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The Treaty Enforcement Power in Federal Constitutions

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The importance of this subject[1] is due to the effects of treaty enforcement on the constitutional division of sovereignty in federal governments, and to the issue which the division raises in international law. Although this paper is mainly concerned with the former aspect, it is inevitable that the rules of international law governing treaty obligations should constantly appear. We start with the proposition that the rules governing treaty enforcement in the federations of the United States, Canada and Australia spring ultimately from the constitutions of these three countries. The differences in the constitutional instruments in this respect have been enhanced by judicial interpretation. Moreover, the position is by no means stable. Judicial decisions are the outcome of litigation, and litigation is optional. Thus the limits of the power only become subject to judicial, and therefore authoritative, definition when a particular problem is brought before the courts, as a result of a challenge to a state of affairs which may have gone unchallenged for years. It is largely accidental whether, as in the United States, many of the remote corners of the subject have been explored by a flood of decisions, or whether, as in Australia, only a few points have been examined in two cases.[2] In all three

[1] *For the United States*, see mainly: (1907), 1 Am. J. Int'l L. 273, 636; 28 *ibid.* 456; (1946), 55 Yale L.J. 467; (1948), 1 Western Pol. Q. 386. *For Canada*, see (1938), 16 Can. Bar Rev. 159.

[2] For some obiter dicta in a case decided under the defence power, see also *Roche* v. *Kronheimer* (1921), 29 C.L.R. 329.

federations, to a greater or lesser extent, the courts tend to avoid discussion of matters not immediately necessary for the decision of the case before them. Indeed, in the United States, they may make considerable efforts to avoid passing on constitutional issues altogether.[3]

There is some confusion as to the nature of the treaty enforcement power. Frequently the term "treaty power"[4] is used. Alternatively the term "foreign relations" or "external affairs"[5] power may be found. Now treaty powers are a genus, of which the treaty enforcement power is one of the species, while treaty making powers and treaty ratification powers are others. Then there is the division of matters into those having internal and those having external effects, though both may be embraced in one treaty. External affairs extend to both groups, and foreign relations are more of a definition of the technical means employed to give effect to the external affairs power than of any power itself. The most satisfactory definition of the treaty enforcement power for our purposes may be given in terms of jurisdiction: in a state where judicial review exists, it is the power relative to the performance of international agreements of any kind which come under the jurisdiction of the courts of that state, and are judged according to the rules of law which those courts are required to apply. Cases arising out of treaties in which municipal law, or a conflict of that law with other municipal laws, is applicable fall in this category, while questions of international obligations[6] and political expediency do not. It is, however, for the court to decline jurisdiction on these grounds, particularly where political questions are involved. The rules of the United States Supreme Court with regard to what constitutes a political question beyond its jurisdiction are incapable of clear definition. The court has only very rarely designated a cause connected with the treaty power as political. Thus, although many types of state or federal action have been declared outside judicial competence by the invocation of their political nature, this has happened only once to an issue in a case involving the treaty enforcement power,[7] except in so far as redress against

[3] See the remarks of Frankfurter J. in Parliamentary Affairs, vol. III, no. 1, p. 55.

[4] See (1934), 28 Am. J. Int'l L. 456.

[5] See (1938), 1 Western Pol. Q. 386.

[6] See (1934), 28 Am. J. Int'l L. 456, for possible enforcement of international obligations by international courts. For authoritative statements of the international legal position see Pitman B. Potter, Manual Digest of Common International Law (New York, 1932); Crandall, Treaties, Their Making and Enforcement (Washington, 1916); C. C. Hyde, International Law (Boston, 2nd revised ed., 1945).

[7] *Foster and Elam* v. *Neilson* (1829), 2 Pet. 254, at p. 308.

a foreign sovereign was sought, in which case the doctrine of political redress was firmly and repeatedly pronounced.[8] In the Commonwealth countries the judicial method of interpreting the constitution as an Act of Parliament has precluded any disclaimer of jurisdiction over questions of treaty enforcement powers, based on the political nature of the cause.

This definition of the treaty enforcement power has come to be established in all three federations, though in the Australian constitution it had to be construed from section 51 (XXIX), which gave the Commonwealth power to legislate with regard to external affairs. This power the court held to include treaty enforcement.[9] It was argued in the leading case on the subject[10] that this only gave the Commonwealth power to legislate with regard to affairs truly external to the Commonwealth territory, such as representation abroad.[11] Further it was argued from Canadian and American decisions that the category of matters properly the subject of international agreement was restricted to such matters as were capable only of international regulation, such as military alliances.[12] Both contentions were unanimously rejected, following Canadian and United States practice. Nevertheless it was stated that the principle of confining treaty enforcement powers to subjects properly a matter for international regulation could not be considered as abandoned, however broadly it might be interpreted.[13] In the United States, the recent victory of the doctrine of powers inherent in the national government over mere powers implied from the constitution[14] has rendered limitless the range of subjects on which treaties may be concluded, through the invocation of the supra-constitutional concept of sovereignty. Since the arguments, which have become known as "Mr. Justice Sutherland's theory",[15] were not necessary to the decision of the case concerned, and since the dicta were based on an elaborate theory of historical transfer of sovereignty, the object can only have been the deliberate exposition of the unfettered range of the power. In the Commonwealth countries, subjects have been considered *ad hoc* so far as

[8] *Underhill* v. *Hernandez* (1897), 168 U.S. 250 (unrecognized foreign sovereign); *Oetjen* v. *Central Leather Co.* (1917), 246 U.S. 297; *Ricaud* v. *American Metal Co.* (1917), 246 U.S. 304.

[9] *McKelvey* v. *Meagher* (1906), 4 C.L.R. 265, at p. 286.

[10] *Rex* v. *Burgess ex parte Henry* (1936), 55 C.L.R. 608.

[11] *Ibid.*, at p. 612.

[12] *Ibid.*, at p. 613.

[13] *Ibid.*, p. 630 *passim*.

[14] *U.S.* v. *Curtiss-Wright Export Corp.* (1936), 299 U.S. 304; *U.S.* v. *Belmont* (1936), 301 U.S. 324.

[15] See George Sutherland, Constitutional Power and World Affairs (1919). The phrase appears in (1946), 55 Yale L.J. 467.

their propriety for international regulation was concerned. But it has been hinted that with the reduction of the barriers of physical distance between one country and another, the limits of the category are likely to be broad.[16] It should be noted, however, that a positive decision on the propriety of a subject for international regulation does not preclude a decision declaring its legislative enactment pursuant to a treaty unconstitutional. Though properly a subject for a treaty, it may, for instance, violate a constitutional prohibition. Thus in Australia no treaty enforcing legislation would be upheld under section 51 (XXIX) if it conflicted with section 92, declaring that interstate trade and commerce shall be free.

There is a limitation on the treaty enforcement power of the Dominion of Canada. According to section 132 of the British North America Act, the powers of the Dominion government necessary and proper to perform Canada's obligations under treaties with foreign countries are full only so far as the Dominion government is a government over part of the British Empire, and in so far as the treaty concerned was concluded by Canada in that capacity. The word "full" here obviously implies a plenitude of powers to be contrasted with the limited, enumerated powers of the Dominion government under section 91. Judicial interpretation of this clause has included as Empire treaties those compacts in which the British Empire was a signatory *eo nomine*, as was usual in League of Nations treaties signed between 1919 and 1926. It has also included formal treaties under the Great Seal, concluded by the King in the style then usual.[17] Without ever handing down an authoritative definition of Empire treaties, both the Supreme Court of Canada and the Judicial Committee of the Privy Council have tacitly followed the definitions given by the Imperial Conferences of 1923[18] and 1926.[19] These Empire treaties were distinguished from agreements made under the authority of the Governor-General and the Dominion Government, and perhaps ratified or accepted informally by the Dominion Government.[20] In the most recent Canadian case involving the treaty enforcement power,[21] Dominion adherence to a number of International Labour Office conventions was followed by corresponding legislation enacting the provisions of the conventions. This legislation was declared invalid by the Privy Council on the grounds that the conventions were not Empire treaties and that legislative powers

[16] *Rex* v. *Burgess ex parte Henry, supra, per* Latham C.J. at p. 224 *passim.*
[17] See (1938), 16 Can. Bar Rev. 159.
[18] Parl. Papers, 1923, Cmd. 1987, xii, pt. I, p. 13.
[19] Parl. Papers, 1926, Cmd. 2768, xi, 545, pp. 22-23.
[20] Parl. Papers, 1923, *supra*, p. 14.
[21] *A.-G. of Canada* v. *A.-G. of Ontario et al.*, [1937] A.C. 326.

over the subjects concerned was not vested in the Dominion parliament by section 91 of the British North America Act, 1867. Thus, once a compact has been defined as an Empire treaty or not an Empire treaty, an entirely different standard is applied by the courts to the power of enforcement under the compact. At present the Dominion powers in this respect, where no Empire treaty is concerned, seem to be no higher than the normal legislative power under section 91. The limits of the power under Empire treaties are less clearly defined in their wider range, and perhaps the recent disappearance of the term "British Empire" may have destroyed the whole basis for the distinction in section 132. This in turn may call for revision of the Canadian constitution in accordance with the modern international status of Canada. A definition approximating more closely to the United States distinction between treaties and mere agreements might be reached, though the Canadian courts may not necessarily follow those of the United States in giving equal status to the legislation enacted under either.

The power to contract international obligations is now held to be the exclusive preserve of the federal government in all three federations, though even this was not established without challenge in the United States.[22] The permissive power given to the states in the constitution[23] to make compacts with foreign countries subject to congressional approval, and the right, so far exercised without challenge, for states to make local border arrangements with each other and with foreign neighbours, may perhaps show the vestiges of an ancient sovereignty. These facts are a challenge to the theory that sovereignty was transformed unbroken from the government of George III to the government of the United States of America.[24] The weight of the decisions establishing the primacy of the United States' national sovereignty is such that it is now doubtful whether congressional permission would be given for the exercise of the permissive foreign relation power by a state.[25]

There is a good deal more doubt over the exclusiveness of the federal enforcement power. In Canada the limits of the federal power under non-Empire treaties, and the consequent danger of

[22] *Julliard* v. *Greenman* (1883), 110 U.S. 421, at p. 441. The exclusive sovereignty of the federal government in the foreign relations field was established by *Virginia* v. *Tennesse* (1892), 148 U.S. 503; *Burnet* v. *Brooks* (1932), 288 U.S. 378. For the argument that states may act internationally see also *Homes* v. *Jennison* (1840), 14 Pet. 540.

[23] Article I, s. 10.

[24] *U.S.* v. *Curtiss-Wright Export Corp.*, *supra*, at p. 320.

[25] Some important cases not connected with treaty powers, but mainly with jurisdictions and immunities, are quoted in (1924), 28 Am. Pol. Sci. Rev. 223.

the Dominion's lack of total international competence, have been held to be avoidable by the co-operation of the Dominion and provincial legislatures which, by the contribution on the part of each of his share of the total legislative powers, can make up the sovereign plenitude and fulfil any obligation acquired by treaty.[26] This legalistic view, which ignores the realities of the Canadian political situation, and the uncertainty of maintaining the concord once it has been achieved, can be dismissed as an academic exercise on the part of the Privy Council. In Australia the share of the states has never been made explicit. On the other hand, the courts test treaty enforcing legislation very closely in order to satisfy themselves that the legislation is designed to enforce the treaty — no more and no less. As the purpose of government, so far as it is not expressed in the legislation concerned, is no concern of British or Commonwealth courts, the courts can only reach their conclusion by close comparison of the treaty and the legislation. If the divergence between them is sufficient to cast doubt on the intention of the federal government to do no more than carry out the treaty faithfully,[27] the legislation, at any rate the repugnant parts of it,[28] will be held invalid. Thus a discretion in legislating can only be achieved by the co-operation of state and Commonwealth legislatures. This may also be true in cases where the forms of the treaty are not sufficiently precise to enable them to be repeated almost word for word in the enforcing enactment. It is significant that, after the first set of regulations on the enforcement of the Aeronautics convention had been declared partly invalid, the Commonwealth government, not content with issuing a new set of regulations, approached the state governments with the request to enact identical legislation, which some states carried out. As in Canada, this co-operation is ephemeral and uncertain, and hence the result of this situation must be the special care with which international agreements, to which Australia is a party, will have to be drawn. In the United States, where the only constitutional loophole to federal exclusiveness in treaty-making exists, the courts have, with one exception,[29] emphasized that the

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[26] *A.-G. of Canada* v. *A.-G. of Ontario et al., supra, per* Lord Atkin at p. 354.

[27] *Rex* v. *Burgess ex parte Henry, supra*; *Rex* v. *Poole ex parte Henry* (1939), 61 C.L.R. 634.

[28] For the question whether any part of an act found invalid does or does not invalidate the whole, see Dixon J. in *Rex* v. *Poole ex parte Henry*. See also *Huddart Parker Ltd.* v. *Commonwealth* (1931), 44 C.L.R. 492, at pp. 513, 529; *New South Wales* v. *Commonwealth* [No. 3] (1932), 46 C.L.R. 246, at p. 259.

[29] *Prevost* v. *Greneaux* (1856), 19 How. 1 (treaty enforcement may depend on state laws).

enforcement power is exclusive once Congress enacts enforcing legislation.

In Australia and Canada the English rule applies, requiring legislation before a treaty will be accepted as binding by the courts.[30] A Canadian-American agreement regulating traffic on the border lakes was held invalid in the Dominion by two judges of the Supreme Court in concurring judgments, on the grounds that no enforcing legislation had been passed.[31] The Ontario Court of Appeals had used a legal fiction in order to uphold the treaty since "any imputation of breaking faith had, if possible, to be avoided".[32] In the United States, although the enactment of enforcing legislation is a constitutional power and may be a duty in international law on the part of the federal government,[33] this only applies where the treaty is not self-executing,[34] or only partly self-executing.[35] The court will resort to a self-executing treaty as it would to a statute.[36] The decision whether a treaty is self-executing, or whether it requires legislation, seems to be in the first instance with the federal government. The courts have interpreted the term "self-executing treaty" very broadly but have avoided any definitions of the term in recent cases, confining themselves instead to a statement whether or not a particular treaty was self-executing.[37] Previous judgments given by the courts were too conflicting to enable a settled rule to be established, which would govern the construction of treaties as non self-executing,[38] except for treaties which by their terms specifically require legislative action, and those belonging "to that exceptional category of treaties which cannot from their nature be given effect as law *ex proprio rigore*".[39] The courts apparently take the view that silence on the part of the legislature in this matter expresses approval of the incorporation of treaty provisions as part of the national law of the United States. In a very recent case involving the interpretation of the human rights provisions

[30] *Walker* v. *Baird*, [1892] A.C. 491.

[31] *Arrow River and Tributaries Slide and Boom Co. Ltd.* v. *Pigeon River River Timber Co.*, [1932] S.C.R. 495, at p. 511.

[32] *Re Arrow River and Tributaries Slide and Boom Co. Ltd.* (1931), 65 O.L.R. 575, at p. 587; [1931] 1 D.L.R. 260, at p. 271.

[33] *Foster and Elam* v. *Neilson*, *supra*, at p. 313.

[34] *Whitney* v. *Robertson* (1887), 124 U.S. 190.

[35] *Aguilar* v. *Standard Oil Co.* (*New Jersey*), (1943), 318 U.S. 724, *per* Stone C.J. at p. 738.

[36] *Head Money Cases* (1884), 112 U.S. 580, at p. 599; *Bacardi Corporation* v. *Domenech* (1940), 311 U.S. 150, at p. 161.

[37] *E.g.*, *Cook* v. *U.S.* (1932), 288 U.S. 102, at p. 119; *Aguilar* v. *Standard Oil Co.*, *supra loc. cit.*

[38] See Dickinson, Are the Liquor Treaties Self-executing? (1926), 20 Am. J. Int'l L. 444.

[39] *Ibid.*, p. 449.

of the Charter of the United Nations (Preamble, Articles 1, 2, 55) the court assumed without examining the proposition that these provisions could be considered self-executing, no enforcing legislation having been passed.[40] This raises the problem of treaties the terms of which "import a contract, when either of the parties engages to perform a particular act, [and where] the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court".[41] Though this rule is well established, contracts of this nature have been more and more narrowly interpreted.[42] A definition of the respective spheres of contractual obligations by treaty, and self-executing provisions, remains to be established. If the provisions of a treaty are held to be not self-executing and therefore inoperative, and no enforcing legislation is enacted, the treaty would be no more than an expression of public policy. According to recent practice even this, however, may be sufficient to have a deciding influence on the decision of the courts.[43] Consequently, on one ground or the other it would be difficult under the present trend of judicial decisions to hold the provisions of a treaty inoperative.

There is thus in the United States a discretion as to whether or not to legislate, and this has directly and inevitably led to a recognized discretion as to the scope of the legislation itself. Unlike Commonwealth courts, the courts of the United States will not undertake a critical comparison between the provisions of treaty and legislation. Another result of the discretion has been the reversal of the normal order of legislative procedure. Instead of legislation following on a treaty, the right of the Senate to participate in the making of the treaty, and its power to enforce by enactment, is sometimes waived by delegation to the executive, in the form of a congressional resolution, of the power to con-

[40] *Fujii* v. *California* (April 24th, 1950) (California Dist. Ct. App., 2nd Dist.). Appeal to the Supreme Court of the State filed June 2nd, 1950. See (1950), 44 Am. J. Int'l L. 543, 590. Articles 104 and 105 of the Charter, concerning the status of the United Nations, were held to be self-executing provisions of the same treaty: *Curran* v. *City of New York* (1947), 77 N.Y.S. (2d) 206.

[41] *Foster and Elam* v. *Neilson, supra* at p. 314.

[42] The provisions of the treaty concerned in *Foster and Elam* v. *Neilson* were later held in *U.S.* v. *Percheman* (1833), 7 Pet. 51, to be self-executing, no contract being imported.

[43] *Oyama* v. *California* (1948), 332 U.S. 633, Black and Douglas JJ. concurring at p. 649. But see (1950), 44 Am. J. Int'l L. 547. It is submitted, with respect, that the remarks of the justices refer to the potential frustration, not primarily of international pledges, but of public policy as signified by these declaratory pledges; that in fact the argument is analogous to that in the *Pink* case, and that the problem of whether the charter is self-executing or not would not by itself govern the decision of the court.

clude certain agreements or to take certain regulatory action as the result of a future agreement.[44] Such a resolution is held to have the status of enforcing legislation in the courts.[45] In view of the large discretion required by the executive in the conduct of foreign relations, a greater degree of delegation by Congress is considered permissible than would be upheld by the courts in purely internal matters.[46]

Originally, a distinction was made in the United States between the extent of federal enforcement power under a full-blown treaty and the power arising out of a mere agreement.[47] In substance this distinction resembles that made in section 132 of the Canadian constitution, though, of course, the Empire qualification is absent. But in more recent times the difference has been washed away by the flood of plenitude discovered in the United States as an international juristic person. It is significant that recent decisions, which gave the federal government powers previously undreamt of and even specifically denied, arose out of executive agreements and even mere diplomatic acts.[48] This all-inclusive definition of treaties in the United States is quite at variance with English or Commonwealth practice.

Having now cleared the ground for an examination of the limits of the power, we can compare the three constitutional provisions regarding them. In cases of Empire treaties, section 132 of the British North America Act, 1867, gives to the Dominion government all powers necessary and proper to enforce by legislation. Article VI of the Constitution of the United States of America makes treaties made under the authority of the United States the supreme law of the land, together with the constitution itself and all laws of the United States made in pursuance of it. Section 51(XXIX) of the Commonwealth of Australia Constitution Act, 1900, gives the Commonwealth government powers to legislate with regard to external affairs, and placitum VI of the same section the same power with respect to defence. In the case of Australia, therefore, the treaty enforcement power is subject to the same limitations as the other enumerated powers of the federal government: absolute prohibitions where the constitution expressly so provides. Thus, as we have seen, treaty enforcement legislation, although satisfying the requirements of the High

[44] *U.S.* v. *Curtiss-Wright Export Corp., supra.*
[45] *U.S.* v. *Pink* (1941), 315 U.S. 203, at p. 230 (an executive expression of public policy may have the same effect as enforcing legislation).
[46] *E.g., Panama Refining Co.* v. *Ryan* (1934), 293 U.S. 388.
[47] Story, Commentaries, s. 1403; Field J. in *Virginia* v. *Tennessee, supra.*
[48] *U.S.* v. *Belmont, supra*; *U.S.* v. *Pink, supra.*

Court in every other respect, would be declared null and void if in conflict with section 116 of the Constitution, prohibiting federal legislation with regard to certain religious matters, or with section 113 establishing the exclusive jurisdiction of a state over intoxicating liquor entering its borders. Such was the prediction of the Chief Justice.[49] The Australian power is thus limited both as regards subject matter and discretion in legislating. Indeed, the need for close conformity between treaty and legislation was felt so strongly that the discrepancy in the *Aeronautics* case led two justices to cast doubt on the good faith of the Commonwealth government in contracting and enforcing its treaty obligations. They thought that the treaty power was being used as a means of extending the sphere of Commonwealth legislation into fields of intra-state commerce constitutionally reserved to the states, by conscious disregard of the actual terms of the treaty.[50] Those who consider federal government to be one long struggle for overall supremacy may feel that the justices were right.

The other Australian decision[51] did not add anything new to the doctrine. The same test was applied to the amended regulations based on the same international agreement. This time, however, the court, by a majority of 4 to 1, upheld the regulations as attempting in good faith to give effect to the parent treaty. Perhaps the majority took a slightly more lenient view of minor divergencies in the later case, but their individual decisions were based on the principles of the previous case.

Where, as in the Canadian and American constitutions, the powers of treaty enforcement are specifically mentioned in the constitution, the first task of the courts has been to establish the place of the power in the hierarchy of powers created by that constitution. In the United States, treaty enforcement regulations, whether originating from a self-executing treaty or from legislation, were at first placed on a par with other federal legislation, and the two were made perfectly interchangeable.[52] Thus a self-executing treaty automatically invalidated prior legislation, and vice versa. At one stage, however, it was held that so far as the subject matter of the treaty was concerned, its provisions were of the same force as the constitution itself.[53] In a later case, decided on other grounds, the federal circuit judge doubted "whether

[49] *Rex* v. *Burgess ex parte Henry, supra, per* Latham C.J. at p. 642.
[50] *Ibid., per* Evatt and McTiernan JJ. at p. 693.
[51] *Rex* v. *Poole ex parte Henry, supra.*
[52] *Head Money Cases, supra, The Cherokee Tobacco* (1870), 11 Wall. 616.
[53] The relevant part of a judgment by Justice Patterson is quoted in (1907), 1 Am. J. Int'l L. 659, but the reference there to *Wave* v. *Hylton* (1796), 3 Dall. 199, is incorrect.

courts had the power to declare the plain terms of a treaty void".[54] Such elevation of the power might seem to imply that unlike federal legislation, which can be abrogated by subsequent legislation, existing treaty provisions can only be superseded by a further treaty for that express purpose. This raises the question of repudiated treaties. In the United States the law is that a treaty will be considered abrogated when it is obviously and hopelessly in conflict with the war policy of the federal government,[55] or when the government has given clear and unequivocal expression of its intention to consider the provisions of the treaty no longer applicable by congressional legislation[56] or otherwise.[57] Seeming incompatibility between public policy and the provisions of a treaty is not enough to make the courts disregard the latter.[58] These rules give treaties as such a status in municipal law which seems to reflect the attempt on the part of the United States courts to give treaties in municipal law some of the force they have in international law — an attempt for which the concept of a self-executing treaty is further evidence. It is not clear whether the same status would be accorded to enforcing legislation pursuant to a non-self-executing treaty. After a treaty has been concluded, a change in circumstances may lead to legislation conflicting with the provisions of the treaty, and such legislation has been upheld, though in one of the two cases concerned[59] the authority to legislate contrary to the treaty provisions was not derived from the treaty enforcement power in the first place, but from the "acepted maxim of international law that every sovereign nation has the power . . . to exclude aliens".[60] There is, therefore, some doubt whether the enhanced treaty powers of the federal government in the United States are dependent on the treaty itself, or on the discretion to legislate municipally which a treaty creates. This difficulty is in part due to a latent conflict between international and municipal law.

The early attempt to fit the scope of treaty powers into a hierarchy under the constitution was thus fraught with difficulties, and has not been repeated since the turn of the century. No

[54] *U.S.* v. *Reid* (1934), 73 Fed. 2nd 153, at p. 155.
[55] *Karnuth* v. *U.S.* (1928), 279 U.S. 231.
[56] A full list of 17 supporting decisons is given in C. C. Hyde, International Law (2nd revised edition, Boston, 1945), Vol II, p. 1463, note 2.
[57] *Techt* v. *Hughes* (1920), 229 N.Y. 222, quoted in *Clark* v. *Allen* (1946), 331 U.S. 503, at p. 509.
[58] *Society for the Propagation of the Gospel* v. *New Haven* (1823), 8 Wheat. 464.
[59] *Fong Yue Ting* v. *U.S.* (1892), 149 U.S. 698. The other case was one of the *Head Money Cases, supra.*
[60] *Nishimura Ekin* v. *U.S.* (1891), 142 U.S. 651, at p. 659.

niche for the federal enforcement power could be found. On the other hand, it was undesirable, if not impossible, openly to make treaty enforcement and the constitution equal and substitutable. Hence the attempt, beginning in the days of Chief Justice Marshall[61] and reaching its climax in the *Belmont* and *Pink* cases, to place the federal treaty enforcement power on an extra-constitutional basis. But this still does not solve the ultimate problem of limits. It was true until quite recently that, wherever possible, courts took pains to construe a treaty so as not to invalidate existing provisions of state law.[62] But in cases where a state statute conflicts with the provisions of a treaty, the statute is prostrated.[63] Where a non self-executing treaty is made, state statutes in conflict with the enforcing legislation are invalid,[64] even though the state statutes had previously been upheld against ultra vires federal legislation enacted before the conclusion, and without the support, of a treaty.[65] When an international agreement, as opposed to a treaty, conflicts with the common law doctrines of a state, the latter are prostrated.[66] Since the existence of a federal common law has been specifically denied, and its previous existence declared unconstitutional,[67] one may well ask before what the common law of the state is prostrated in cases where an international agreement gives no hint of any self-executing provisions beyond the assignment of such claims as may be found valid in the courts. Consider the case of *U.S.* v. *Pink*. Here the Litvinov assignment, which assigned certain claims on the part of the Russian Government against United States citizens to the United States government, was the self-executing agreement concerned. The validity of the claims themselves remained subject to the decision of the courts, and hence the agreement did not seem prima facie to affect the substance of the claims, but merely substituted one potential beneficiary for another. This interpretation was indeed suggested in earlier cases involving the Litvinov assignment, both in the New York and the United States Supreme Courts. In the present case, however, the latter court produced a public policy from behind the terms of the assignment, calling for a speedy settlement of claims and counter claims,

[61] *Cohens* v. *Virginia* (1821), 6 Wheat. 414.
[62] *Todok* v. *Union State Bank* (1929), 281 U.S. 449.
[63] *Ware* v. *Hylton* (1796), 3 Dall. 199; *Chirac* v. *Chirac* (1817), 2 Wheat. 259; *Geoffroy* v. *Riggs* (1889), 133 U.S. 258; *Hauenstein* v. *Lynham* (1879), 100 U.S. 483.
[64] *Missouri* v. *Holland* (1919), 252 U.S. 416.
[65] *U.S.* v. *McCullagh* (1915), 221 Fed. Rep. 288; *U.S.* v. *Shauver* (1914), 214 Fed. Rep. 154.
[66] *U.S.* v. *Pink*, *supra*.
[67] *Erie Railroad Co.* v. *Tompkins* (1937), 304 U.S. 64, at pp. 65, 77-78.

which had dogged Soviet-American relations for fifteen years. In order to give effect to this public policy, the court gave greater full faith and credit to the acts of the Soviet government than that normally required by article IV, section 1, of the constitution, and greater than that given by the English courts in cases involving the same problem. It follows that executive agreements of a routine character, such as recognition, are capable of very broad construction, and have considerable effect in the interpretation of the doctrine of *Erie* v. *Tompkins*. Either, to paraphrase Chief Justice Hughes' remark, the provisions of a treaty are what the judges say they are, or, if this enormous discretion is unacceptable, the decision of the court must spring from something like a federal discretion as to the choice of law in conflict cases where treaties are involved.

Neither state statutes nor state common law rules have thus proved obstacles to the federal treaty enforcement power. The courts have perhaps been more chary of tampering with rules of equity in state law when upholding the federal power than with any other conflicting state rules.[68] There remain the positive constitutional prohibitions, such as the fifth amendment. Only in one case has a possible conflict arisen between the provisions of a treaty and the fifth amendment. The issue was to some extent avoided by the extension of certain limitations on the equal applicability of the fourteenth amendment to citizens as well as resident aliens,[69] to the fifth amendment also.[70] This controversial method made it unnecessary for the court to pass on the effectiveness of the fifth amendment as a bar to the treaty enforcement power. The most that can therefore be said is that the courts will probably refuse to uphold the treaty enforcement power in the face of a direct constitutional prohibition, particularly as the normal scope of constitutional prohibition can be narrowed when some question of emergency is invoked. On the whole, the Supreme Court has frowned upon the full implications of an emergency doctrine,[71] and it is therefore unlikely to bolster up the

[68] *U.S.* v. *Guaranty Trust Co.* (1937), 304 U.S. 126 (the assignment of Soviet claims in the United States to the U. S. Government cannot interfere with the liquidation proceedings against Russian assets in New York according to the rules of that state). This decision has been in part reversed by *U.S.* v. *Pink, supra.*

[69] *Disconto Gesellschaft* v. *Umbreit* (1907), 208 U.S. 570; *Santovincenzo* v. *Egan* (1931), 284 U.S. 30, at p. 40.

[70] For the implications and effects of this, see the comment on the *Pink* case in (1942), 51 Yale L.J. 851, and (1942), 55 Harv. L. Rev. 864.

[71] *Ex parte Milligan* (1866), 4 Wall. 2, 120; *Ex parte Endo* (1944), 323 U.S. 283. The doctrine appears in *Home Bldg. & Loan Co.* v. *Blaisdell* (1933), 290 U.S. 398, *per* Hughes C.J. at p. 426; *Moyes* v. *Peabody* (1908), 212 U.S. 78; *Korematsu* v. *U.S.* (1944), 323 U.S. 314, *per* Frankfurter J. concurring

already large treaty enforcement power in this way. This view of the treaty enforcement power corresponds to the definition given in a leading case that the nature of the government of the United States cannot be altered by the enforcement of treaties, and that no part of a state may be excluded from the Union in this way without its own consent.[72] On the other hand, no self-executing treaty, or treaty enforcing legislation, has yet been declared invalid in the United States.

This fact has not prevented the representatives of the United States from pleading their country's constitutional incapacity to enter into certain international obligations, particularly those involving the police power. Examples were particularly frequent in the inter-war period, when the solemn treaty of former days was being supplemented, and to some extent replaced, by informal international compacts.[73] The United States objections were twofold: executive inability to commit the Senate, and potential conflict with states' rights. The scruples of the United States made it balk at conventions which both Canada and Australia, with experience of narrower interpretation of their constitutions, had apparently no hesitation in signing. Perhaps the outstanding example of these scruples is the statement of the United States representative at an all-American conference in 1928: "The delegation of the United States regrets very much that it is unable at the present time to approve the code of Dr. Bustamente, as, in view of the constitution of the United States of America, the relations among the states, members of the Union, and the powers and functions of the Federal Government, it finds it very difficult to do so".[74] Clearly, this view of America's international potential is not a correct exposition of the federal powers as defined by the courts. It is hardly surprising that one commentator should find it necessary to devote a number of pages in the American Journal of International Law to an inquiry into the good faith of the United States government in making this and similar declarations.[75] The following might be considered a more orthodox statement of the United States position before the present war: "The administration is careful to make no arrangement by treaty which cannot be put into practice under state legislation".[76]

at p. 324; *Yakus* v. *U.S.* (1943), 321 U.S. 414, *per* Rutledge J. concurring at p. 462. It also appears in the writings of Jefferson, Lincoln and Sumner.

[72] *Fort Leavenworth Raiload Co.* v. *Lowe* (1884), 114 U.S. 525, at p. 541, quoted in *Geoffroy* v. *Riggs*, *supra*, at p. 267.

[73] For this paragraph see (1934), 28 Am. J. Int'l L. 456.

[74] U.S. Dept. of State, Report . . . to the Sixth International Conference of American States (Washington, 1928) 167.

[75] 28 Am. J. Int'l L. 456.

[76] Professor Chamberlain, League of Nations Information Service, 1933, Press Release No. 6755.

In Canada there is an optional judicial step between the conclusion of a treaty and its review by a court after challenge. Reference may be made to the Supreme Court of the Dominion for an advisory opinion *inter alia* on constitutional questions. At the least for an advisory opinion on constitutional questions, such references are treated with great respect by the courts of Canada and by the Judicial Committee of the Privy Council, though the Dominion government is not bound to follow the view of the court in its subsequent course of action. Reference has been unpopular with judges since the days of Sir Edward Coke, and the opinions of the Canadian Supreme Court have naturally tended to be cautious. There have been four original references on matters affecting the treaty power,[77] and in each case the opinion of the court was either upheld by the Privy Council, or the grounds of the opinion were extended on appeal in the course of subsequent litigation. In one case the Supreme Court was equally divided over the correctness of the opinion expressed in a previous reference on the same subject.[78]

The limits of Empire and non-Empire treaty powers have not been clearly defined, and there has been considerable diversity in the judicial decisions on the subject. Though no legislation pursuant to an Empire treaty has yet been declared invalid, the dicta of both the Supreme Court and the Privy Council point to undefined yet very real limits to the discretion the federal legislature has for the purpose of giving effect to a treaty. As in Australia, departure from the text of the treaty is fraught with judicial menace.[79] It is noteworthy, in this connection, that the Canadian legislation pursuant to the Aeronautics convention, upheld under section 132 by the Privy Council, followed the terms of the convention more closely than the Australian legislation based on the same convention, which was held invalid on the grounds of excessive departure. On the other hand, the distinction between Empire and non-Empire treaties was somewhat obscured in an opinion by two justices of the Supreme Court, which stated that although only parts of the enforcing legislation might be valid under the special heads of section 91, nevertheless, though the treaty was clearly not an Empire treaty, the legislation was possibly valid under sec-

[77] *In the matter of legislative jurisdiction over hours of labour*, [1925] S.C.R 505; *Re Treaty of Versailles re hours of labour*, [1925] 3 D.L.R. 1114; *Re Regulations and Control of Aeronautics in Canada*, [1930] S.C.R. 663, *Re Aerial Navigation*, [1931] 1 D.L.R. 13; *Re Regulation and Control of Radio Communication*, [1931] S.C.R. 541, 4 D.L.R. 865.

[78] *Re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 461.

[79] *In re the Regulations and Control of Aeronautics in Canada*, [1932] A.C. 54.

tion 132.[80] Viscount Dunedin, delivering the opinion of the Privy Council in the subsequent case, refused to accept the relevance of the enumerated powers of section 91 to radio communication, exempted the convention from the provision of section 132 as a non-Empire treaty, but indicated a reserve fund of Dominion enforcement powers from the general provisions of section 91 dealing with federal control over legislation for the peace, order and good government of Canada.[81] This raised a controversy in legal circles in Canada. Was the latter part of the judgment obiter or did it provide a means of circumventing the distinction in section 132 for practical purposes? It is a perennial source of difficulty that the Australian and the Canadian constitutions were enacted 50 and 83 years ago respectively by the British parliament and that both countries have since become "international juristic persons"[82] in the fullest sense, but that, like all acts of the British parliament, the constitution acts are stringently interpreted by the courts, "inconveniences, even grave inconveniences"[83] notwithstanding. But the hopes based on this part of section 91 proved shortlived. The decision of the Privy Council in the I.L.O. case relegated non-Empire treaties to inferior rank, and no mention was made by Lord Atkin of the general provision of section 91.

As in the United States, Empire treaty enforcement can invade the sphere of legislation normally reserved to the states,[84] and it invalidates inconsistent state statutes.[85] But it has never been clearly recognized as exclusive. Indeed, the chief justice and two justices agreed in describing the federal power as paramount rather than exclusive.[86] In other words it was thought that the provinces may legislate undisturbed on any subject regulated by the Dominion pursuant to an Empire treaty, providing that such legislation was not repugnant to the Dominion legislation. The Privy Council has, on the whole, gone further than the Supreme Court. For instance, the exclusiveness of the federal power under Empire treaties was established there after the Supreme

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[80] *Radio Reference, supra, per* Lamont J. 4 D.L.R. at p. 884, Rinfret J. at pp. 882-3.

[81] *In re the Regulation and Control of Radio Communication in Canada, A.-G. of Quebec* v. *A.-G. of Canada et al.*, [1932] A.C. 304, at pp. 311, 312, 317.

[82] *A.-G. of Canada* v. *A.-G. of Ontario et al.*, [1937] *supra*, at p. 350.

[83] *Rex* v. *Burgess ex parte Henry, supra, per* Latham C.J. at p. 641.

[84] *Rex* v. *Stuart*, [1935] 1 D.L.R. 12.

[85] *Brooks-Bidlake and Whittall* v. *A.-G. of British Columbia et al.*, [1923] A.C. 450; *A.-G. of British Columbia* v. *A.-G. of Canada*, [1924] A.C. 203; *In re Nakane and Okazaka* (1908), 13 B.C.R. 370; *In re Employment of Aliens* (1922), 63 S.C.R. 293; *Re Oriental Orders in Council Validation Act* (1922), 65 D.L.R. 577 (British Columbia).

[86] *The Aeronautics Reference, supra, per* Anglin C.J. at p. 15 and Cannon J. at p. 53.

Court had expressed doubts whether, in the particular case concerned, the power "involved or implied the supersession of provincial by Dominion legislation".[87] It is possible to make an interesting comparison of the issues considered important by the courts in the United States and in Canada, since a case has arisen in each country[88] involving the interpretation of the same agreement, a migratory birds convention between the two countries.[89] In the Canadian case the argument was not concerned with the question whether or not section 132 was applicable, for this was undisputed, but on the broad or narrow interpretation of the Dominion's legislative powers in relation to the treaty. The legislation was much wider in scope than the convention had been, but the court held that the regulations were designed to give effect to the object sought by the treaty, that a broad interpretation ought to be applied, and that the regulations ought to be upheld.

In the American case the argument for the state of Missouri was based on the fundamental question whether treaty enforcement legislation had any status superior to ordinary federal legislation. Holmes J. dealt with this issue only, and cited a long line of decisions against the argument of the state. Though control over birds might be with the state in ordinary circumstances, the subject was eminently one for international regulation, and both the acceptance as well as the enforcement of the treaty could only be carried out by the federal government. It can be seen that the American court, though passing on a more fundamental aspect of the treaty enforcement power than the Canadian court, found the grooves for its decision far better oiled by previous judicial lubrication.

With regard to the attitude of the executive towards entering international commitments, the use of the reference shows that, though the Dominion government may not be certain of its constitutional justification in making and enforcing certain treaties, these doubts are not sufficient, or do not appear sufficiently early, to prevent either the conclusion of the treaty or the enactment of enforcing legislation pursuant to it. Thus only in one case leading to eventual litigation did the reference take place before ratification and before enactment of enforcing legislation.[90] It should

[87] *Ibid.*, *In re Regulations and Control of Aeronautics in Canada*, *supra*, at p. 60.

[88] U.S.: *Missouri* v. *Holland*, *supra*; Canada: *Rex* v. *Stuart*, *supra*.

[89] Ratified at Washington December 7th, 1916. 39 U.S. Statutes at Large, p. 1702; Canada, 7 & 8 George V, c. 18.

[90] First I.L.O. reference, *supra*. In the *Aeronautics* case the reference took place after the ratification, and this, in turn, was undertaken only

be noted that section 405 of the Treaty of Versailles, which mentioned the possible disability of federations to engage fully in international compacts, has been quoted in cases and in official documents of the United States, Canada and Australia. It is surprising, therefore, that the Canadian government has been more chary than the United States of specifically pleading its constitution and system of government as a bar to participation in international conventions and treaties.

There are interesting and significant differences in the interpretation of treaty enforcement powers by the courts in the three federations. Even more important is the effect of the treaty enforcement power, and its interpretation on the fundamental principle of federal government, the division of legislative sovereignty between the two co-ordinate units of federal and of state or provincial government. There is no doubt that this power has done violence to the strict definition of legislative division by groups of subjects, and, if this is held to be *conditio sine qua non* of federalism, to the whole federal principle.[91] Treaty powers indeed are not the only route by which the federal or central government has, with the approval of the courts, committed inroads on legislative spheres normally reserved to the provincial or regional governments. Thus the war power, as part of a wider emergency power, and the taxing power, have to some extent modified the strict division of legislative powers. But the treaty enforcement power differs from these both in scope and kind. The defence power is to a large extent limited, in its overriding capacity, to the time of an emergency, and the courts have not been chary to declare the substantive limits which must not be overstepped[92] as well as the time limit to which emergencies can be drawn out.[93] Judicial interpretation of the federal taxing power, though it has given absolute priority to the direct federal taxes in the Commonwealth countries,[94] and qualified priority in the United States, is only indirectly responsible for the enormous possibilities of political control by the federal government which lurk behind the taxing power. But the treaty enforcement power, by its very nature, is neither self-liquidating nor indirect. All courts are bound to hesitate before plunging a government into international diffi-

after the regulation enforcing the treaty had been passed. This reverse order was one of the grounds for the challenge of the treaty. In the *Radio* case the order was also legislation, ratification, reference.

[91] *E.g.*, Wheare, Federal Government (1946), Ch. 1.

[92] *Ex parte Endo, supra.*

[93] *The Australian Petrol Rationing* case (1949), not yet reported.

[94] Canada: *In re Silver Bros. Ltd.*, [1932] A.C. 514; Australia: *South Australia* v. *The Commonwealth* (1942), 65 C.L.R. 373.

culties which would follow if a properly contracted treaty were declared void municipally, even if they have the power to do so. The onus of proof thus seems to be on the party arguing that treaty enforcing legislation is void, which is a reversal of the normal procedure, at any rate in American cases, where the constitutionality of federal legislation is in issue. In addition, the extra-constitutional basis of national sovereignty, invoked as a prop for the power of treaty enforcement and foreign relations together, makes any restraining action by the courts more difficult, since the normal means of restraint may not apply.

Whether or not this power is inherent in every government is really a philosophical question. But it may be asked whether such a power can be possibly combined with any system of government embodying the full federal principle. If it cannot, one conclusion is obvious: the federal principle breaks down, not as a result of the internal conflict between the two co-ordinate sovereignties, but because this division of sovereignty cannot stand up to the test of modern international relations. The limiting factor is therefore not the need for undivided sovereignty in internal affairs, but the inability of international law to recognize such a division. There are three possible solutions of this problem. The federal state may choose to adopt a foreign policy sufficiently negative to prevent conflict between the internal division of sovereignty and the demands of international obligations. This seems to be the policy in the one federation where the constitution actually prevents the conflict from arising, by excluding the legislation of the general government from the scope of judicial review.[95] Alternatively, the federal principle may be subordinated to the demand for full international competence on the part of the general government, and only for that purpose. This seems to be the policy adopted in the United States and, to some extent, in Canada. Finally, an attempt may be made by the courts to examine the reasons behind the treaty by passing on the question whether the subject of the treaty is appropriate for international regulation and by submitting the good faith of the government over the treaty and any pursuant legislation to a searching examination. From the evidence of two cases this appears to be the attitude adopted by the High Court of Australia. This approach does, however, imply that the courts must take into consideration issues of a purely political nature, and rely on evidence from diplo-

[95] Swiss constitution, articles 90, 94, 101. Instead, treaties binding Switzerland for more than fifteen years or indefinitely must be submitted by referendum to the approval of the people on demand of 30,000 voters or 8 cantons (article 89 of 1921).

matic sources such as is rarely used by courts outside the Supreme Court of the United States. These judicial functions might thus lead to jurisdiction over matters of which British courts have tended to steer clear. Nevertheless, the successful combination of satisfactory enforcement powers and a federal system of government may only prove to be possible by thus extending the process of judicial review and the power of the courts.

Freedom of Speech

Truth and understanding are not such wares as to be monopolized and traded in by tickets, and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broad-cloth and our woolpacks. What is it but a servitude like that imposed by the Philistines, not to be allowed the sharpening of our own axes and coulters, but we must repair from all quarters to twenty licensing forges?

Had any one written and divulged erroneous things and scandalous to honest life, misusing and forfeiting the esteem had of his reason among men, if after conviction this only censure were adjudged him, that he should never henceforth write, but what were first examined by an appointed officer, whose hand should be annexed to pass his credit for him, that now he might be safely read; it could not be apprehended less than a disgraceful punishment. Whence to include the whole nation, and those that never yet thus offended, under such a diffident and suspectful prohibition, may plainly be understood what a disparagement it is. So much the more whenas debtors and delinquents may walk abroad without a keeper, but unoffensive books must not stir forth without a visible jailor in their title. Nor is it to the common people less than a reproach; for if we be so jealous over them, as that we dare not trust them with an English pamphlet, what do we but censure them for a giddy, vicious, and ungrounded people; in such a sick and weak state of faith and discretion, as to be able to take nothing down but through the pipe of a licenser? . . . Wisdom we cannot call it, because it stops but one breach of licence, nor that neither; whenas those corruptions, which it seeks to prevent, break in faster at other doors, which cannot be shut. (John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England. November 1644.)