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TREATIES AS LAW IN NATIONAL COURTS: THE UNITED STATES*

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In discussing the problem of treaties as law in national courts we must accept the dualist point of view that international courts apply international law and national courts apply national law. The sources of these two branches of law are different, so that rules may be in conflict. Unless appropriate processes exist for dealing with such conflicts, serious situations may develop.

Dualism implies that treaties, the object of which is to establish a relationship in international law, are applicable in national courts only insofar as incorporated in national law. The same is true of customary international law. International monists hold that such incorporation is automatic — that national courts must apply international law in case of conflict — but this theory has no support in practice.

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

National courts, however, under the dualist theory, are necessarily concerned with methods of incorporation and the extent to which the rules of a particular treaty or of general international law have been incorporated. Such incorporation may be effected by a general constitutional prescription, such as that in article VI of the United States Constitution, which declares that treaties are the supreme law of the land, or it may be ef-

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fected by specific legislation, dealing with a particular treaty or a particular body of customary law. In Great Britain, for example, where treaties are concluded by the Crown in Council, they are not normally directly applicable as law in national courts, although there is an exception in the case of prize courts. It is, therefore, in most cases necessary for Parliament to pass legislation incorporating the rules of a treaty in national law. The government usually lays draft treaties before Parliament and obtains such legislation before ratifying the treaty so there is seldom any difficulty. Continental European constitutions usually require the participation of the Legislature in the making of treaties effecting individual rights, and then authorize the courts to apply such treaties as law.

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

In regard to treaties, it has been held that they are, like all other acts of the federal government, subject to the Constitution. They must have been concluded in accord with the constitutional procedures and, in substance, they must deal with a matter of genuine international interest. They cannot be a subterfuge for achieving domestic legislation. This issue has rarely risen in the courts, and doubtless if it did the courts would usually treat it as a political question, to be decided by the political organs of government. Furthermore, treaties cannot violate specific prohibitions of the Constitution, such as those included in the Bill of Rights and in the guarantees of the territorial integrity and republican form of government of the states. The problem of conflict with the Bill of Rights might arise judicially and, in one case, where a treaty with France had reciprocally given consuls immunity from subpoena as witnesses in criminal cases, it was said that this immunity con-

flicted with the constitutional right of a person accused of a crime to subpoena witnesses in his behalf. There can be no doubt but that a treaty which encroached upon constitutional rights of the individual would be regarded as unconstitutional and would not be applied by national courts.

Even in such a case, however, a problem would remain of the international validity of the treaty. Foreign governments have taken the position that they cannot be expected to know how the courts of the United States will interpret constitutional guarantees, and that their only access to American constitutional limitations is through the President and the Secretary of State, with whom alone they can deal. Consequently, if these officials, by signing and obtaining ratification of a treaty, assert, directly or by implication, that it accords with the Constitution, foreign governments are entitled to assume that the treaty is valid and the United States is bound, even though American courts subsequently reach the conclusion that the treaty is inapplicable nationally because of the Constitution. This argument, which has usually been supported in international law, means that the responsibility for maintaining constitutional guarantees in relation to treaties, necessarily belongs to the President and the Senate, in conducting the process of treaty-making. Congressional or judicial action after the treaty has been concluded may nullify the treaty in national law, but cannot relieve the United States of its international obligations under it. This has been clearly recognized in the case of congressional legislation in violation of a treaty, such, for instance as the Chinese Exclusion Act of 1888. The Supreme Court held that the act of Congress was applicable even though in violation of a treaty with China. (The Chinese Exclusion Case, 130 U.S. 581 [1889]). But subsequent diplomatic experience indicated that in international law, the United States remained bound by the treaty.

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

Another exception to the judicial application of treaties lies

in the distinction, originally made by Chief Justice Marshall in *Foster v. Neilson* (27 U.S. (2 Pet.) 253 [1829]) between *self-executing* and *non-self-executing* treaties. The latter refers to treaty obligations, the execution of which is specifically vested in the Congress. This has been held true of treaties requiring an appropriation. Such treaties cannot be carried out until Congress acts. The same has been held in regard to treaty obligations concerning criminal punishment. They cannot be executed without congressional action defining the crime and conferring jurisdiction on a court. The line between self-executing and non-self-executing treaties is, however, a vague one, which has been drawn only by judicial precedents. In general, treaties specifying rights of aliens have been held self-executing and the courts have on numerous occasions enforced them, even though contrary to state legislation.

This is a matter of particular importance because it indicates that the treaty-making power in some respects goes beyond the delegated powers of Congress. One of the important objects of treaties is to assure protection of American citizens abroad, and, obviously, this implies a reciprocity whereby citizens of the other State will be protected in the United States. The protection of individual rights is, however, normally within the domain of the States. Consequently if this treaty function is to be carried out, the treaty-making power must go beyond the delegated powers of Congress. It is clear that it was intended to do so, because it was on precisely such issues, which arose under the Articles of the Confederation, that article VI of the Constitution was inserted. Under the Articles of Confederation, the States had consistently violated rights assured the Englishmen under the Treaty of Peace of 1783, with the result that the national government was seriously hampered in the conduct of foreign relations. After the Constitution was in effect, the courts had no hesitancy in applying these provisions of treaties concluded before the Constitution. This situation accounts for the terminology of Article VI of the Constitution, making treaties supreme law of the land if made under the authority of the United States, while this is true of the laws of the United States only if made in pursuance of the Constitution.

It is to be noted that the principle making most treaty provisions self-executing applies only to treaty *obligations* and not to treaty *permissions*. If the United States entered into a treaty

permitting it to take measures contrary to the Bill of Rights, for example, it is clear that this would give neither the courts nor the Congress the power to take advanatge of such permission. The permission is under international, not constitutional, law. It is important to emphasize this, because some adherents of the Bricker amendment movement have suggested that an international Human Rights Covenant might not go so far in the protection of civil liberties as does our Constitution, and that in that case it would permit Congress to violate the Bill of Rights. There is no authority for this position. It is only treaty obligations which can be regarded as self-executing. The Human Rights Covenant would oblige states not to fall below the standard it established, but it would not oblige them to refrain from going above that standard.

It is clear, however, that a treaty obligation such as that undertaken by the United States in the migratory bird treaty with Canada, justifies Congress, the courts, and other organs of the government in utilizing their powers to enforce the obligation by punishing poachers, even though it goes beyond the delegated powers of Congress. This is the issue raised in the case of *Missouri v. Holland.* (252 U.S. 416 [1920]) The normal powers of the states are not prohibitions against treaty making and the protection of migratory birds is a matter of genuine international interest. Under the necessary and proper clause, Congress has power to enforce treaty obligations, which have been assumed in the constitutional manner, which are within the proper orbit of treaty-making, and which do not conflict with a positive prohibition of the Constitution.

Furthermore, a treaty obligation is not self-executing unless it is sufficiently precise to be applied as a rule of law. This is the issue raised in connection with article 56 of the United Nations Charter, by which the members of the United Nations pledge themselves to take joint and separate action in cooperation with the organization, for the achievement of the purposes set forth in article 55. According to this article, the United Nations shall promote higher standards of living, full employment, and other economic and social objectives, as well as universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. In the *Fujii* case, a lower California court held that this treaty provision constituted an obligation which

would be violated if the California Land Act, discriminating against Japanese in the ownership of land, were enforced. (*Sei Fujii v. State*, 217 P.2d 481, 218 P.2d 595 [1950]) The Supreme Court of California, however, held that articles 55 and 56 of the Charter were too vague to be applied as rules of law. (38 Cal.2d 718, 242 P.2d 617 [1952]) Undoubtedly, these articles do imply some obligation, but the obligation may be only to negotiate covenants of human right and other instruments through the United Nations. On this particular matter the Supreme Court of the United States has not yet expressed its opinion, though the dicta of some of the Justices in other cases suggest that the Court may eventually regard at least some of the provisions of articles 55 and 56 as constituting self-executing obligations.

To be applicable in the courts, a treaty must, of course, have been made in accordance with the procedure established by the Constitution. For most important instruments, this means the President acting with consent of two-thirds of the Senate. It is clear, however, that the constitutional powers of the President as Commander-in-Chief, as chief administrative officer of the federal government, and as representative of the United States in diplomacy, gives him authority to make executive agreements insofar as essential for the exercise of these powers. It is also clear that Congress can, within the orbit of its delegated powers, authorize executive agreements to carry out its expressed legislative policies. The line between executive agreements, congressional executive agreements, and treaties in the strict sense of the word, has not been clearly drawn. It would seem to depend upon the authority to execute the obligations undertaken. Insofar as the President under his constitutional powers can carry out such obligations without support from any other organ of the federal government or without encroaching upon the normal powers of the states, it would seem that he can make the instrument constitutionally under his own authority alone. It is true that the *Belmont* and *Pink* cases seem to have suggested a somewhat wider scope of executive agreement making. (*United States v. Belmont*, 301 U.S. 324 [1937]; *United States v. Pink*, 315 U.S. 203 [1942]) The conclusion reached in these cases can, however, be justified on other grounds. I think it can generally be said that an executive agreement which encroaches upon the normal powers of the states, and which is not within the normal powers

of the President to execute, would not be applied as law by the courts.

The complexity of our problem lies in the dilemma arising because of the unified responsibility of the United States under international law, and the limitation of the powers of all organs of the government under the Constitution. The United States may be responsible and yet the President, as sole representative organ in international relations, may lack power to discharge the responsibility to solve the dilemma. On the one hand, every organ of the government should use its powers to assure that international responsibilites which have been undertaken will be fulfilled; but on the other, no organ should exercise its powers in a way to accept national responsibilites which are not likely to be discharged or can only be discharged by violating the principle of democratic consent to major decisions. These principles are flexible and political. They lie in the realm of constitutional and international understanding, rather than of law. They call for a spirit of cooperation among President, Senate, House, courts, and states, in the process of making and fulfilling treaties and other international commitments, rather than in a spirit of self-centered legalism, which has too often animated these organs to the detriment of a sound conduct of foreign policy.