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ON AMENDING THE TREATY-MAKING POWER: A COMPARATIVE STUDY OF THE PROBLEM OF SELF-EXECUTING TREATIES*

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THE current furor concerning the treaty-making power of the United States has been aroused by the apprehension that this country might become a party to certain multilateral treaties in the social and economic fields, and, notably, the draft Covenants on Human Rights, the Genocide Convention and the Convention on Political Rights of Women. The plethora of proposed constitutional amendments now before the Congress merely marks an intensification of the controversy, recurrent throughout our history, concerning the legal effect of Article VI, Section 2, of the Constitution of the United States. Problems concerning the relative authority of treaties and other international agreements, on the one hand, and of the Constitution, Acts of Congress, and state constitutions and legislation, on the other, have led to proposals for a change in a law and practice which have become traditional in this country. These far-reaching proposals would sweep away well-established constitutional land-marks, and would, in effect, involve a repeal of the fundamental rule, hitherto unquestioned, that "all treaties made . . . under the authority of the United States shall be the supreme law of the land. . . ."[1]

Senator John W. Bricker, the author of the leading proposal for the

*The present article is, in part, based upon an address delivered on April 27, 1951, before the American Society of International Law. AM. SOC. INT. L. PROC. 82-100 (1951). Unless otherwise indicated the translations are by the author.

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1 On the framing of Article VI, §2, see Myers, "Treaty and Law under the Constitution," 26 DEPT. OF STATE BUL. 371 (1952); Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 UNIV. PA. L. REV. 26 at 34-43 (1952); and, on the position of international agreements in the American constitutional system, Bishop, "The Structure of Federal Power over Foreign Affairs," 36 MINN. L. REV. 299 (1952); Wright, "Congress and the Treaty-Making Power," AM. SOC. INT. L. PROC. 48-57 (1952). On the immediate issues raised by the proposals now before the Congress, see, for example, Perlman, "On Amending the Treaty Power," 52 COL. L. REV. 825 (1952); Chafee, "Amending the Constitution to Cripple Treaties," 12 LA. L. REV. 345 (1952); and Sutherland, "Restricting the Treaty Power," 65 HARV. L. REV. 1305 (1952).

curtailment of the treaty-making power, has discovered, at this late date, that there is in our Constitution "a menacing loophole" which makes it "possible for the sovereignty and the independence of the United States to be surrendered by treaty," and that by "a ruthless exercise of the treaty-making power a President, with the support of two-thirds of the Senators present and voting, could revolutionize the relationship between the American people and their Government as prescribed by the Constitution."[2] Others, who have communicated their constitutional alarms to the Senator and his supporters, have found that the treaties by which this country is threatened now confront us with a "new concept, revolutionary in character," by which our domestic law is "henceforth not only to be influenced, but in many cases, controlled and overridden by international pronouncements under the treaty-making power vested in the President and Senate of the United States."[3]

[2] 98 CONG. REC. 908 (Feb. 7, 1952).

[3] Holman, "Treaty Law-Making," 36 A.B.A.J. 707 at 708 (1950). See, in general, ALLEN, THE TREATY AS AN INSTRUMENT OF LEGISLATION (1952); and the annual A.B.A. REPORT OF THE COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS (1949-1952).

The Committee on Peace and Law has expressed its misgivings with regard to "the new premise that international law is no longer the law of states but that of individuals." It apparently considers that it has sufficiently condemned this premise by quoting, "without comment," a passage from JESSUP, A MODERN LAW OF NATIONS 137 (1948), in which the growing tendency to deal internationally with matters affecting individuals is approved. REPORT OF THE COMMITTEE ON PEACE AND LAW THROUGH UNITED NATIONS 6 (1949) [hereinafter cited Report of the Committee on Peace and Law]. It is a somewhat ironic fact that this tendency, deplored by the committee as revolutionary, is condemned by a Soviet jurist as a "reactionary theory of the individual as a subject of international law." Bogdanov, "American International Law Doctrine in the Service of Imperialist Expansion," SOVETSKOE GOSUDARSTVO I PRAVO (May, 1952), quoted by Kulski in 47 AM. J. INT. L. 128 (1953).

The current controversy has been centered upon the judgment of an intermediate court of appeal in the case of Sei Fujii v. California, (Cal. App. 1950) 217 P. (2d) 481, in which the California Alien Land Law was held to be unenforceable on the ground of its repugnancy to the provisions of the United Nations Charter relating to the observance of human rights. See Preuss, "Some Aspects of the Human Rights Provisions of the Charter and their Execution in the United States," 46 AM. J. INT. L. 289 (1952). On April 17, 1952 the Supreme Court of California reached the same result, but by a different route, in holding that the law at issue was invalid, as inconsistent with the equal protection clause of the Fourteenth Amendment. 38 Cal. (2d) 718, 242 P. (2d) 617 (1952). Holman makes the following comment upon the latter decision: "Thus, though in a technical legal sense the California Supreme Court holds the Charter is not a self-executing treaty, the Charter is allowed to produce the same effect by projecting itself into the thinking of the court in a new construction of the fourteenth amendment to the Constitution of the United States to the extent that earlier statutes and decisions upon the identical issue that have stood the experience of time and experience are swept away. . . . When the latest Fujii decision is reviewed from every angle . . . one cannot escape the conclusion that [the] United Nations Charter effected the overthrow of the established law of a great State as the people of that State had determined it for themselves, and that this change of domestic law influenced by the provision of a treaty would not have occurred if there had been a

The "Bricker Amendment," introduced as Senate Joint Resolution 1 on January 7, 1953,[4] was intended, in part, to prohibit any abridgment or denial of rights enumerated in the Constitution (section 1), and to prevent any foreign power or international organization from supervising, controlling or adjudicating such rights of American citizens, "or any other matter essentially within the domestic jurisdiction of the United States" (section 2). The resolution, as reported favorably by the Committee on the Judiciary on June 15, 1953, was so amended as to substitute for the above-cited provisions, the following:

> SECTION 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

In the present article we are not concerned with the merits of such provisions as those above-cited, but solely with that requirement of section 2 which would deprive treaties of their self-executing character

constitutional amendment assuring the judges that it was not the will of the American people that their local laws be changed merely by a treaty or the so-called moral commitments thereof." Treaties and Executive Agreements: Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate on S.J. Res. 130, 82d Cong., 2d sess. (1952). For a sane perspective upon the Fujii case, see Fairman, "Finis to Fujii," 46 AM. J. INT. L. 682 (1952).

[4] This resolution, sponsored by sixty-three other Senators, is a somewhat modified form of S.J. Res. 130, which was introduced by Senator Bricker in the Eighty-Second Congress, second session. Senator Bricker has given the fullest exposition of his views in a speech delivered on the floor of the Senate on March 13, 1953, 99 CONG. REC. 2022-2028 (March 13, 1953). See Treaties and Executive Agreements: Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d Cong., 2d sess., on S.J. Res. 130; Treaties and Executive Agreements: Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 83d Cong., 1st sess., on S.J. Res. 1 and S.J. Res. 43; and Constitutional Amendment Relative to Treaties and Executive Agreements, Report of the Committee on the Judiciary [To accompany S.J. Res. 1] together with Minority Views, 83d Cong., 1st sess. (June 15, 1953).

S.J. Res. 1, as amended and reported out on June 15, 1953, adopts the substance of section 1 of S.J. Res. 43, introduced by Senator Watkins on February 16, 1953. The latter, in turn, was inspired by a resolution adopted by the House of Delegates of the American Bar Association, February 26, 1952, upon the motion of its Committee on Peace and Law through United Nations. REPORT OF THE COMMITTEE ON PEACE AND LAW 4 (1952).

In the present session of the Congress, resolutions identical with S.J. Res. 130 have been introduced in the House as H.J. Res. 7 (Auchincloss), H.J. Res. 79 (Smith of Wisconsin), H.J. Res. 25 (Dolliver), H.J. Res. 143 (Van Zandt), and H.J. Res. 171 (Norrell). Resolutions identical, or virtually so, with S.J. Res. 1 have been introduced as H.J. Res. 107 (Gross) and H.J. Res. 147 (Gross). The following resolutions are identical with S.J. Res. 1 (as amended) and S.J. Res. 43, save for omitting the section on executive agreements: H.J. Res. 32 (Fisher), H.J. Res. 84 (Wilson of Texas), H.J. Res. 141 (Pelly), H.J. Res. 150 (Lyle), and H.J. Res. 172 (Norrell). Compare the still more drastic restrictions upon the treaty-making power provided by H.R. 2515 (Burdick), H.R. 2516 (Burdick) and H.R. 28 (Dondero). For proposed amendments which would provide for the advice and consent of both Houses of the Congress prior to the ratification of treaties, see note 65 infra.

as a part of the supreme law of the land.[5] This section, a revised version of section 3 of the original S.J. Res. 1, provides:

> SECTION 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.[6]

Although the arguments advanced in favor of this radical and truly revolutionary change have frequently been expressed in legal terms, "the conjuring up of objections [to the present method of treaty-making] on constitutional grounds is no more than the parading of theories long since rejected in the development of our constitutional processes."[7] They represent a "curious kind of constitutional frustration" and a

[5] "A self-executing treaty is one which furnishes a rule for the executive branch of the Government, the courts, the States, and private individuals, either by operation of its own terms or because it can be implemented by the executive branch or the States without Congressional intervention. On the other hand, a non-self-executing treaty is one which requires implementation by Congress before it can be enforced as the supreme law of the land." Evans, "Some Aspects of the Problem of Self-Executing Treaties," AM. SOC. INT. L. PROC. 66 at 73, 74 (1951). See also, comment 48 MICH. L. REV. 852 (1950).

The confusion with regard to the nature of self-executing treaties which frequently prevails may be illustrated by the following colloquy between a member of the Senate Foreign Relations Committee and the Solicitor General of the United States, January 23, 1950:

"Senator HICKENLOOPER. The [Genocide] Convention, as it is contemplated, is in effect self-executing because it binds us to pass laws implementing it. The discretion as to whether or not we pass laws is taken away from us. We agree and are bound by the provisions of the convention to pass laws. Therefore to that extent it is self-executing.

"Mr. PERLMAN. Senator, that has not been considered to be a self-executing provision.

"Senator HICKENLOOPER. What do you mean by self-executing? I would like to get this straight so far as the definition is concerned.

"Mr. PERLMAN. I mean that if you have a treaty that is so complete in itself that it does not require any further legislative action, that is a self-executing treaty."

The Genocide Convention: Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 82d Cong., 2d sess., on Executive O, p. 31 (1950).

[6] S.J. Res. 1, as introduced provided: "A treaty shall become effective as internal law only through enactment of appropriate legislation." The added requirement that such legislation must fall within the delegated legislative power of the Congress in the absence of treaty is derived from the "Watkins Amendment" (S.J. Res. 43). Its obvious purpose is to effect a legislative "recall" of the judgment of the Supreme Court in the case of Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920), which an active member of the Committee on Peace and Law has characterized as having been motivated by "deep concern for the food supply of wild duck for a suffering people. . . ." Rix, "Human Rights and International Law," AM. SOC. INT. L. PROC. 52 (1949).

Any objection to this section applies, a fortiori, to section 3 of S.J. Res. 1 (as amended), which provides: "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article." See a memorandum on the "Position of the Department of State regarding proposals 'to Impose Limitations with regard to Executive Agreements,'" Dept. of State, Treaty Affairs, Office of the Legal Adviser (Feb. 20, 1952) (mimeographed); and the statement of Secretary of State John Foster Dulles, Hearings on S.J. Res. 1 and S.J. Res. 43 (cited, note 4 supra) p. 825.

[7] Philip B. Perlman, in The Genocide Convention: Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 82d Cong., 2d sess., on Executive O, p. 52 (1950).

"retreat into an asserted constitutional difficulty which is hardly more than a screen for the deeper internal cleavages with respect to commitments which considerable numbers of our people are reluctant to undertake."[8]

The immediate controversy may prove to have been somewhat allayed by the recent announcement by the Secretary of State that the United States does not intend to become a party to the projects and conventions at issue. However, the fundamental issue which he raised remains of whether our nation's ability to deal with other countries should be gravely impaired by restrictions on the treaty-making power.[9]

A common feature of the Bricker amendment and other proposed constitutional revisions is that a treaty shall in no case become internally operative *unless, until,* or *except to the extent that,* it shall have been expressly incorporated into the internal domestic order by a statute of Congress. Such a provision, it is asserted, is necessary in order to place the United States on a "parity," on a plane of "equality," or in a position of "mutuality" with other nations. The United States, it is alleged, is in a "unique constitutional position," or has an "isolated status," in providing that certain treaties, described as self-executing, shall be executory at the time they become obligatory internationally, and without the necessity of subsequent legislation. It is variously stated that the United States is the only country (or, perhaps, the only country except France) or that it is the only federal state (or one of the few federal states) in which this situation obtains.[10] Senator Bricker has repeatedly made this contention. Thus, on March 13, 1953 he stated on the floor of the Senate: "Our Constitution is unique in that it permits treaties to become the supreme law of the land without legislative action. Section 3 [of S. J. Res. 1] provides for equality of international obligations."[11]

It is submitted that these allegations of the "uniquity" or "quasi-uniquity" of American law and practice with regard to the self-execut-

[8] DICKINSON, LAW AND PEACE 137, 139, and, in general, 134-144 (1951).

[9] Statement of John Foster Dulles, Hearings on S.J. Res. 1 and S.J. Res. 43, 83d Cong., 1st sess., p. 825 (1953).

[10] Thus Holman asserts: "In all other countries except the United States even after the ratification of a pact or treaty, the state may decide to what extent it will implement the treaty by the passage of national legislation. We are the only country (except possibly France) facing the peculiar legal situation that when a treaty is ratified by our constitutional process—by our Senate—its provisions become a part of the supreme law of the land. . . ." "International Proposals Affecting So-Called Human Rights," 14 LAW AND CONTEM. PROB. 479 at 487 (1949). See also the A.B.A. REPORT OF THE COMMITTEE ON PEACE AND LAW 24 (1950).

[11] 99 CONG. REC. 2026 (March 13, 1953).

ing character of certain treaties are based upon: (1) a superficial examination of foreign practice, and, particularly, upon an exclusive reliance upon the formal texts of constitutional instruments;[12] (2) a misunderstanding of the process by which treaties are given effect under foreign legal systems, and of the rôle played by the legislature in this process, especially in countries of parliamentary government;[13] and (3) the influence of the dogmas of a dualistic and voluntaristic conception of international law which logically involves, or very nearly approaches, a negation of the very notion of international legal obligation.

The United Kingdom is most frequently cited as an example of a country with which the United States is not in a position of "equality" or "mutuality," in so far as the implementation of treaty obligations is concerned, since, as the Privy Council has asserted: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action."[14]

A leading authority has stated: "Treaties which for their enforcement by British courts of law require some addition to or alteration of

[12] "It is probably the case that some written constitutions are in certain respects scarcely less difficult to interpret than if they were unwritten, having been so glossed upon by subsequent governmental decrees or interpretations of the courts that it may in many cases be a matter of real difficulty to ascertain precisely what the true position is." Fitzmaurice, "Do Treaties Need Ratification?" 15 BRIT. Y.B. INT. L. 113 at 131-132 (1934).

[13] "The contention that the change would place the United States on a parity with other nations in the treaty-making process, does not withstand analysis. The situation in the United States is in no way comparable to that existing in countries like Great Britain, France, Holland, or Belgium, for example, where the executive is chosen by the majority of the Parliament or legislative body. In those countries, the government in power controlling both the executive and legislative branch must necessarily be in a position to implement any treaty negotiated by it with a legislative act—otherwise the government which negotiated the treaty would itself fall." Association of the Bar of the City of New York: Statement in Opposition to S.J. Res. 1, 83d Cong., 1st sess., 14 (1953).

[14] Per Lord Atkin, in Attorney General for Canada v. Attorney General for Ontario, [1937] A.C. 326 at 347.

In general, see MCNAIR, THE LAW OF TREATIES 7-37 (1938); McNair, "When Do British Treaties Involve Legislation?" 9 BRIT. Y.B. INT. L. 59 (1928); "L'application et l'interprétation des traités d'après la jurisprudence britannique," 43 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 253-262 (1933-I); Holdsworth, "The Treaty-Making Power of the Crown," 58 L.Q. REV. 175 (1942); H. Lauterpacht, "Is International Law a Part of the Law of England?" 25 GROT. SOC. TRANS. 51 (1940); ARNOLD, TREATY-MAKING PROCEDURE: A COMPARATIVE STUDY OF THE METHODS OBTAINING IN DIFFERENT STATES 38-40 (1933); WADE AND PHILLIPS, CONSTITUTIONAL LAW, 4th ed., 200-202 (1950); and Stewart, "Treaty-Making Procedure in the United Kingdom," 32 AM. POL. SCI. REV. 655 (1938).

The treaty-making procedure in the United Kingdom is summarily described in a recent statement of the Foreign Office in the following terms: "Treaty provisions are not 'self-executory' in English law, and it is accordingly the practice of the Government to ensure, before ratifying a treaty, that legislative machinery for applying the treaty is adequate and that the Government has all statutory power to enable it to give effect to the treaty, or, if existing law is inadequate, that necessary enabling legislation is enacted. In

the existing law cannot be carried into effect without legislation."[15] The Crown, therefore, will not exercise its undoubted prerogative of ratifying treaties, thus binding the United Kingdom internationally, until enabling legislation has been passed or parliament has given the necessary assurance that it will be passed. It is true that treaties, duly ratified by the Crown, may obligate the United Kingdom internationally to the fulfillment of duties which, in default of implementing legislation, it is incompetent to perform. This, however, is of a highly theoretical character, by reason of the normal practice of obtaining the necessary legislation *prior* to ratification of the treaty.[16]

such circumstances ratification is deferred until enactment of the enabling legislation. Formal Parliamentary approval of treaties as such is not normally required, except in a limited category, e.g., treaties entailing cession of territory or voting of money from public funds, in which cases ratification takes place only when approved by Parliament, usually in the form of an Act of Parliament. In rare cases where Parliamentary sanction for a treaty is required, this is generally given in a short Act to which the treaty text is annexed. The text of every treaty that is subject to ratification is laid before Parliament for a period of 21 working days (Parliamentary) before it is ratified. This affords an opportunity for debating the provisions, if Parliament so desires. Ordinarily it is not necessary to promulgate, proclaim, or publish a treaty to put it into effect." Dept. of State, Treaty Affairs, Office of the Legal Adviser 9, note (May 23, 1952) (mimeographed). Lauterpacht, Special Rapporteur, "Report on the Law of Treaties," U.N. Doc. A/CN. 4/63, at 168-170, International Law Commission, Fifth Session (March 24, 1953).

[15] McNair, "When Do British Treaties Involve Legislation?" 9 BRIT. Y.B. INT. L. 59 at 67 (1928). "If," McNair further states [THE LAW OF TREATIES 7-8 (1938)], "Parliament declines to . . . [legislate], the Crown will not ratify the treaty; if by imprudence the Crown has already ratified the treaty, the United Kingdom is bound by it (for the Crown is internationally omnicompetent in the matter of treaties), and the Crown must do its best to extricate the country from an embarrassing situation. Even the fact that the treaty has been ratified and is internationally binding upon the United Kingdom does not enable a British court to give effect to it municipally if it should conflict with the law of the land. Nevertheless, a duty to make reparation for any resulting breach of an international obligation would arise."

Lauterpacht has stated ["Is International Law a Part of the Law of England?" 25 GROT. SOC. TRANS. 51 at 74, note (*y*) (1940)] that, to his knowledge, the only British or Commonwealth case in which a court has actually refused to apply a treaty because of the lack of the requisite enabling legislation is the judgment of the Supreme Court of Canada in Re Arrow and Tributaries Slide and Boom Co., Ltd., [1932] 2 D.L.R. 250. To this should probably be added the judgment of the High Court of Rajasthan in the case of Birma v. The State, [1951] A.I.R. (38) Raj. 127, reported, and criticized, by Alexander, "International Law in India," 1 INT. AND COMP. L.Q. 289 at 295 (1952). The judgment in the case of The Republic of Italy v. Hambros Bank, Ltd., [1950] 1 All E.R. 430, is only an apparent exception, since therein the court declined to consider the Financial Agreement concluded in pursuance of the Treaty of Peace with Italy and the Treaty of Peace (Italy) Order, 1948, to be couched in language sufficiently express and precise to justify the conclusion that it was intended to incorporate their provisions as a part of English law. The judgment turned upon the interpretation of a particular Agreement and Order, and its importance is, therefore, strictly limited. See comment by Carter, "Municipal Courts and the Enforcement of International Agreements," 3 INT. L.Q. 413 (1950); and Johnson, in 17 BRIT. Y.B. INT. L. 462, 463 (1950).

[16] Lauterpacht, "Is International Law a Part of the Law of England?" 25 GROT. SOC. TRANS. 51 at 74 (1940). On occasion it is stipulated in the treaty itself that it shall not come into force until it has received Parliamentary sanction; and frequently the Crown, *ex abundanti cautela,* will submit to Parliament treaties, either before signature or ratifica-

In view of this practice of securing enabling legislation in advance of ratification, treaties in the United Kingdom are self-executing even in circumstances in which like treaties in the United States might not be. From the moment the treaty becomes binding *internationally,* the British Government is in a position to give effect to it *internally.* No further legislative action is required *subsequent* to ratification. The treaty is, in effect, self-executing by virtue of prior legislative action, or by reason of the fact that legislation adequate for its internal enforcement was already in existence at the time of the ratification of the treaty.

An example drawn from recent practice may suffice to illustrate this point. The Treaties of Peace with Italy, Bulgaria, Finland, Hungary and Rumania were signed on February 10, 1947, and ratifications were deposited on September 15, 1947,[17] but only after Parliament had, on April 29, 1947, passed "An Act to provide for carrying into effect Treaties of Peace between his Majesty and certain other Powers."[18]

The most familiar example of a recent constitution providing expressly for self-executing treaties is that of France. The relevant articles of the Constitution of October 27, 1946,[19] provide, in part:

> "Art. 26. Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to insure their ratification.[20]

tion, which involve no alteration of the internal law, and which, therefore, could constitutionally be ratified by the Crown without the necessity of legislation. For examples, see MCNAIR, THE LAW OF TREATIES 31, 32 (1938); and Stewart, "Treaty-Making Procedure in the United Kingdom," 32 AM. POL. SCI. REV. 655 at 667, 668 (1938).

[17] GREAT BRITAIN, TREATY SER., Nos. 50, 52-55, incl. (1948).

[18] 10 & 11 Geo. 6, c. 23. A like practice with regard to treaties requiring for their application in the United Kingdom that the Crown should receive powers not already possessed by it was followed at the close of World War I. The relation between the dates of the passage of the enabling acts and the deposit of ratifications is shown by the following summary: "Versailles deposited on Jan. 10, 1920, Act passed on July 31, 1919; St. Germain deposited on July 16, 1920, Act passed on April 27, 1920; Neuilly deposited on Aug. 9, 1920, Act passed on April 27, 1920; Trianon deposited on July 26, 1921, Act passed on May 12, 1921; Lausanne deposited on Aug. 6, 1924, Act passed on April 15, 1924." MCNAIR, THE LAW OF TREATIES 22, note 4 (1938).

[19] In force October 27, 1946. JOURNAL OFFICIEL, Oct. 28, 1946. See, in general, Mouskhély, "Le traité et la loi dans le système constitutionnel français de 1946," 13 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT 98 (1950); Rousseau, "Le régime actuel de conclusion des traités en France," 2 LA TECHNIQUE ET PRINCIPES DU DROIT PUBLIC: ETUDES EN L'HONNEUR DE GEORGES SCELLE 565 (1950); Preuss, "The Relation of International to Internal Law in the French Constitutional System," 44 AM. J. INT. L. 641 (1950) and Preuss, "Droit international et droit interne dans la Constitution française de 1946," 1 REVUE INTERNATIONALE D'HISTOIRE POLITIQUE ET CONSTITUTIONNELLE 199 (1952).

[20] Jules Basdevant has observed that the situations in which special legislation is required in order to give internal force to treaties are, in France, rare and exceptional. "Le

"Art. 27. Treaties . . . that modify French internal legislation . . . shall not become final until they have been ratified by virtue of a law."

The Report of the Constitutional Committee of 1946 stated:

"A treaty must necessarily prevail and suffice in itself. It is therefore unnecessary to modify the law in advance with a view to ensuring the possible application of the treaty. The tacit abrogation, or, at least, the neutralization of provisions contrary to the treaty is effected *de plein droit.*"[21]

Even prior to 1946 the practice had long become established of submitting for parliamentary approval before ratification nearly all important treaties, and especially those which required for their internal execution a modification of, or an addition to, the laws. Under the present system no further formality subsequent to ratification is necessary in order to make the treaty applicable by the judicial and other authorities of the Republic. The treaty, once ratified, has *force de loi.* Legislative approval, followed by ratification and publication, in circum-

rôle du juge national dans l'interprétation des traités diplomatiques," 38 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 413 at 416 (1949). Article 26 must, of course, be read with the tacit proviso that it refers only to treaties which are susceptible of direct application by the judicial and other authorities of the state, either by virtue of an executive decree, if they fall within the *"compétence règlementaire,"* or if they establish new rules of law which are applicable by the judicial and administrative authorities, as, for example, those which relate to the acquisition of nationality or to the status of resident aliens. Even where legislative authorization has been accorded in conformity with the requirement of Article 27, a further executory law may be essential, as, for example, in cases in which a treaty imposes the obligation to make an appropriation, to establish a penalty, or to organize a new governmental organization. Whether such legislation is requisite in any particular case can be determined only by reference to the relevant rules of positive law. This is true in France, as in other countries, and, notably, in the United States. The effect of Articles 26 and 27 of the French Constitution is to integrate treaties into the internal legal order to the greatest possible extent; they cannot apply to treaties which, by the nature of the obligations imposed, are not self-executing.

[21] Mouskhély, supra note 19 at 110-111. Article 28 of the Constitution further provides: "Since diplomatic treaties duly ratified and published have superior authority to that of French internal legislation, their provisions shall not be abrogated, modified or suspended without previous formal denunciation through diplomatic channels." Even before the adoption of the Constitution of 1946 there was a strong, although not constant, tendency on the part of French tribunals to accord to treaties a greater efficacy than that given to laws, even though the latter were subsequent in point of time. See, for example, Hobier v. Sigg Sandrino and Compagnie d'Assurances "La Zurich," (1936), ANN. DIG. REP. INT. L. CASES 421 (1935-1937), in which the Court of Appeal of Orleans held that "legislative dispositions of an internal order, laid down by each State independently, cannot modify rules fixed by common consent between several States by a diplomatic convention intended to govern international relations." In any event, conflicts between treaties and laws were generally avoided by application of the rule whereby laws were construed as containing a tacit reservation with regard to rights guaranteed by treaty. As the Commission Supérieure de Cassation stated in its judgment of Jan. 19, 1933: "A derogation from this principle of

stances in which treaties might in the United States be non-self-executing, suffice to integrate the treaty into the internal legal order of France.

Whether treaties are self-executing, or whether they require legislative "incorporation" or "transformation" before they become executory internally, cannot be determined with respect to any given country by means of a merely cursory examination of formal constitutional texts. Countries whose written constitutions contain only procedural provisions relating to the conclusion, legislative approval and ratification of treaties, may nevertheless have developed through judicial or administrative practice the doctrine that certain treaties, upon their entry into force internationally, become directly binding upon individuals and authorities of the state, without the requirement of further legislative implementation. Such treaties are self-executing, notwithstanding the lack of any formal constitutional text which expressly accords to them this effect.

Thus the High Court of the Netherlands has consistently held that a treaty constitutionally concluded by the Crown has the force of law, and, consequently, is directly and immediately obligatory, not only upon the contracting parties, but also, if it is self-executing according to the intention of the parties, upon individual subjects.[22] The Court stated in its decision of May 25, 1906:

> ". . . Treaties [are submitted] to the approval of the States-General precisely because they may modify the national laws, that

general order [respect for treaties—*pacta sunt servanda*] cannot be inferred from silence maintained by the legislator in this regard." Dame veuve Python v. Demoiselle Baumann, Recueil Dalloz . . . Hébdomadaire 119 (1933).

For an example of an application of the "supremacy clause" of the Constitution of 1946, see Fraenkel v. Cie "La Vita," 39 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 73 at 74 (1950), in which the Civil Tribunal of the Seine held that legislation enacted in 1930 was ineffective to override a treaty of 1869, in stating that "in case of conflict between an internal law and the international treaty, the treaty must be applied, in conformity with Articles 26 and 28 of the French Constitution." Also, Min. publ. v. S . . . , Court of Appeal of Lyons (1952), Recueil Dalloz . . . Hébdomadaire 800 (1952), with note by Maurice Chavrier, id. at 801-804. In general, see Preuss, 44 AM. J. INT. L. 654-668 (1950).

France is not, as is commonly alleged, the sole non-federal state whose constitution expressly provides for self-executing treaties. The A.B.A. REPORT OF THE COMMITTEE FOR PEACE AND LAW, Appendix A (1950), in citing the procedural provisions on treaty-making in the constitutions of Paraguay and Korea omits, for example, reference to the following provisions: "This Constitution, the laws dictated as a result of it, and treaties with foreign nations, are the supreme law of the nation.". Art. 4, Constitution of the Republic of Paraguay, July 10, 1940. 2 PEASLEE, CONSTITUTIONS OF NATIONS 745 (1950). "The duly ratified and published treaties and the generally recognized rules of international law shall be valid as a binding constituent part of the law of Korea." Art. 7, Constitution of the Republic of Korea, Sept. 28, 1946. Id., 338 at 339.

[22] See Art. 60, Constitution of the Kingdom of the Netherlands (Fundamental Law of Aug. 24, 1815; reissued with amendments, Jan. 22, 1947) 2 PEASLEE, CONSTITUTIONS

is to say, the legal rights of subjects. This approval would be deprived of meaning and would be merely a vain formality if, once accorded, it had to be followed by a special law conferring legal authority upon the treaty in order to make it obligatory for subjects.

". . . Such treaties, approved by the States-General and then ratified by the Queen, not only obligate the Contracting Parties in their mutual relations, but also, after promulgation of the law of approval, become obligatory for Dutch subjects, in such a way that modifications of Dutch law effected by these treaties have henceforth force of law for Dutch subjects with respect to the relations into which they enter with the nationals of other states which are parties to the treaties."[23]

OF NATIONS 513 at 519, which has been construed to mean that treaties which may affect private rights shall be ratified by the Crown only if they have been approved by the States-General. On the position of self-executing treaties in the Dutch constitutional system, see PAUL DE VISSCHER, DE LA CONCLUSION DES TRAITES INTERNATIONAUX 96-101 (1943); VAN DER POT, HANDBOEK VAN HET NEDERLANDSCHE STAATSRECHT, 2d ed., 151-155 (1946); KRANENBURG, HET NEDERLANDSCHE STAATSRECHT, 2d ed., 417-423 (1947); FRANCOIS, 1 HANDBOEK VAN HET VOLKENRECHT 319-322 (1931); and, especially, Telders, 'Le droit des gens dans la jurisprudence des Pays-Bas," 35 BULLETIN DE L'INSTITUT JURIDIQUE INTERNATIONAL 1 at 3 ff. (1936), and cases collected there.

[23] X. v. Pastini-Cyrus, WEEKBLAD VAN HET RECHT, No. 8383 (1906), French text in 35 JOURNAL DE DROIT INTERNATIONAL PRIVE 1278 (1908). J. W. H. Verzijl asserts that this "governmental and judicial thesis, according to which a treaty is immediately binding upon the Courts and the subject without the necessity of any further transformation into municipal law, has given rise to much discussion on constitutional doctrine, but has never been superseded either by judicial or by governmental practice." ANN. DIG. REP. INT. L. CASES 354 (1931-1932). For a later case, see Public Prosecutor v. J. V., Cantonal Court of Amsterdam (1932), id. at 354; and for a general discussion, see Schurmann, in 30 GROT. SOC. TRANS. 36, 37 (1945).

Certain treaties of the Netherlands, which merely obligate the contracting parties to undertake some future action, are not, of course, self-executing. See Public Prosecutor v. Managing Director of N. V. Zwitsersche Waschinrichting, Cantonal Court of The Hague (1934), ANN. DIG. REP. INT. L. CASES 507 (1933-1934), in which Art. 28 of the Geneva Convention of July 27, 1929 was held to be non-self-executing. Art. 28 provided: "The Governments of the High Contracting parties whose legislation is not at present adequate for the purpose, shall adopt or propose to their legislatures the measures necessary to prevent . . ." the private or commercial use of the Red Cross emblem. The Court, in holding that this provision could produce no effect in the internal sphere, stated: "The Convention, approved by the Dutch legislature, does not contain any penal provision; it merely imposes upon the national authorities the duty to bring such a provision into being."

Although the Dutch courts would probably give internal effect to a law which is clearly and irreconcilably in conflict with a prior treaty, as do the courts of the United States, it appears that they have never been confronted with such a case. Schurmann, in 30 GROT. SOC. TRANS. 37 (1945). The possibility of such a conflict is minimized by the uniform interpretation of the law as being in conformity with the treaty. The rule of construction applied by the Dutch courts was expressed by the District Court of Maastricht, in its judgment of March 1, 1937, as follows: ". . . apart from the question whether the operation of a treaty does not prevail over that of a law or statutory regulations, the scope of the law could not be deemed to have brushed aside rights attributed by treaty to subjects of a foreign Power." ANN. DIG. REP. PUB. INT. L. CASES 11 (1935-1937), and cases there collected.

In Belgian practice, treaties which "bind Belgians individually," which relate to a matter already regulated by law, or which concern a matter exclusively within the legislative competence will be ratified by the King only if the assent of Parliament has been obtained.[24] The international validity of the treaty is based upon the executive act of ratification, but its internal effect is dependent upon legislative approval given *prior* to ratification.[25] In the case of a treaty which is subject to parliamentary approval, the necessary assurance that the state will be in a position to fulfill internally the obligations of the treaty as soon as it is in force internationally is ordinarily obtained by providing in one and the same law, first, that the King shall be authorized to ratify the treaty, and second, that he shall be given in advance the power to execute it internally.[26] It has been stated by the Civil Tribunal of Léopoldville:

> ". . . It is an established principle of Belgian public law . . . that international conventions, which the chief of the executive power is competent to conclude or to ratify, acquire by legislative approval at least the force, if not the character, of an ordinary law . . . and that they are thereby rendered obligatory for the state as a juridical personality in its relations with individuals, as well as for the state as a sovereign entity in its relations with the other contracting parties."[27]

The Italian Constitution of January 1, 1948 contains no express

[24] Art. 68, ¶2, Constitution of February 7, 1831 (with amendments). 1 PEASLEE, CONSTITUTIONS OF NATIONS 127 at 136 (1950).

[25] See DE VISSCHER, DE LA CONCLUSION DES TRAITES INTERNATIONAUX 42-50 (1943); and Rolin, in 30 GROT. SOC. TRANS. 32 (1945). The function of the Parliament is merely one of *"habilitation,"* and the King remains free to ratify or not to ratify a treaty which it has approved. Its approval, therefore, has the same effect as the "advice and consent" of the United States Senate. If the treaty is ratified, if it is of a nature which renders it susceptible of direct application by the judicial and other authorities of the state, and if it was intended to be operative internally without enabling legislation subsequent to ratification, it is, in both countries, a self-executing treaty.

[26] See Nisot, "La conclusion et l'exécution des traités internationaux envisagées par rapport à l'Etat belge," 2 MELANGES OFFERTS A ERNEST MAHAIM 228 at 234, and, in general, 228-237 (1935).

In its judgment of May 20, 1916, the Court of Cassation held that the conventions signed at The Hague in 1907 were self-executing, since they were submitted by the Belgian Government to the Parliament with that intent, and since the single article of the law of May 25, 1910, in approving the conventions and authorizing their ratification, ordered that "these conventions and declarations shall have their full and complete effects." The court concluded that the treaty at issue, "clothed with the assent of the Chambers and promulgated in Belgium has, therefore, the force of law, and must for this reason be applied by the tribunals." The law of approval, "at the same time that it constitutes the assent of the Chambers to the treaty, contains the formal order that this treaty shall have in Belgium full and complete effect." Procureur général près la Cour d'Appel de Liége v. Marteaux, Pasicrisie Belge (Pt. I, 1915-1916) 376 at 417, 418.

[27] Decision of Sept. 21, 1932, JOURNAL DES TRIBUNAUX 633 (1932), quoted by DE VISSCHER, DE LA CONCLUSION DES TRAITES INTERNATIONAUX 48 (1943).

provision affirming the self-executing nature of treaties. Article 80 provides:

> "The Chambers authorize by law ratification of those international treaties which are of a political nature, which involve arbitrations or judicial regulations, or which entail changes in the national territory, financial burdens, or modifications of laws."[28]

This article, in providing for prior legislative approval of treaties which modify internal laws, merely confirms a constitutional practice which had already become well-established.[29] Under the Kingdom, the Crown had been constitutionally competent, at least in theory, to bind the state internationally by ratifying such a treaty without the assent of Parliament.[30] In order to obviate situations in which Italy might incur an international liability through inability to give effect internally to the obligations of a valid treaty, it was the uniform practice of the legislature to enact an "order of execution" prior to ratification. This order had the dual function of assenting to ratification, and of creating, or of authorizing the executive to create, the rules of Italian law necessary to give the treaty internal force. Issued in contemplation of ratification, it ensured that the domestic measures essential to the performance of the obligations of the treaty should be available to the state as soon as the treaty should become effective from the international point of view.[31]

[28] 2 PEASLEE, CONSTITUTIONS OF NATIONS 279 (1950); RACCOLTA UFFICIALE DELLE LEGGI E DEI DECRETI, No. 298 (Dec. 27, 1947).

[29] Arrigo Cavaglieri, in ANN. DIG. REP. PUB. INT. L. CASES 320 (1923-1924).

[30] SERENI, THE ITALIAN CONCEPTION OF INTERNATIONAL LAW 323 (1943).

[31] Id. at 322-324. The order, as Sereni points out, "differs from the usual legislative acts, because it does not expressly indicate the rights and duties, powers and burdens, which it creates, but only indirectly by reference to the annexed treaty. The order of execution creates all the rules of Italian law necessary to produce within the scope of the domestic legislation the results desired by the treaty to which it refers; it abrogates all the pre-existing provisions which are incompatible with it. The domestic legislation is so completely adapted to the treaty."

A law inconsistent by its express terms with a prior treaty was given effect by the courts under the previous Constitution. See Kopelmanas, "Du conflit entre le traité international et la loi interne," 64 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 88 at 100-101 (1937). It has been suggested that the effect of Article 10(1) of the new Constitution, which provides that "The Italian juridical system conforms to the generally recognized principles of international law," is to make treaties prevail over subsequent laws. See Vedovato, "I Rapporti Internazionali Dello Stato," in 1 CALAMANDREI AND LEVI, COMMENTARIO SISTEMATICO ALLA COSTITUZIONE ITALIANA 87 at 88-93 (1950).

On the self-executing nature of treaties in Italy, see, for example, De Marco v. Waren Handelsgesellschaft (1924), ANN. DIG. REP. PUB. INT. L. CASES 321-322 (1923-1924), in which the Court of Cassation stated: "Once an international treaty has been approved in the ways laid down by the fundamental law of the State, it has the force of law and may be invoked by private persons independently of any provision of the Government, with the exception only of those parts which by their nature or by the express provisions of the Treaty need some such provision in order to be enforceable." Also, Chini v. Société Guerlain, Court of Cassation (1935), ANN. DIG. REP. PUB. INT. L. CASES 436 (1935-1937).

This method of giving to treaties a self-executing effect has been carried over into the constitutional practice of the Republic.[32] Thus, for example, the Treaty of Friendship, Commerce and Navigation with the United States, February 2, 1948, was ratified on June 18, 1949, after the enactment of legislative implementation by the Chambers,[33] and entered into force upon the exchange of ratifications on July 26, 1949.[34] A like procedure of securing enabling legislation prior to ratification was followed with respect to the Statute of the Council of Europe, an instrument containing several provisions which would have been non-self-executing in default of such legislation.[35]

It has been alleged that the United States, Argentina and Mexico are "the only federal governments in which treaty law overrides internal state laws and constitutions in conflict therewith."[36] This assertion over-

[32] Monaco, "I trattati internazionali e la nuova costituzione," 4 RASSEGNA DI DIRITTO PUBBLICO 197 at 202, 204 (1949).

[33] RACCOLTA UFFICIALE DELLE LEGGI E DEI DECRETI, No. 385 (1949-II). Art. 2(2) contains the standard formula: 'E' fatto obbligo a chiunque spetti di osservarla e di farla ossenvare come legge dello Stato."

[34] See DEPT. OF STATE, TREATIES AND OTHER INTERNATIONAL ACTS SERIES, No. 1965.

[35] RACCOLTA UFFICIALE . . . , No. 433 (1949-III). Art. 3, for example, provides for the election of Italian representatives in the Consultative Assembly, and Art. 5 for payment of Italy's financial contributions to the expenses of the Council.

[36] A.B.A. REPORT OF THE COMMITTEE FOR PEACE AND LAW 9 (1950). See Art. 22, Constitution of the Argentine Republic, March 16, 1947, 1 PEASLEE, CONSTITUTIONS OF NATIONS 63 at 65 (1950).

In the case of Montero v. Fernández, Court of Appeals of La Plata (1938), ANN. DIG. REP. PUB. INT. CASES 472 (1938-1940), it was stated: "In our opinion the requirement of a law to amend the local law is unnecessary; the law which ratified the treaty is sufficient for that purpose. In a conflict between the national law and a treaty, the latter ought without doubt to prevail when, as in the present case, its ratification implies a manifestation of the will of the legislative bodies subsequent to the local law whose text is irreconcilable with the treaty. Such is, moreover, the Argentine practice. The National Congress, for example, ratified the Montevideo treaties without it being necessary to modify expressly the domestic laws which no longer apply in the cases covered by the treaty. . . ." For an example of a non-self-executing treaty, see Alonso v. Haras "Los Cardos" S.A., Argentina, Supreme Court (1940), id. at 474. See Art. 133, Political Constitution of the United States of Mexico, Jan. 13, 1917. 2 PEASLEE, CONSTITUTIONS OF NATIONS 415 at 417 (1950).

The Constitution of the United States of Brazil, Sept. 24, 1946, 1 PEASLEE, CONSTITUTIONS OF NATIONS 181 (1950), contains no express provision establishing the supremacy of treaties. Valladão maintains that such a provision would be superfluous, since treaties form part of the law of the land by virtue of their approval by the legislature before ratification. Since the treaty is approved in the form of a law, it supersedes prior legislation; conversely, it was held by the Federal Supreme Court in 1905 that a treaty overrides earlier legislation. 98 O DIREITO 243, cited by Valladão, "O direito internacional no projeto da Constituição," 2 BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL 10 (1946). The delegates of Brazil and Mexico at the Fifth General Assembly of the United Nations stated without reservation that, so far as their countries were concerned, the implementation of a Covenant on Human Rights was within the legislative competence of their respective governments. UNITED NATIONS, General Assembly, 5th sess., Official Records,

looks the status of treaties in the federal constitutional system of Switzerland, which provides a special remedy against any cantonal laws which may be contrary to international treaties, either before the Federal Tribunal, or, in the case of the violation of certain categories of treaties, before the Federal Council or the Federal Assembly. The Swiss Federal Government, furthermore, can insist upon the repeal of any cantonal legislation which is incompatible with international treaty obligations.

> "According to the practice of the Swiss courts, the general principles of international law have the same force as federal or cantonal law. . . . In particular, treaties concluded by Switzerland with foreign countries become binding as soon as they enter into force, there being no need to enact any legislation for this purpose.[37]
>
> "In conformity with the fundamental principles of international law, a treaty becomes binding for the contracting parties with the exchange of ratifications. With its entry into force internationally, the internal obligation of a treaty of a law-making nature also arises automatically for Switzerland, that is to say, the law-making treaty ipso jure becomes binding also upon officials and citizens, in so far as it is directly applicable. In the latter event, it becomes at the same time Federal law [*Bundesrecht*]. For its entry into internal force there is required no transformation of a treaty into a Federal statute [*Bundesgesetz*]."[38]

Third Committee, 143, 139 (1950). See, in general, Sorensen, "Federal States and the International Protection of Human Rights," 46 AM. J. INT. L. 195 (1952).

Several non-federal Latin-American countries also recognize self-executing treaties as the supreme law of the land, and even apply them in derogation of later legislation, although their constitutions contain no provision to this effect. Thus, the Supreme Court of Colombia, in its judgment of June 13, 1925 held: ". . . It is a principle of public law that the Constitution and public treaties are the supreme law of the land and their provisions prevail over ordinary legislation which is in conflict, even if the legislation is of later date." Quoted by Gibson, "International Law and Colombian Constitutionalism: A Note on Monism," 36 AM. J. INT. L. 619, note 18 (1942). See also the judgment of May 11, 1944, ANN. DIG. REP. PUB. INT. L. CASES 238 (1943-1945), judgment of the Supreme Court of Panama (1931), id. at 12 (1931-1932); Judgment of the Supreme Court of Guatemala (1937), id. at 10 (1935-1937). The Supreme Court of Cuba held in 1930 that a treaty "once approved in legal form by the signatory States has for their courts and citizens the same obligatory force as the national laws." Id. at 337 (1929-1930).

[37] Reply of the Government of Switzerland, Jan. 25, 1929, LEAGUE OF NATIONS, 3 Conference for the Codification of International Law . . . Bases of Discussion . . . (C.75.M.69.V) 238. See Art. 175(3) and Art. 189(4), Federal Law on the Judicial Organization, March 22, 1893. GIACOMETTI, DAS OEFFENTLICHES RECHT DER SCHWEIZERISCHEN EIDGNEOSSENSCHAFT, 2d ed., 239, 252 (1938).

[38] GIACOMETTI, SCHWEIZERISCHES BUNDESSTAATSRECHT 829 (1949). The writer continues: "The automatic legal operation of law-making treaties results from the very nature of Art. 113(1) of the Federal Constitution, whereby treaties approved by the Federal Assembly [in conformity with Art. 85(5)] are also binding upon the Federal Tribunal."

The Swiss Federal Tribunal has explained the self-executing effect of treaties in the following terms:

> "The obligation of the law-enforcing authorities of the individual contracting state to observe such a treaty [as the Hague Convention on Civil Procedure of July 17, 1905] does not flow from the treaty by and in itself, which primarily creates only an obligation between the two states as such, as subjects of international law. There is necessary a further act of the authorities competent in internal law, an act which prescribes the fulfillment of the treaty stipulations and thereby gives them internal force in internal relationships. . . . The acceptance of a treaty by the Federal Assembly has, therefore, a double legal meaning: it signifies the requisite consent to the creation of a new international legal obligation for Switzerland, while at the same time, it contains also an authorization for the Federal Council to exchange the instruments of ratification; on the other hand, it confers upon the substantive content of the treaty the force of law, and makes it binding upon officials and citizens of its own state. The provisions of the treaty . . . have the same effect as an internal law [Gesetz] and must be enforced by the internal authorities. . . ."[39]

A second federal state in which self-executing treaties prevail over inconsistent federal and state legislation is the Federal Republic of

Art. 113(3) provides: "The Federal Tribunal has also jurisdiction in regard to . . . complaints . . . by individuals in respect of violation of concordats or treaties." 3 PEASLEE, CONSTITUTIONS OF NATIONS 122 at 144 (1950). See 1 GUGGENHEIM, LEHRBUCH DES VOELKERRECHTS: UNTER BERUECKSICHTIGUNG DER INTERNATIONALEN UND SCHWEIZERISCHEN PRAXIS 34, 35 (1947); Rice, "The Position of International Treaties in Swiss Law," 46 AM. J. INT. L. 641-666 (1952); and Sécretan, "Swiss Constitutional Problems and the International Labour Organisation," 56 INT. LABOUR REV. 1 at 18-20 (1947).

[39] Lepeschkin v. Zürich Obergericht (1923), Entscheidungen des Zweischerischen Bundesgerichts 188 at 195-196 (1923-Pt. I). DE VISSCHER, supra note 22 at 122, makes the following comment on this case: "It appears vain to seek whether or not this doctrine espouses the monist theory or the dualist theory. In any event, it would appear difficult to speak here of a transformation of the treaty into a law, since it is one and the same act which creates simultaneously the treaty and the law, and since the former cannot exist without the latter." See Kosters, "Décision du Tribunal Fédéral Suisse, du 2 Fevrier 1923 . . . ; Le caractère juridique des traités relatifs aux droit légaux des sujets," 9 BULLETIN DE L'INSTITUT INTERMEDIAIRE INTERNATIONAL 1 (1923), with German and French texts of the opinion, 31-50.

Up to the time of the judgment of the Federal Tribunal in the case of Steenworden v. Société des Auteurs, Compositeurs et Éditeurs de Musique (1933), ANN. DIG. REP. PUB. INT. L. CASES 9 (1935-1937), in which the American rule with regard to the "repeal" of treaties by later laws was followed, the Swiss courts accorded full effect to treaties conflicting with subsequent legislation. See Kopelmanas, supra note 21 at 95. The possibility of a conflict is, however, virtually eliminated through the application of the rule of construction favorable to the treaty. See, for example, Greek Republic v. Superior Court of Zürich, Federal Tribunal (1930), 56 Entscheidungen des schweizerischen Bundesgerichts 237 (1930-Pt. I).

Western Germany, whose Basic Law, the "Bonn Constitution" of May 23, 1949, provides, in Article 25:

> "The general rules of international law shall form part of federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory."[40]

Although the above-quoted article does not expressly refer to treaties, it apparently includes within its guarantee the "general rule of international law that the obligatory force of a treaty shall never be destroyed by an act of legislation or internal administration. . . ."[41] Thus the Bonn Constitution not only provides that federal treaties shall override inconsistent prior legislation, whether federal or state,[42] but probably contains an advance over the practice of the Weimar Constitution in providing that all subsequent legislation must conform to the stipulations of treaties in force. Treaties which are self-executing by their nature and intent are thus binding directly upon officials and individuals. If they refer to matters of federal legislation they require, prior to ratification, approval by the competent legislative organs.[43] But once this approval is given, no further legislative action is essential to confer upon the treaty executory force. In this respect, the practice under the new constitution will doubtlessly, in view of its internationalist tendencies, go at least as far as that established under the preceding constitution, a practice which has been described, in terms which would seem to be applicable *mutatis mutandis* to the present system, as follows:

[40] DEPT. OF STATE, Pub. No. 3526 (June 1949). Article 100(2) further provides: "If in litigation it is doubtful whether a rule of international law forms part of federal law and whether it creates direct rights and duties for the individual (Article 25), the court shall obtain the decision of the Federal Constitutional Court."

The constitutions of the *Länder* of the American, French (with one exception) and Soviet zones all contain provisions that the "general" or the "generally recognized" rules of international law shall be an integral part of the law of the *Land*, and shall be binding upon the state and upon the individual citizen. See CONSTITUTIONS OF THE GERMAN LAENDER, prepared by the Civil Administration Division, Office of Military Government (U.S.) (1947); and Preuss, "International Law in the Constitutions of the Länder in the American Zone in Germany," 41 AM. J. INT. L. 888 (1947). The constitutions of Hesse and of the Saar provide expressly that treaties, as well as the general rules of international law, shall be an integral part of the internal law, and, further, that they shall prevail over conflicting legislation.

[41] Münch, "Droit international et droit interne d'après la Constitution de Bonn," 19 Revue international française du droit des gens, 5 at 14, and, in general, 5-20 (1950); von Mangoldt, 2 DAS BONNER GRUNDGESETZ: KOMMENTAR 165-169 (n.d.); and GIESE, GRUNDGESETZ FUER DIE BUNDESREPUBLIK DEUTSCHLAND VOM 23. MAI 1949, 61, 62 (1951). Cf. Menzel, in KOMMENTAR ZUM BONNER GRUNDGESETZ, commentary on Art. 25, 23 pp.

[42] Art. 31 of the Bonn Constitution provides, as did Art. 13(1) of the Weimar Constitution, that: "Federal law shall supersede Land Law."

[43] Art. 59(2) of the Bonn Constitution.

"The significance of the practice . . . obligatorily prescribed by the Weimar Constitution lies in the automatic extension of the validity of the treaty to citizens and officials which is thereby guaranteed, in so far as this is possible according to the content and formulation of the treaty stipulations. Since special legislative implementation is not further required in this case, the Reichstag as the legislative organ having already adopted it prior to its international entry into force through its law of approval, there is established in German law a general incorporating provision of the same type as Article VI, Clause 2 of the Constitution of the United States. It is obvious that the danger that federal law shall violate international treaties is reduced by this technique."[44]

The general case for non-self-executing treaties in federal states has often been supported by reference to the opinion of the Privy Council in the case of *Attorney General for Canada v. Attorney General for Ontario*.[45] This opinion, which has been represented to be an "unim-

[44] WALZ, VOELKERRECHT UND STAATLICHES RECHT: UNTERSUCHUNGEN UEBER DIE EINWIRKUNGEN DES VOELKERRECHTS AUF DAS INNERSTAATLISCHE RECHT 379 (1933). See the judgment of the Reichsgericht, Feb. 9, 1931, 3 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT 147 (1933-Pt. II); ANN. DIG. REP. PUB. INT. L. CASES 351 (1931-1932).

121 Entscheidungen des Reichsgerichts in Zivilsachen, 7 at 9 (1928). ANN. DIG. REP. PUB. INT. L. CASES 408 (1927-1928).

A single opinion of the Reichsgericht will suffice to illustrate a doctrine which, consistently followed by German tribunals in the past, will doubtlessly guide them in the future: "The Treaty of Versailles is an international treaty, and, therefore, in principle creates rights and duties only for the contracting states. It has, however, received internal force in the German Reich through the Law of July 16, 1919 [and internationally on January 10, 1920]. But an individual is entitled to advance claims under its provisions only in so far as this can be determined with complete clarity from the treaty itself, that is, . . . when the content, purpose and tenor of the specific provisions are so adapted as to exercise an effect in private law without the necessity of further international or internal action." See also judgments of June 18, 1927, 117 Entscheidungen des Reichsgerichts in Zivilsachen 284 (1927); and Nov. 29, 1927, 119 id. 156 (1927).

[45] [1937] A.C. 326. See "The Negotiation and Signature of International Agreements," 1 EXTERNAL AFFAIRS 23-25 (Jan. 1949) (Dept. of Ext. Affs., Canada). In a note from the Department of External Affairs, February 17, 1953, to the Department of State, the treaty-making procedure of Canada was summarized as follows: "A treaty or agreement does not automatically become part of the law of Canada at the time when it becomes a binding international obligation. If a treaty does not accord with existing Canadian law, it will be necessary to alter that law, or enact new law. This is done by the Parliament of Canada or the legislatures of the Provinces, or by both, depending upon whether the subject matter of the international agreement is within federal or provincial jurisdiction. . . . In recent years . . . it has been the policy of the Government to submit, *prior* to ratification, agreements which require for their implementation new statute law, or amendments to existing law, especially if they involve large public expenditures, important national obligations, or far-reaching political considerations." (Italics added) Dept. of State, Treaty Affairs, Office of the Legal Adviser, "Survey of Foreign Treaty Procedures," 3 (April 2, 1953) (mimeographed).

peachable statement of the law on this subject,"[46] has been generally condemned by Canadian authorities. One writer has said, it is "absurd to say that a matter which has become the subject of international agreement can yet be considered a matter of a 'private and local' nature in which the controlling voice is that of the provinces."[47] In the case cited, the Privy Council held that the Dominion of Canada, although internationally bound by a treaty, could not give internal effect thereto in so far as the subject matter of the treaty fell within the reserved powers of the Provinces under the terms of the British North America Act. This opinion reversed a long line of decisions by the Canadian courts and by the Privy Council itself. As a leading Canadian authority has stated:

> ". . . whereas up to 1937 the federal Parliament was able to legislate on all treaties and conventions binding on Canada, and had in fact so legislated as to override provincial authority. . . , after 1937 the treaty-enforcing power in Canada was decentralized and Ottawa was deprived of a power held effectively for seventy years. A major constitutional limitation in international affairs was imposed upon the Canadian nation in the very decade in which she finally achieved full national status. *No other federal state in the world is so restricted,* and in an age desperately seeking new bases for international co-operation such national weaknesses become something more than domestic problems."[48]

A sister member of the Commonwealth, Australia, is not so handicapped in the exercise of its treaty-making power. Although its Constitution does not expressly authorize the Parliament to enact laws for the enforcement of treaties, there has been no doubt since the beginning of the Federation that the power to legislate with respect to "external affairs" enables the Commonwealth to give internal effect to all treaties which are binding upon it internationally.[49] The High Court has held:

[46] George A. Finch, Hearings on S.J. Res. 130, p. 312 (1952).

[47] MacDonald, "The Canadian Constitution Seventy Years After," 15 CAN. B. REV. 401 at 419 (1937).

[48] Scott, "Centralization and Decentralization in Canadian Federalism," 29 CAN. B. REV. 1095 at 1114 (1951) (italics added).

See also a symposium, 15 CAN. B. REV. 393 (1937); Matas, "Treaty Making in Canada," 25 CAN. B. REV. 458 (1947); MacKenzie, "Canada: The Treaty-Making Power," 18 BRIT. Y.B. INT. L. 172 (1937); Stewart, "Canada and International Labor Conventions," 32 AM. J. INT. L. 36 (1938); and, for general background, Vanek, "Is International Law Part of the Law of Canada?" 8 UNIV. TORONTO L.J. 251 (1950).

[49] Constitution of the Commonwealth of Australia, July 9, 1900, Art. 51 (xxix), 1 PEASLEE, CONSTITUTIONS OF NATIONS 93 at 100 (1950).

The treaty-making and treaty-enforcing procedures of Australia have been summarized as follows: "Treaties are submitted to Parliament, and are ratified after approval either (a)

"The Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenor even although the subject matter of the agreement is not otherwise within Commonwealth legislative jurisdiction."[50]

The practice of securing the requisite legislation in advance of ratification has been compared by an Australian authority to the practice followed in Great Britain with respect to treaties:

"The position in Australia is broadly the same as in Britain. . . . The tendency, therefore, is increasingly for an Executive to consult Parliament before entering into final international commitments. . . . In practice, in the period between the two wars, Gov-

by simple Act of approval, embodying or attaching text, or (b) by legislative measures to change domestic law as basis for giving effect to treaty provisions. In any event, only one Act [is] needed." Dept. of State, Treaty Affairs, Office of the Legal Adviser, "Treaties as the Law of the Land in Various other Countries," 1 (May 23, 1952) (mimeographed).

See Bailey, "Australia: Federal States in International Relations," BRIT. Y.B. INT. L. 175 (1937); Bailey, "Australia and the International Labour Conventions," 54 INT. LABOUR REV. 285 (1946).

[50] The King v. Burgess: Ex parte Henry, 55 C.L.R. 608 at 696 (1936). This case concerned the effect of the Convention for the Regulation of Aerial Navigation, signed on October 13, 1919, ratified by the King on June 1, 1922, but implemented by the Common wealth Act of March 28, 1920, and regulations purporting to give effect thereto, dated February 11, 1921. [The order of the dates above-cited is significant.] The ruling of the court that the regulations were invalid was based solely upon the ground that they departed substantially from the terms of the treaty to which they purported to give effect. This did not, of course, affect the holding as to the general principle with respect to the treaty-making power in the Australian federation.

In commenting upon this case, Professor Bailey has said: "Lord Atkin's judgment in *Attorney-General for Canada* v. *Attorney-General for Ontario* in 1937 can certainly not be claimed as authority for the proposition that in federal systems legislative power to give effect to treaties is necessarily distributed between the federation and the component States according to the subject matter of the international agreement concerned." 54 INT. LABOUR REV. 285 at 308 (1946). Also, Evatt, "Constitutional Interpretation in Australia," 3 UNIV. TORONTO L.J. 1 at 12-13 (1939-40); and Foendander, "The Commonwealth Legislative Power Under the Australian Constitution in Relation to Labour," 8 UNIV. TORONTO L.J. 7 at 22 (1949-50), who states: ". . . by the fact of the Commonwealth entering into a treaty, the Commonwealth Parliament is enabled to legislate upon a matter which, in the absence of such a treaty, would be beyond its competence. Derogations from the rights of the states as residuary legatees of legislative power under the constitution could be brought about through the agency of the external affairs power since, in the exercise of that power, matters not expressly conferred upon the Commonwealth under the constitution (or incidental thereto) could become the subject of federal legislation."

The practice in India is similar. The Central Legislature, by virtue of Article 253 of the Constitution, has power to conclude treaties and other international agreements, or to approve decisions adopted by any international organization of which India is a member. ". . . if a treaty or agreement has to be introduced into the orbit of municipal law by legislative enactment, Parliament alone is competent to do so, . . . and can do it for the whole or any part of the territory of India. Thus, it can encroach in international matters on the sphere of competence of local State legislatures in spite of the federal division of powers as laid down in Schedule VII of the Constitution." Alexander, "International Law in India," 1 INT. & COMP. L.Q. 289 at 295 (1952).

ernments made it a rule not to ratify unless and until they were satisfied that the legislation necessary to comply with the Convention was actually upon the statute book."[51]

The above survey of state practice with respect to the internal execution of treaties, however brief and fragmentary, should suffice to demonstrate the soundness of the observation that "the introduction of a treaty into the internal order responds rather to a practical arrangement than to considerations of pure juridical logic."[52] Whether or not treaties shall form a "part of the law of the land" is determined, not by international law, but by the constitution or the constitutional practice of the individual state.[53] As Mr. George A. Finch has said, in a statement which would in itself be unquestionable were it not for certain conclusions which he seeks to draw from it, "It is not a requirement of international law that treaties be [directly and immediately] enforceable as municipal law in the courts of the contracting parties."[54]

In support of this assertion Mr. Finch quotes, in part, from the opinion of Justice Curtis in the case of *Taylor v. Morton,* in which it was stated:

> "If the people of the United States were to repeal so much of their constitution as makes treaties part of their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern."[55]

It is, however, surely misleading to omit the earlier observation, essential to the context, of the learned Justice, who was careful to point out:

> "The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done is, exclusively, for the consideration of the United States."

Clearly, *Taylor v. Morton* is authority only for the proposition that the United States is capable, by means of congressional legislation enacted subsequent to the conclusion of a treaty, of depriving the latter of internal effect. It is no authority for the proposition that the United States

[51] Bailey, "Australia and the International Labour Conventions," 54 INT. LABOUR REV. 285 at 296, 297 (1946).

[52] 1 ROUSSEAU, PRINCIPES GENERAUX DU DROIT INTERNATIONAL PUBLIC 392-393 (1944).

[53] See Kunz, "International Law by Analogy," 45 AM. J. INT. L. 329 at 331 (1951).

[54] Hearings on S.J. Res. 130, p. 320.

[55] 23 Fed. Cas. 784 at 785 (1858).

can by such action relieve itself of the international responsibility thereby incurred.[56]

Senator Bricker, in a speech made on the floor of the Senate on March 13, 1953, acknowledged this incontrovertible principle in stating:

> "It is true that Congress may repeal by ordinary legislation the domestic effect of a treaty. Unilateral repudiation of a treaty, however, cannot relieve the United States of its international obligation. Congress cannot repeal what turns out to be a bad or dangerous contract without inviting whatever retaliatory action the community of nations may decide to take."[57]

The fallacy of the arguments advanced by proponents of the Bricker and related amendments lies in the common assumption that the *failure* of a state to enact legislation essential to the enforcement of a duly ratified treaty constitutes no breach of international obligation. Thus a past president of the American Bar Association has, from the admitted rule of constitutional law that a statute may "repeal" a prior treaty, drawn the entirely unwarranted conclusion that this rule has "the salutory effect of preserving in the people, through their elected representatives in Congress, the ultimate power of preventing the President, with the consent of the Senate, from making domestic law on a particular subject, or supplementing or amending the Constitution of the United States without the consent of the people."[58] The Committee on Peace and Law Through United Nations, whose general views Senator Bricker has unqualifiedly endorsed, in emphasizing the power of a state to violate its international obligations, while ignoring its legal duty to observe them, has actually contended that the failure of a state to enact enabling legislation when such is required under its constitutional system "is not universally regarded as a breach of international *bona fides*."[59]

[56] Compare the statement of Secretary of State Charles Evans Hughes, February 19, 1923: ". . . a judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. The distinction is often ignored between a rule of domestic law which . . . may be inconsistent with an existing Treaty, and the international obligation which a Treaty establishes. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense. . . ." Quoted, 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 194.

[57] 99 CONG. REC. 2022-2028 (March 13, 1953).

[58] Holman, "Treaty Law-Making: A Blank Check for Writing a New Constitution," 36 A.B.A.J. 707 at 709 (1950).

[59] REPORT OF THE COMMITTEE FOR PEACE AND LAW 11 (1950). In support of this extraordinary assertion the committee quotes, and completely misinterprets, a passage from MCNAIR, THE LAW OF TREATIES 35 (1938), in which the author, while expressly affirm-

Although the committee correctly points out that a large group of states require parliamentary approval *prior* to ratification of treaties which modify internal laws, it implies, through a complete *non sequitur*, that a state may legally determine *after* ratification whether or not it will enact such legislation as may be necessary to ensure their execution.

The views expressed by recent proponents of a radical amendment of the treaty-making power ignore a proposition "constantly maintained and also admitted by the Government of the United States that a Government cannot appeal to its municipal regulations as an answer to a demand for the fulfillment of international duties," a proposition "so well understood and generally accepted" that a distinguished Secretary of State more than a half-century ago did not deem it "necessary to make citations or to adduce precedents in its support."[60]

In what is perhaps the most famous arbitration in which the United States has participated, that of the Alabama Claims, our government successfully sustained before the tribunal the proposition that the failure of a state to enact legislation essential to the enforcement of its international obligations constitutes no excuse. It was contended in the American case:

> "The local law, indeed, may justly be regarded as evidence, as far as it goes, of the nation's estimate of its international duties;

ing the obligation of a contracting state to bring its internal law into conformity with its treaty obligations, observes that failure to do so "does not, however, strictly speaking, in itself give rise to a right of complaint on the part of the other party. A right to complain only arises when the treaty is actually broken by some act which is based on the municipal law in question instead of being based on the treaty provision and is incompatible with the latter." Sir Arnold here refers to the Panama Canal Tolls controversy of 1912-1913 with the United States, in which the British Government considered that it had "certainly a political, and probably a legal, right to protest in advance against the threatened violation" of its treaty rights by legislation inconsistent therewith, but not yet applied. The act complained of was repealed.

The important distinction which is ignored in the above-cited assertion of the Committee has been pointed out with utmost clarity in a statement by the Swiss Government: ". . . it is not failure to enact a law which involves the responsibility of a State, but rather the fact that this State is not in a position, by any means, to fulfil its international obligations. It therefore follows that, even in the absence of a law by which the State could immediately fulfil its obligations, we will not be confronted with a fact or act contrary to international law unless some circumstance arises by which the rights of other States are prejudiced." L. of N. Doc. supra note 37 at 238.

[60] Mr. Bayard to Mr. Connery, November 1, 1887, 2 MOORE, INTERNATIONAL LAW DIGEST 235 (1906). See the cases and authorities collected in the Reply of the Government of the United States, May 22, 1929, LEAGUE OF NATIONS, 3 Conference for the Codification of International Law, Supp. . . . (C.75(a).M.69.1929.V) 6-8; 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 24-39; 5 id. 164-167, 194-197; Draft Convention on the Law of Treaties, with Comment, Harvard Research in International Law, 29 AM. J. INT. L., SUPP., Pt. III, 977-992, 1029-1044 (1935).

but it is not to be taken as the limit of those obligations in the eye of the law of nations."[61]

Mr. Livingston, Secretary of State, in 1833 forcefully stated a principle which has only recently been drawn into question in certain quarters:

> "The Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the Government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations."[62]

Finally, the advocates of change in the force and effect of the treaty clause of Article VI, section 2 of the Constitution disregard the uniform rulings of international tribunals, such as that of the Permanent Court of International Justice, which has regarded it as "self-evident" that ". . . a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken."[63]

Even more succinctly, the International Court of Justice has held that ". . . refusal to fulfill a treaty obligation involves international responsibility. . . ."[64]

[61] 1 PAPERS RELATING TO THE TREATY OF WASHINGTON, GENEVA ARBITRATION 47 (1872).

[62] 2 WHARTON, INTERNATIONAL LAW DIGEST, 2d ed., 67 (1887). As the Law of Treaties, Draft Convention with Comment, Harvard Research in International Law, 29 AM. J. INT. L. 1037, Supp., Pt. III. (1935), states: ". . . If the law or practice of a State requires that a treaty to be 'incorporated' or 'transformed' into its municipal law before it can be executed, such requirement shall not affect in any way the international obligation of the State to execute the treaty. Consequently, the failure of the State to perform its obligations under the treaty during the interval beween . . . which the treaty comes into force and the enactment of the 'transformation' legislation cannot be pleaded as a legitimate defense to the charge of non-performance by the State of its treaty obligations. . . . The duty to execute the stipulations of a treaty from the date at which, by agreement of the parties, it becomes legally binding upon them, is not dependent upon some posterior unilateral act of a party which may be required by its own jurisprudence or practice [to transform the treaty]—unless, of course, the treaty itself contains an express provision to the effect that there shall be no duty of execution prior to such act."

See Morgenstern, "Judicial Practice and the Supremacy of International Law," 17 BRIT. Y.B. INT. L. 42 at 91 (1950); and Reiff, "The Enforcement of Multipartite Administrative Treaties in the United States," 34 AM. J. INT. L. 661 (1940).

[63] Opinion relative to the Exchange of Greek and Turkish Populations, Publications of the Court, Series B, No. 10, p. 20 (1925). See also the cases collected in 1 SCHWARZENBERGER, INTERNATIONAL LAW, 2d ed., 28, 29 (1949).

[64] Opinion relative to the Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania, I.C.J. Reports 228 (1950).

In fact, the arguments presently advanced on behalf of the Bricker and related amendments, in so far as they would deprive certain treaties of their self-executing effect, could much more cogently be employed to support proposals that the House of Representatives be associated with the Senate in the approval of treaties, and especially those which would involve a modification of, or addition to, the existing internal law of the United States. Proposals that the House should participate in the treaty-making process have frequently been made in the past,[65] and there are pending before that body at the present time two proposed constitutional amendments, identical in their terms, which would provide that "Hereafter treaties shall be made by the President by and with the advice and consent of both Houses of the Congress."[66]

The Bricker and other proposed amendments would actually place the United States in a position of inequality in its dealings with other countries. Far from raising the United States to a plane of "parity" or "equality" with other nations, they would, in several vital spheres of international action, reduce this country to a position of virtual impotence. In no other country have such constitutional absurdities as those envisaged in the current proposals been seriously considered.[67]

The discretion with respect to the fulfillment of international treaty obligations which the Bricker and other amendments intend to reserve is one which presumably would, on occasion, be exercised; and each time that it would be exercised the United States would be placed in default. It is amazing that it should now be proposed that this country, having voluntarily acquired obligations based upon considerations of reciprocal or mutual advantage, should seek to evade or avoid them. Woodrow Wilson stated the basic issue presented by the current proposals when he successfully urged the repeal of legislation contrary to the treaty obligations of the United States in the following terms:

> ". . . We consented to the treaty; . . . and we are too big, too powerful, too self-respecting a nation to interpret with too strained

[65] See, for example, H.J. Res. 6, 78th Cong., 1st sess. (1943), and like proposed amendments in Amendment to Constitution Relative to Making of Treaties: Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 78th Cong., 2d sess. (1944).

[66] H.J. Res. 12, Jan. 3, 1953 (Burdick); H.J. Res. 65, Jan. 3, 1953 (Mills).

[67] "No other country in the world, so far as careful study of the laws and practices of other countries reveals, is required by its constitution or its constitutional practice to follow such a double procedure [as envisaged in S.J. Res. 1 and related proposals] of obtaining enactment of legislation as well as specific approval by one part of its national legislature to make a treaty the law of the land." Dept. of State, Treaty Affairs, Office of the Legal Adviser, "Treaties as the Law of the Land in Various Other Countries," 1 (May 23, 1953).

> or refined a reading the words of our own promises just because we have power enough to give us leave to read them as we please."[68]

To reverse that policy now by "constitutionalizing" the unilateral repudiation of treaty obligations through reserving the right to deny them domestic force and effect would contribute to a further weakening of that basic principle—*pacta sunt servanda*—"the great moral ligament which binds together the different nations of the globe."[69]

[68] Quoted in 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 164 (1943).
[69] 1 SIR ROBERT PHILLIMORE, INTERNATIONAL LAW, 3d ed., §136 (1879).