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# Treaty-Making Power with Special Reference to the Untied States

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## THE TREATY-MAKING POWER WITH SPECIAL REFERENCE TO THE UNITED STATES

AMOS S. HERSHEY \*

“The treaty-making power of States is as a rule, exercised by their heads, either personally, or through representatives appointed by these heads.”<sup>1</sup> In principle, all treaties are signed *ad referendum*, i. e., they are not complete or fully valid until they are ratified.

The following steps or stages in treaty-making should be carefully distinguished: (1) the negotiation (negotiation in the narrow sense) by the plenipotentiaries; (2) the signing of the treaty by those fully empowered to sign it; (3) the ratification of the treaty by the Head or Chief of State—a solemn act by which he gives it his final approval; (4) the exchange or deposit of ratifications (usually provided for in the treaty) by representatives of the respective governments; and (5) the publication or proclamation of the treaty where this is required, as in the United States, to make it a part of the law of the land.<sup>2</sup>

“The organization and powers of the agencies through which States enter into treaties are defined by their fundamental laws, or constitutions. This delegation of power by the State, in first instance, is final, and an obligation constitutionally contracted is binding on the entire State. . . It is a principle of International Law that a sovereign state is restrained only by self-limitations or by such as result from a recognition of like powers in others.”<sup>3</sup>

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\*See biographical note p. 271.

1. <sup>1</sup>Oppenheim, Sec. 495, p. 657, He adds: “Yet, as a rule, heads of States do not act in person, but authorize representatives to act for them.” These receive full powers and instructions, together with other documents.

2. This latter step is not necessary to making the treaty fully valid or binding upon the respective Governments. “It will be noted that the range of binding effect of the treaty increases at each stage, from signature through ratification and exchange to promulgation. Signature binds the government, ratification and exchange of ratification binds the State, promulgation binds the people of the State individually.” Potter, *Int. Organization*, 150.

States may also become participants in treaty rights and obligations through *adhesion* or *accession*. The terms are used loosely or interchangeably, and there seems to be no practical difference between them. On *adhesion* or *accession*, see Foster, *Practice of Diplomacy*, 281-82; Oppenheim, Sec. 533; and 2 Satow, *Diplomatic Practice*, Secs. 613-18.

It should be noted in this connection that, according to Art. 18 of the Covenant of the League of Nations, “every treaty or international engagement entered into hereafter by any Member of the League shall forthwith be registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.” For memorandum on the registration and publication of treaties approved by the Council of the League of Nations, see Supp. to <sup>14</sup>A. J. (1920), 366-70.

3. Crandall, *Treaties*, etc., Secs. 1-2. The author of this—perhaps the best—work on treaties continues: “Accordingly, the full power to enter

In modern States, the treaty-making power lies mainly in the hands of the Executive, though parliamentary and democratic tendencies point toward an increasing participation of representative bodies in treaty-making. In England treaty-making seems still to be regarded essentially as a prerogative of the Crown,<sup>4</sup> but on the European Continents parliaments have attained to a considerable direct share in the exercise of this power.

The example and influence of France on the Continent of Europe has been most important in this respect. Art. 8 of the Constitutional Law of July 16, 1875 provides that the President of France shall negotiate and ratify treaties. The French law classifies under five general heads the treaties that shall receive legislative approval—treaties of commerce, treaties that involve the finance of the State, those relating to the persons of French citizens in foreign countries, and the cession, exchange or annexation of territory. The

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into treaties is an attribute of every such State, as likewise a limitation on its exercise is a first mark of dependence. It does not follow that the power resides unrestricted in the regularly constituted treaty-making organ."

4. Of course this power is exercised through a responsible Cabinet and Secretary of State, and is indirectly subject to the control of Parliament. 2 Anson, *Law and Custom of the Const.* (4th ed.), Pt. II., 97, Cf. Ridges, *Const. Law of Eng.* (2d ed.), 534. For a severe criticism of the British system and proposed reforms, see Ponsonby, *Democracy and Diplomacy, passim*. However, "treaties involving a charge on the people, or a change in the law of the land can be carried into effect only by an Act of Parliament." Crandall, *op. cit.* p. 280. This is particularly the case with treaties abridging the private rights of British subjects (*Ibid.*, Sec. 123) and "those modifying the established laws of trade and navigation" (*Phillipson, Termination of War*, 157).

It has not been customary to submit treaties to Parliament before ratification, though it seems that the Treaties of Paris (1919-20) were so submitted in the form of a bill for carrying them into effect. On April 1, 1924, Mr. Ponsonby, the Parliamentary Under Secretary of State for Foreign Affairs, declared in the House of Commons:

"It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every Treaty, when signed, for a period of 21 days, after which the Treaty will be ratified and published and circulated in the Treaty Series. In the case of important Treaties, the Government will, of course take an opportunity of submitting them to the House for discussion within this period. . .55 *Brit. Yr. Bk.* (1924), 191, citing 171 Hansard, 2007.

It should be noted that this announcement did not appear to contemplate any change in the British procedure respecting the negotiation or ratification of treaties, but it did aim to secure publicity of the terms of all treaties and to keep Parliament informed of agreements, excepting those of minor or technical character, with foreign Powers.

It appears that the practice referred to above, inaugurated by the McDonald or Labor Government, was subsequently abandoned by the present Conservative Government.

For an interesting address on the "Treaty-Making Power of the Crown," see Atherley-Jones, in 4 *Grot. Soc.* (1919), 95-109.

approval of the legislature in these cases is given in the form of a law authorizing the President to ratify the treaty and cause it to be executed.

The French Chamber of Deputies has a Commission on Foreign and Colonial Affairs which "exercises a more constant and effective supervision over the executive than is exercised by the parliamentary body in any other country."<sup>5</sup>

The Fundamental Statute of Italy (1848) declares (Art. 5); "To the King alone belongs the executive power. He is the supreme head of the State; . . . declares war; makes treaties of peace, alliances, commerce, and other treaties, communicating them to the Houses as soon as the interest and security of the State permit, . . .; treaties involving financial obligations or alterations of the territory of the State shall not take effect until after they have received the approval of the Houses."

It should be added that "in practice, however, treaties of commerce, as well as treaties touching upon matters, the regulation of which belongs to Parliament, are, it appears, regularly submitted to that body prior to their ratification. The legislative approval is given in the form of a law authorizing that the treaty be carried effect."<sup>6</sup>

There exists in the Italian Parliament no Committee of Foreign Affairs and the Italian Government enjoys a wide independence in dealing with international questions.

Article 11 of the former German Constitution of 1871 provided that "it shall be the duty of the Emperor . . . to declare war and conclude peace . . . to enter into alliances and other treaties with foreign countries. . . ."

"So far as treaties with foreign countries relate to matters which, according to Article 4 are to be regulated by imperial legislation, the consent of the Bundesrat shall be required for their conclusion, and the approval of the Reichstag shall be necessary to render them valid." Article 4 lists no less than sixteen matters which shall be subject to imperial legislation.

The new German Constitution (1919) declares (Art. 45): "The National President represents the Commonwealth (Reich) in matters of International Law. He concludes in the name of the Commonwealth, alliances and other treaties with foreign powers. . . War is declared and peace concluded by national law. Alliances and treaties with foreign States relating to subjects within the jurisdiction of the Commonwealth, require the consent of the National Assembly."

The National Assembly (Reichstag) is to appoint a Standing Committee on Foreign Affairs (Art. 35). "Its purpose is to submit the

<sup>5</sup> McBain and Rogers, *New Consts. of Europe*, 150, citing Barthelemy, *Democratie et diplomatie*, 130 ff. and 322 ff.

<sup>6</sup> Crandall *op. cit.* Sec. 140, p. 321.

foreign policies of the Cabinet to a constant surveillance by the popular representation.”<sup>7</sup>

In general, “the new European constitutions follow the model of France. Certain classes of treaties are enumerated that require legislative ratification; inferentially other treaties may be concluded by the executive. War and peace may be declared only by the legislature. In most of these constitutions no provision is made for a Commission of Foreign Affairs similar to the French, although presumably such commissions may be established under the standing orders of the Parliaments without express constitutional authorization.”<sup>8</sup>

The constitution of the United States declares that the President “shall have power, by and with the advice of the Senate, to make treaties, provided two-thirds of the Senators present concur;” and that “this Constitution, and the laws of the United States which shall be made *in pursuance thereof*, and all *treaties* made, or which shall be made *under the authority of the United States*, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.”<sup>9</sup>

<sup>7</sup> Brunet, *The New German Const.*, 150 f.

<sup>8</sup> McBain and Rogers, *op. cit.*, 150-151. See *e. g.*, Art. 64 of the Constitution of Czechoslovakia, Art. 51, Art. 79 of that of Jugoslavia, and Art. 49 of the Polish Constitution.

The latter, which is more or less typical, declares: “Commercial and customs treaties, as well as treaties which impose a permanent financial burden on the State, or contain legal rules binding on the citizens, or change the frontiers of the State also alliances, require the consent of the Sejm.”

“It is interesting to note that even though the new constitutions contain liberal provisions for the initiative and referendum, they make no attempt to bring foreign affairs within the scope of direct government.” McBain and Rogers, p. 151. The only modern State which admits the people to a direct share in the treaty-making power is Switzerland. In January, 1921, the Swiss electorate adopted by an overwhelming majority the following amendment to Art. 89 of the Federal Constitution: “Treaties with foreign powers which are concluded without limit of time or for a period of more than fifteen years shall also be submitted to the people for acceptance or rejection upon demand of 30,000 Swiss citizens qualified to vote, or of eight cantons.” It may be recalled that in May, 1920 the Swiss people voted in favor of entering the League of Nations. Brooks, in 14 and 15 *Am. Pol. Sci. Rev.* (1920 and 1921), 477-80 and 423-25 respectively, Cf. McBain and Rogers, 152 f.

For additional data bearing on Parliamentary Participation in the Treaty-Making Power, see Crandall, *op. cit.*, chs. 18-20; Dodd, *Modern Consts.*; Harley, in 13 *A. J.* (1919) 393 ff.; McBain and Rogers, *op. cit.*, Pt. 1, ch. 7 and Pt. II., *passim*; Phillipson, *Termination of War*, 156-59; Ponsonby, *Democracy and Diplomacy*, App. II, 128 ff.; and “Ratification of Treaties,” in 14 Sen. Doc., No. 26, 66 Cong., 1st session (1919).

<sup>9</sup> Art. II, Sec. 2 par. 2 and Art VI, par. 2. The italics used above are intended to call attention to a difference in respect to phraseology between laws and treaties. It is also provided that “no State shall enter into any

The Senate may be said to participate in the negotiation of treaties in the broader but not in the narrower sense. The earlier custom inaugurated by Washington of seeking the advice of that body prior to the negotiation of treaties has been followed only in rare or exceptional instances; though individual members, particularly those on the Committee of Foreign Relations, are not infrequently consulted on the conduct of important negotiations.

The President is the sole organ of communication with foreign powers, but the Senate has frequently exercised its right of participating in the negotiation of treaties in the broader sense by advising amendments or reservations or by making these a condition for its consent to ratification by the President.

The President may withhold from the Senate a treaty already negotiated, or may submit a treaty to that body with recommendations for amendments. He may even refuse to ratify treaties approved by the Senate or withdraw treaties from its consideration.

The custom seems to be growing, on the part of our Senate, of making *reservations*<sup>10</sup> to treaties. These may be *distinguished from amendments* as not involving formal or textual changes as do the latter. They may be merely interpretive, in which case the meaning of the treaty remains unchanged. As in the case of amendments, reservations or interpretations may be attached to the treaty draft or proposal by a mere majority of the Senators present. For this and other reasons (one is that it tends to make the conduct of foreign affairs more complicated and difficult), this tendency toward an increasing participation of the Senate in the negotiation of treaties in the broader sense is to be deplored.

The President is not bound to accept either amendments or reservations at the hands of the Senate any more than the Senate is bound to accept them from him. The other Signatories to a signed treaty must give their consent to reservations as well as to amendments, but the consent may be tacit or expressed. It is believed that reservations as well as amendments to a treaty on the part of other Signatories must be submitted to the Senate.

The word "treaty" is here used in its constitutional rather than in its international law sense i. e., it means an international contract for the ratification of which the concurrence of two-thirds of the Senators present is necessary. But there are many international agreements—so-called *executive agreements*—which are not submitted to that body.

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treaty, alliance, or confederation;" and that "no State shall, without the consent of Congress. . . enter into any agreement or compact with another State, or with a foreign power." Art. 1, sec. 10, pars. 1 and 3.

<sup>10</sup> On *Reservations*, see Anderson and Kellogg, in 13 *A. J.* (1919), 526-30, 767-73; 2 Hyde, Sec. 519; Mathews, *Conduct of Am. For. Rel.* 154-61; Miller, *Reservations to Treaties* (1919); Washburn, in 5 *Cornell Law Quar.*

Executive agreements are of two main kinds: (a) Simple executive agreements, such as arbitrations or conventions for the adjustment of private claims against foreign governments, agreements involving the military power of the President, agreements serving as the basis of future negotiations or of foreign policy like the Lansing-Ishii Exchange of Notes in 1917 with Japan, *modi vivendi* or provisional and working arrangements of various sorts, and agreements in execution of treaty stipulations. Perhaps the most important simple executive agreements have been the armistice and Peace Protocol with Spain of 1898 and the Final Protocol signed with China in 1901 at the close of the Boxer Uprising. The Senate has insisted on substituting the word "treaty" for special agreements (*compromis*) in certain arbitration treaties, but "there have been numerous instances in which the Senate has approved treaties providing for the submission of specific matters to arbitration, leaving it to the President to determine exactly the form and scope of the matter to be arbitrated and to appoint the arbitrators."<sup>11</sup>

(b) Agreements under Acts of Congress. These have related to trade and navigation, including reciprocity arrangements, international copyright, trade-marks, international postal and money order conventions, agreements with Indian tribes, and the acquisition of territory.<sup>12</sup>

The assertion that treaties are "the supreme law of the land" must be taken with considerable allowance. In the first place it only applies to treaties in the constitutional sense as explained above. In the second place it is only true of treaties or stipulations in treaties that have been proclaimed and may be said to be self-executing; i. e., such as "require no legislation to make them operative."<sup>13</sup>

The House of Representatives has from time to time asserted a right to refuse to enact legislation, more particularly to pass the appropriations, necessary to carry a treaty into effect. It is of course true that there is no legal means of compelling Congress to pass legislation essential for the enforcement of treaty agreements, and that payments of money can be made only on the authority of an Act of Congress; but the assent of the House is not necessary to

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For a "Compilation of Treaty Reservations," see 15 *Sen. Doc.* (1919), (1920), 257 ff.; and Wright, in 6 *Minn. Law Rev.* (1919), 17-39. 66th Cong., 1st sess. No. 135.

On the various reservations proposed to the Versailles Treaty, see Finch, in 14 *A. J.* (1920), 175ff.

<sup>12</sup> On *Executive Agreements*, see especially: Barnett, in 15 *Yale Law Journal*. (1905), 18 ff. and 63 ff. (reprinted with additions, in pamphlet form); Corwin, *The President's Control of For. Rel.* 116-25; Crandall, *Treaties*, etc., chs. 8-9; Foster, *The Practice of Diplomacy*, ch. 16, and in 11 *Yale Law Journal* (1901) 89 ff.; 2 Hyde, Secs. 505-09 and notes; Mathews, *op. cit.*, ch. 10; 5 Moore, *Digest*, Secs. 752-56, and in 20 *Pol. Sc. Quar.* (1906), 385-420; 1 Willoughby, *Const. Law of the U. S.*, ch. 33; and Wright, *Control of Am. For. Rel.* (see index.)

the validity of a treaty, though it may be essential to its execution. However, "while the House still holds to the existence of its discretionary power in the enforcement of treaties, as a matter of fact it has seldom, if ever, refused to take the necessary action to provide the means of enforcement."<sup>14</sup>

Thus in the United States the Senate is an important part of the treaty-making power, and treaties are not mere international contracts, but a part of the law of the land. Treaties are paramount over State Laws and State Constitutions which are null and void if in conflict with them.<sup>15</sup> An Act of Congress, however, "supersedes a prior inconsistent treaty as a law binding the courts. Conversely, it has frequently been declared that so far as a treaty operates of its own force as municipal law, it supersedes inconsistent Acts of Congress."<sup>16</sup>

There is no certain agreement as to the extent of the treaty-making power in the United States. The classic statement of the prevailing doctrine is that of Justice Field in a dictum contained in *Geofroy v. Riggs*. "The treaty-making power in the United States extends to all proper subjects of negotiation between our government and the governments of other nations." Justice Field continues: "The treaty-power, as expressed in the Constitution, is in terms unlimited

<sup>13</sup>J. Field, in *Whitney v. Robertson*, 124 U. S. (1888) 190, 194, Cf. Marshall, in *Foster v. Neilson* (1829), 2 Pet. 253 and Scott, 429, 432.

<sup>14</sup> Mathews, *op. cit.*, 203.

On this subject, see Burr, *Treaty-Making Power in the U. S.*, ch. 5 pp. 376 ff.; 1 and 2 Butler, *Treaty-Making Power of the U. S.*, ch. 10 and 12, Secs. 363-75; Crandall, *Treaties, etc.*, chs. 12-13; Corwin, *National-Supremacy*, ch. 10, and *The President's Control of For. Rel.*, 92-109; Mathews, *op. cit.*, ch. 11 pp. 201-12; 5 Moore, *Digest*, Secs. 758-61; Tucker, *Limitations on the Treaty-Making Power*, ch. 8; and 1 Willoughby, *op. cit.*, Sec. 206.

<sup>15</sup> This principle was first judicially asserted by our Supreme Court in very sweeping fashion in the case of *Ware v. Hylton* (1796), 3 Dall. 166, 236, and has been reasserted in many subsequent cases. For reviews of the leading cases, see especially: 2 Butler, *Treaty-Making Power*, Ch. 91, (particularly Sec. 359 for conclusion); Corwin, *National Supremacy*, *passim*, particularly chs. 4, 8, 11; Crandall, ch. 16; Devlin, *Treaty Power*, ch. 9; and 1 Willoughby, *Const. of the U. S.*, ch. 35, Secs. 212-15.

<sup>16</sup> Crandall, Sec. 72, p. 161 See *Ibid.*, note 12 for citation of leading cases. For reviews of cases see also 2 Butler, *op. cit.* ch. 12; Devlin, ch. 8; and 1 Willoughby, Secs. 207-09.

"There would seem to be certainly one exception to the rule that the later treaty abrogates the prior inconsistent statute, and this is in reference to acts for raising revenue." 1 Willoughby Sec. 209, p. 488. Cf. Crandall, Sec 89.

"When the two relate the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided, always the stipulation of the

except by those restraints which are found in that instrument against the action of the government or of its departments, and those rising from the nature of the Government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the States, or a *cession of any portion of the latter without its consent*. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiations with a foreign country."<sup>18</sup>

Perhaps the most noteworthy expression of the prevailing nationalistic view is that by Ex-Secretary Root: "In international affairs there are no States; there is but one nation, acting in direct relation to and representation of every citizen in every State . . . So far as the real power goes, there can be no question of State rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question."<sup>19</sup>

But it is generally admitted that "a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."<sup>20</sup> However, no case has ever arisen in which a treaty has been held unconstitutional by our Supreme Court.

treaty on the subject is self-executing." J. Field, in *Whitney v. Robertson*, 124 U. S., 190, 194.

<sup>17</sup> 133 U. S. (1890) 258, 267.

<sup>18</sup> It should be pointed out that the limitation expressed in the phrase set in italics is questionable.

<sup>19</sup> Root, in *A. J.* (1907), 273, 278-79.

<sup>20</sup> J. Swayne, in *The Cherokee Tobacco Case*, 11 Wall. (1870) 616, 620. There are, says Sec'y Root in the article cited above, no express limitations, but "there are certain implied limitations arising from the nature of our government, and from other provisions of the Constitution." But he does not attempt to state what these are beyond quoting the dicta from J. Field, in *Geofrey v. Riggs*.

On this difficult and complicated subject of the limitations on the treaty-power in the United States, consult especially the works of Butler, Corwin and Crandall, cited above. See particularly Willoughby's view on the reserved rights of the States in their relation to the treaty-power, as expressed in Sec. 215, pp. 502-03 of his *Const. Law of the U. S.*

On the *Treaty-Making Power in the U. S.*, see; Anderson, in 1 *A. J.* (1907), 636-70, and in 14 *A. J.* (1920), 400-02; Bacon, in 180 *No. Am. Rev.* 502 ff.; Burr, *Treaty-Making Power in the U. S. passim*, and in 51 *Proc. of the Am Philos. Soc.*, No. 206; 1 and 2 Butler, *Treaty-Making Power in the U. S.*, *passim*; Clancey, in 7 *Mich. Law Rev.* (1908-09), 19 ff.; Corwin *National Supremacy, and The President's Control of Foreign Policy, passim*; Crandall, *Treaties, etc., passim*; Devlin, *Treaty-Power, etc., passim*; Foster, in 11 *Yale Law J.* (1901), 69 ff., and *Practice in Diplomacy*, chs. 12-16; Hayden, *The Senate and Treaties, 1789-1817*; Hall and Hyde, in 7 *Proc. Acad. Pol. Sci.* (1917), No. 3, Pt. 11, 548 ff.; Kuhn in 7 *Columbia Law Rev.* (1907), 172 ff.; Lewis, in 34 *Annals, etc.*, (1909), 313-43; Lodge,

in 31 *Scribners* (1902), 33-42; Mathews, *The Conduct of Am. For. Policy*, chs. 8-13; Mikell, in 57 *Univ. of Pa. Law Rev.* (1908-09) 435 ff. and 528 ff.; Miller, in 41 *Am. Law Rev.* (1907), 527 ff.; 5 Moore, *Digest*, Secs. 734-38; Pomeroy, *Const. Law of the U. S.*, Sec. 669-81; Root, in 1 *A. J.* (1907), 273-86; Sutherland, *Const. Power and World Affairs*, chs. 6-7; Tansill, in 18 *A. J.* (1924), 459-82; Tucker, *Limitations in the Treaty-Making Power* (for criticism of prevailing doctrine); Wheeler, in 17 *Yale Law J.* (1907-08), 151 ff.; 1 Willoughby, *Const. Law of the U. S.* chs. 32-35; Wright, *The Control of Am. For. Rel. passim*, particularly ch. 8, in 13 *A. J.* (1919), 247-64, and in 12 *A. J.* (1918), 64-95.

See also Gregory, Ion, Lewis, Kuhn, and Willoughby in *Proc. Am. Soc. I. L.* (1907), 150 ff.; and Meyer, *List of References on the Treaty-Making Power.* (Washington 1920).

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