts

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satisfaction of knowing that their labors will serve as a foundation for any committee which the Council appoints. Accordingly, what at first seemed to be a task of Sisyphus now promises to be marked off by metes and bounds and made directly purposeful.

President Coolidge, in his annual message to Congress, on December 4, 1924, while not mentioning the action of the Assembly of the League *eo nomine*, referred with approval to the "efforts which are being made toward the codification of international law." Truly the present seems to be a period of confidence in unofficial rather than governmental initiative; therefore the President looks forward more hopefully in the first instance "to a coöperation among representatives of the bar and members of international law institutes and societies," leaving to governments the approval of the projects when sufficiently developed.

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INTERNATIONAL POLITICAL QUESTIONS IN THE NATIONAL COURTS

Much has been made of the principle, in England and America, that international law is part of the national law to be applied by national courts in appropriate circumstances. As Mr. Justice Gray has expressed it, in the *Paquete Habana:*

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.[1]

The principle is useful, where it is applicable, but it is subject to limitations which are sometimes inadequately appreciated. Indeed it is not often that "questions of right" depending upon international law, as distinguished from questions of jurisdiction, are really presented in the national courts. Such questions are more likely to fall within the exclusive competence of the so-called political departments of government.

There is at the outset a primary limitation upon the principle which is expressed in the extremely potent proposition that courts must always yield to the law-making authority. If the law-making department has spoken in terms free from ambiguity, the courts must apply the rule laid down whether it violates international law or not. Demonstrating the point with an impossible but poignant case, Stephen has declared that:

> If Parliament were to pass an act to the effect that the whole criminal law of England should apply to the conduct of Frenchmen in France,

[1] 175 U. S. 677, 700. See Triquet *v.* Bath, 3 Burr. 1478; Respublica *v.* De Longchamps, 1 Dall. 111; Hilton *v.* Guyot, 159 U. S. 113, 163; West Rand Mining Co. *v.* The King, [1905] 2 K. B. 391; Picciotto, *Relation of International Law to the Law of England and of the United States.*

> and that the Central Criminal Court should have jurisdiction over all offences against that law committed in France; and if a Frenchman who had murdered another Frenchman in Paris were brought for trial before the court, the court would try him as it would try an Englishman who had committed a murder in London, but the result might probably be war between France and England.[2]

Courts reconcile legislative enactments and international law wherever it is reasonably possible to do so, but in the event of conflict there is no choice. The statutes are paramount.

A second limitation upon the priciple, intimately related to the first, has been described as the doctrine of political questions.[3] Many, if not most, of the international questions which arise in litigation are regarded as political in nature and hence not within the competence of the judicial department at all.

It hardly requires illustration to establish that most questions arising out of or involving a rupture of diplomatic relations [4] and all questions of peace or war [5] are preëminently for the political departments to decide.

> The judiciary, under the constitution, cannot declare war or make peace. . . . The condition of peace or war, public or civil, in a legal sense, must be determined by the political department, not the judicial. The latter is bound by the decision thus made.[6]

When war shall be declared, how it shall be conducted, and when it shall be brought to an end are matters exclusively within the competence of those charged with the conduct of international relations. As was observed by one of the highest British tribunals, in the case of the *Zamora*, "Those who are responsible for the national security must be the sole judges of what the national security requires." [7]

Familiar illustrations remind us that many important peace-time questions are excluded from judicial competence by the same effective doctrine. If the political departments of government dispute a boundary with a foreign nation, the courts must bring their decisions into harmony with the

[2] *History of the Criminal Law of England*, Vol. II, pp. 37. See Beale, "Jurisdiction of Courts over Foreigners," 26 *Harvard Law Review*, 193, 194. See also Mortensen *v.* Peters, 8 Sess. Cas. 93; United States *v.* Siem, 299 Fed. 582, 583.

[3] See Field, "The Doctrine of Political Questions in Federal Courts," 8 *Minnesota Law Review*, 485.

[4] See the *Gul Djemal*, 296 Fed. 563. See also the cases involving international recognition, discussed *infra*.

[5] See United States *v.* Anderson, 9 Wall. 56; the *Protector*, 12 Wall. 700; the Chinese Exclusion Case, 130 U. S. 581, 603; Hamilton *v.* McClaughry, 136 Fed. 445, 449; *In re* Wulzen, 235 Fed. 362, 365; United States *v.* Oglesby Grocery Co., 264 Fed. 691, 692. See also United States *v.* Yorba, 1 Wall. 412; Hornsby *v.* United States, 10 Wall. 224; More *v.* Steinbach, 127 U. S. 70.

[6] United States *v.* One Hundred and Twenty-Nine Packages, Fed. Cas. No. 15,941, p. 288.

[7] [1916] 2 A. C. 77, 107.

position thus asserted.[8] In the famous case of Foster *v.* Neilson, Chief Justice Marshall declared:

> In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established.[9]

After reviewing executive proclamations and legislative acts asserting title to the territory in dispute, Chief Justice Marshall continued:

> After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that the construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question and in its discussion, the courts of every country must respect the pronounced will of the legislature.[10]

If the political departments assert jurisdiction over any territory, the courts are concluded by the action taken. Thus when the authority of the United States over Navassa Island was challenged, in Jones *v.* United States, the Supreme Court replied:

> Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.[11]

Equally conclusive are assertions of jurisdiction upon the seas. In one of several cases arising out of the claim made by the United States to control the seal fisheries in Behring Sea, a federal court declared:

[8] See De la Croix *v.* Chamberlain, 12 Wh. 599, 600; Foster *v.* Neilson, 2 Pet. 253; Garcia *v.* Lee, 12 Pet. 511.

[9] 2 Pet. 253, 307.

[10] 2 Pet. 253, 309.

[11] 137 U. S. 202, 212. See also Watts *v.* United States, 1 Wash. Terr. 288, 295; Wilson *v.* Shaw, 204 U. S. 24, 32.

> National dominion and sovereignty may be extended over the sea as well as over the land, and in our government, when congress and the president assert dominion and sovereignty over any portion of the sea, or over any body of water, the courts are bound by it.[12]

In a recent forfeiture proceeding instituted against a foreign vessel seized on the high seas for smuggling liquor into the United States, another federal court has remarked:

> The line between territorial waters and the high seas is not like the boundary between us and a foreign power. There must be, it seems to me, a certain width of debatable waters adjacent to our coasts. How far our authority shall be extended into them for the seizure of foreign vessels which have broken our laws is a matter for the political departments of the government rather than for the courts to determine.[13]

In like manner, if the political departments deny the jurisdiction of a foreign state, the courts must acquiesce and frame their decisions accordingly. This was done in Williams *v.* Suffolk Insurance Co., in 1839, after the United States had denied the authority of Buenos Ayres over the Falkland Islands. Justice McLean said:

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.[14]

The same reasons which require that the judiciary be guided by the executive and legislative departments in all international contests over territorial or maritime jurisdiction, at home or abroad, require also that the courts defer to the same departments in controversies which turn upon a question of international recognition. Whether there is a condition of insurrection in a foreign state, whether the insurgents shall be regarded as belligerents, whether a successful revolutionary government shall be recognized in the position which it has in fact established, whether a new state shall be treated as a member of the international community of states, these are questions which it is exclusively for the political departments of government to decide.[15] In the comparatively recent case of the *Rogdai*,

[12] The *Kodiak*, 53 Fed. 126, 130. See also the *Marianna Flora*, 11 Wh. 1, 39; *In re* Cooper, 143 U. S. 472, 499, 502, 503; the *James G. Swan*, 50 Fed. 108, 110.

[13] The *Grace and the Ruby*, 283 Fed. 475, 478.

[14] 13 Pet. 415, 420. See also Foster *v.* Globe Venture Syndicate, 69 L. J. Ch. 375, 377.

[15] See the *Three Friends*, 166 U. S. 1; United States *v.* Palmer, 3 Wh. 610; Gelston *v.* Hoyt, 3 Wh. 246; Dickinson, "The Unrecognized Government or State in English and American Law," 22 *Michigan Law Review*, 29, 118.

an action instituted by the Soviet Republic to secure possession of a Russian naval transport, the court observed:

> The question at issue is one of state; it involves international relations, and is primarily for the State Department. If, as contended by the libelants, it be granted that a revolution has taken place in Russia, and that the Soviet Republic is in actual control, the question when, if at all, such *de facto* government shall be recognized, is a political one. It involves considerations of national policy, which are not justiciable, and touching it the voice of the Chief Executive is the voice, not of a branch of the government, but of the national sovereignty, equally binding upon all departments.[16]

Many of the most important matters pertaining to the negotiation, observance, and termination of treaties are likewise within the exclusive competence of the political departments. Whether a foreign government is competent to negotiate, whether it has power to ratify, how the treaty shall be construed, at least in respect to matters of public right, whether it shall be treated as terminated upon the succession of another state to the foreign contracting party, whether it shall be treated as terminated on account of violations by the other contracting party, whether it shall be observed, suspended, or ended, these again are primarily political questions.[17] In Doe *v.* Braden, Chief Justice Taney declared that:

> It would be impossible for the executive department of the government to conduct our foreign relations with any advantage to the country, and fulfil the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.[18]

In Taylor *v.* Morton, Mr. Justice Curtis said:

> Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it

[16] 278 Fed. 294, 296. For the same reason, questions of diplomatic character are exclusively for the executive to decide. United States *v.* Liddle, 2 Wash. C. C. 205; United States *v.* Ortega, 4 Wash. C. C. 531; United States *v.* Benner, Baldw. 234; *Ex parte* Hitz, 111 U. S. 766; *In re* Baiz, 135 U. S. 403; the *Rogday*, 279 Fed. 130; Savie *v.* City of New York, 193 N. Y. Supp. 577.

[17] See Doe *v.* Braden, 16 How. 635. See also United States *v.* Rauscher, 119 U. S. 407, 423–4; *In re* Taylor, 118 Fed. 196; Johnson *v.* Browne, 205 U. S. 309, 317; Charlton *v.* Kelly, 229 U. S. 447, 468. Even in matters affecting private rights, a construction adopted by the political departments weighs heavily in the courts. Charlton *v.* Kelly, *supra*. See Terlinden *v.* Ames, 184 U. S. 270, 288; United States *v.* Jordan, 1 Extraterritorial Cases 259. See also Ware *v.* Hylton, 3 Dall. 199, 260; Taylor *v.* Morton, 2 Curtis 454, 461; Charlton *v.* Kelly, *supra*. And also Head Money Cases, 112 U. S. 580, 598; the Chinese Exclusion Case, 130 U. S. 581, 602; Techt *v.* Hughes, 229 N. Y. 222, 242, 243.

[18] 16 How. 635, 657.

> is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws.[19]

Delivering the opinion of the Supreme Court in the Head Money Cases, Mr. Justice Miller remarked:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.[20]

Treaties are always subject, of course, so far as the courts may be concerned, to such acts as Congress may subsequently pass for their enforcement, modification, or repeal.[21]

The admission, exclusion, or expulsion of aliens is also a political power and controversies with respect to its exercise are beyond judicial competence. In Fong Yue Ting *v.* United States, it was said:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government.[22]

In the earlier Chinese Exclusion Case, Mr. Justice Field had remarked:

> If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.[23]

It is difficult to conceive of any act of the executive or legislative departments, affecting adversely the interests of a foreign country, which the courts would feel competent to regard as legally wrong in its international aspect.[24] And, on the other hand, it is well settled that no court will ever sit in judgment on the acts of a foreign government done within its own

[19] 2 Curtis 454, 461.

[20] 112 U. S. 580, 598.

[21] Taylor *v.* Morton, 2 Curtis 454; Head Money Cases, 112 U. S. 580; Whitney *v.* Robertson, 124 U. S. 190.

[22] 149 U. S. 698, 713.

[23] 130 U. S. 581, 606. See also Nishimura Ekiu *v.* United States, 142 U. S. 651, 659; Bugajewitz *v.* Adams, 228 U. S. 585, 591.

[24] See O'Reilly *v.* Brooke, 209 U. S. 45, 52.

dominion.[25] In the early case of the *Invincible*, Mr. Justice Story declared that:

> The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and the parties to such acts are not responsible therefor in their private capacities.[26]

In the more recent case of Earl Line S. S. Co. *v.* Sutherland S. S. Co., Judge Learned Hand has said:

> The act of another sovereign within its own territory is of necessity legal. . . . It is quite true that the act of any public official of a foreign state may in fact be illegal by the municipal law of that state, but no domestic court may admit such a possibility without trenching upon the prerogative of its own executive.[27]

Finally, it is noteworthy that a very large proportion of the controversies of international import which courts do feel competent to decide are controversies involving only the question of immunity from jurisdiction. Cases involving the immunities of foreign states, diplomatic representatives, public ships, and other kinds of public property afford illustrations. In all such cases the substantial controversy is settled, if at all, through the intervention of the political departments.

No attempt has been made to achieve scientific analysis of the above cases or even to make the mere enumeration in any sense complete.[28] The writer hopes merely to have suggested how very limited the judicial function really is in most cases of international significance. The principle that international law forms part of the national law achieves little in the way of subjecting international controversies to the processes of judicial settlement. The obvious propriety of subjecting many of the controversies reviewed to settlement by judicial procedure indicates that there is a vast field, but slightly tilled, in which international judicial settlement may be developed. In the meantime it should be emphasized—it cannot be emphasized too often—that in all matters of international import the political departments of government, legislative and executive, are not only vigilant advocates for the nation which they represent. They are also responsible instrumentalities in the ultimate process by which international justice is achieved.

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[25] The *Invincible*, 2 Gall. 29; Underhill *v.* Hernandez, 168 U. S. 250; Oetjen *v.* Central Leather Co., 246 U. S. 297; Ricaud *v.* American Metal Co., 246 U. S. 304; Hewitt *v.* Speyer, 250 Fed. 367; Earl Line S. S. Co. *v.* Sutherland S. S. Co., 254 Fed. 126; the *Adriatic*, 258 Fed. 902. See also American Banana Co. *v.* United Fruit Co., 213 U. S. 347.

[26] 2 Gall. 29, 44.

[27] 254 Fed. 126, 129.

[28] For more systematic analysis and the citation of additional cases, see Field, "The Doctrine of Political Questions in Federal Courts," cited *supra*. See also Corwin, *President's Control of Foreign Relations;* Wright, *Enforcement of International Law through Municipal Law in the United States*, pp. 17, 19, 25, 28, 29, 44, 48, 84, 86, 92, 101, 106, 143, 201, 218, and *passim;* Wright, *Control of American Foreign Relations*, pp. 1, 47, 75, 107, 143, 191, 247, 251, and *passim*.