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# Implementation of International and Supra-national Law by Sub-national Units

## 1. Introduction

In recent years, some standard assumptions of federal systems have come to be questioned. One, asserting the pre-eminence of the national government and dismissing the relevance of the sub-national units in the conduct of foreign relations, has been particularly contested. This has compelled a reassessment of the role of sub-national units in the implementation of international and supra-national law. The subject has attracted serious attention in the United States and Europe, facilitating novel solutions from practitioners and the judiciary.

Given the intensity of the scrutiny already received and the variety and complexity of the solutions evolved to meet the challenges in numerous political contexts, what follows is only a synoptic presentation of the salient features of the problem posed. Discussion on the implementation of international and supra-national law by sub-national units must obviously commence with the position in that regard of the national governments that compose the sub-national units. Courts in different federal jurisdictions have consistently used international law principles as one of the sources of their decisions. However, the sense of obligation to invoke and apply that law complementarily, or in substitution of national law, has varied depending on the legal system of the country.

### 1.1. The primacy of international law

In the United States, courts have routinely applied customary international law. Consolidating earlier decisions, the United States Supreme Court famously held in the *Paquete Habana* case that:

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

For ascertaining and administering that law, the Court offered this guidance:

" ... where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat".[1]

The *Paquete Habana* ruling, more than a century old, is considered good law even today.[2]

The respect shown by the United States judiciary for international law is conditioned, inter alia, by the position accorded to treaties in its constitution. The United States constitution provides that the president "shall have Power, by and with the Advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur" (Article II). The presidents of the United States have exercised this power to commit the nation to hundreds of international obligations. Thousands more additional obligations have been assumed by United States presidents, without going

through the Article II process, by means of the so-called “executive agreements”.[3] By virtue of Article VI, “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” The Supreme Court has held that this supremacy applies only to treaties that are self-executing. The supremacy clause (tempered by the requirement of Senate approval by two-thirds majority) has had interesting consequences for the federal system of the United States. Before going into that, a word on the position of international law in general and treaties in particular in other jurisdictions will be appropriate at this stage.

Almost without exception, federal constitutions assign the conduct of foreign policy to the central government. A well-defined residual authority in this field is sometimes vested in the sub-units, as in the case of the Swiss cantons and the German Länder. In the case of Canada, the power to conclude treaties lies with the federal government. However, the implementing power has to conform to the general division of powers in the constitution. When implementation entails encroachment upon the powers assigned to the provinces, the central government has found it necessary to solicit the provincial governments’ cooperation. The authority of the central government in Australia (Commonwealth) is comparatively unfettered. Nevertheless it has in practice found it prudent to expand the scope of the central initiatives by the process of treaty consultation. Although the federal government in Germany similarly enjoys predominant power in the field of foreign affairs, it has developed the practice of consulting the Länder in the adoption of treaties in which the interest and responsibilities of Länder are involved (Henkin, 1996, 49-51).

Article 32 of the Federal Republic of 23 May 1949 regulates the powers of the federal government and the Länder in the field of foreign relations. Under this scheme:

- The federal government conducts relations with foreign states;
- Before the conclusion of the treaty affecting the special circumstances of a Land that Land shall be consulted in sufficient time;
- In the areas in which the Länder have the power to legislate, they may, with the consent of the federal government, conclude treaties with foreign states.

The constitutional limits of the federal government and the Länder were tested in an early case before the Federal Constitutional Court in what is known as the *Reichskonkordat* case. The case concerned the constitutionality of a statute passed by the Land of Niederssachsen in 1954, providing for common non-denominational education for all school children. The federal government found the Land legislation inconsistent with its treaty obligation under the concordat concluded between Germany and the Vatican in 1933, prescribing separate Catholic schools for children of Catholic parents within Germany. The Constitutional Court held that under the Bonn constitution of 1949, the subject matter of education fell within the jurisdiction of the Länder. The Court noted that the treaty commitments of the federal government did not override the powers vested exclusively with the Länder on specific subjects. However, conscious of the fact that its ruling might pose difficult problems for the federal government in the conduct of foreign policy, the Court stated that the remedy lay in the inner harmony of the constitution which upheld the

principle of federal comity (Bundestreue) between the federal government and the Länder.[4]

The above three rather overlapping jurisdictions have generated significant controversy. But a practice seems to have developed in which both sides (the federal and state governments) seem to exercise their powers with moderation. The federal authorities exercise their apparently exclusive power in consultation with the Länder where the latter's competence comes into play. And the Länder do not establish diplomatic missions of their own, although their right to communicate with their counterparts in other federations was confirmed in one of the first decisions of the Federal Constitutional Court (Leonardy, 1993, 236). The Länder's right to communicate with their counterparts in other countries is respected by involving them in negotiations conducted with other states and the European Union (EU) by the federal governments, if the issues at stake concern legislative competence of the Länder (Leonardy, 1993, 247).

### 1.2. The supremacy clause in the United States

The supremacy clause in the United States has led to expansive claims. For Lori Damrosch, for instance,

"our constitutional law is clear: the treaty-makers may make supreme law binding on the states as to any subject, and notions of states' rights should not be asserted as impediments to the full implementation of treaty obligations" (Damrosch, 1991, 515, 530).

The interpretation is primarily based on the celebrated decision of the Supreme Court in *Missouri* v. *Holland*. In this case, the Court upheld a migratory bird

protection statute as a valid implementation of a treaty with Great Britain, dismissing the argument that the statute unconstitutionally interfered with Missouri's rights in violation of the Tenth Amendment. In a statement that would gladden the hearts of today's environmentalists, Justice Holmes observed in 1920 that the treaty in question concerned "a national interest of very nearly the first magnitude" that could be protected "only by national action in concert with that of another power".[5] States must adhere to the treaties not because international law so requires, but because by adopting a treaty, the federal government is engaging in the exercise of its foreign relations power. As Lea Brilmayer notes, international law hardly puts in an appearance in the state courts (Brilmayer, 1995, 295 at 313, 314).

The preoccupation with local issues translates into sovereignty-related claims in the supra-national context. In the classical federal structure, it could generate tricky posers over the power of federal authorities to force state governments to implement the international commitments assumed by federal authorities. In a supra-national context it could lead to judicial smear and political bickering, for example when a member state fails to implement a non-binding "directive" of the supra-national agency. The issue has created considerable controversy even in an advanced supra-national structure like the EU.

The vexing problem of enforcing/implementing federal directives/rules has played out differently in the European Community from the experience in the United States. Following the seminal decision in *Francovich* v. *Italy*, the European Court of Justice has held member states liable for breaching Community law in a variety of circumstances – most notably for their failure to implement directives when that

failure allows one private party to commit wrongs against another. The supremacy of the Community law, conspicuously absent in its constituent instruments, is asserted by reference to the principles of individual rights, direct applicability and direct effect.[6] The doctrinal confluence has given rise to such normative homogeneity in national remedies that Lord Denning warned in 1974 that Community law was creeping "into the estuaries and up the rivers" of England. Extending the metaphor, Professors Curtin and Motelmans observed that it has since "partially burst its banks and is now rushing in great gulps into surrounding country-side, with all the inherent risks not only for the unprepared country-folk, unfamiliar with its vigour and its thrust, but also for their long familiar national landscape and monuments."[7]

Resistance to imposed homogeneity is reflected in the member states' proclivity to exaggerate compliance and hide non-compliance. The failure to implement Community legislation is reportedly widespread. The more than 90% compliance reported by member states disguises the proportion of directives that have yet to be fully implemented. They also "fail to show the variance by sector, variability among member states, and the quality of implementation and enforcement", says Swaine, and adds: "The degree to which non-implementation has taxed, and continues to tax the energies, credibility, and success of the Community is hard to overstate."[8] Failure to implement Community directives has attracted adverse judgments in cases running into hundreds, notes Swaine.[9] The failure of the Court to secure compliance has resulted in greater reliance on the Commission and resort to national courts that have distinct advantages in this field.

### 1.3. Foreign policy and states' rights

How does the foreign policy- and treaty-making power correspond with the rights of the sub-units in a federation? Is international law a paramount body of principles controlling and limiting municipal law? Or do international law and municipal law each have their own separate and distinct spheres of operation, so that a country might be fully bound by international law by virtue of a treaty obligation, yet be incapable (because of its own internal municipal law, owing for example to the federal form of government) of giving effect to or implementing the treaty in its municipal law? How far, for instance, does the federal treaty-making power, or foreign affairs power generally, impinge on its internal scheme of power distribution? Put differently, should the mere fact of concluding a treaty on a given subject confer on the national government legislative power over that subject in so far as is necessary to implement the treaty; and does that amount to an interdiction of the power of the member states over the same subject matter? Solutions to these and other equally challenging issues have been attempted differently in different jurisdictions (McWhinney, 1962).

India has resolved the dilemma by vesting plenary power of treaty making and implementation with the national government. Article 253 of the Constitution stipulates:

"Notwithstanding anything in the foregoing provisions of this chapter Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or

countries or any decision made at any international conference, association or other body."[10]

The law of the United States on the effect of state legislation on the foreign affairs power of the national government is quite complex. However, there is consensus among scholars that state and local laws are unconstitutional if they "impair the effective exercise of the Nation's foreign policy."[11] That view is based on the supremacy clause of the Constitution (Article VI). According to Article VI, state laws that are in conflict with federal laws or treaties are unsustainable. The consensus ends there. There is controversy as to what state action constitutes "impairment", and what action facilitates the nation's foreign policy. Is state action, for example, penalising companies doing business in Burma (as Massachusetts did in 1996) as a response to the human rights record of the Burmese military regime, consistent with the nation's foreign affairs power. Two federal courts have invalidated that statute as inconsistent with federal foreign policy.[12] That and other local trade sanctions became a subject of heated debate in the American academic community.[13]

### 1.4. Judiciary's endorsement

The foreign policy pre-emption of state action has received judicial endorsement in a series of cases. Even in 1875, the Supreme Court had struck down a California law which, to counter unwanted Chinese immigration, had created an Office of Immigration with discretionary powers restricting supposedly undesirable immigrants. In *Chy Lung* v. *Freeman,*[14] the Supreme Court held the state action invalid, on the grounds that "a silly, an obstinate, or a wicked [state] commissioner may bring

disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend".

Fifteen years later, in *Chae Chan Ping* v. *United States,*[15] the Court further explained:

"The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country ... has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power".[16]

In the 1930s, the Court rendered a series of judgments making the foreign affairs power of the national government plenary and exclusive. The best known of the decisions of that period was *United States* v. *Curtiss-Wright Export Corp*. which involved a federal statute delegating to the president the authority to impose arms embargoes upon certain foreign nations. The Court traced the power of the Union to the Articles of Confederation and upheld the "irrefutable postulate that though the states were several their people in respect of foreign affairs were one."[17] A year later in the *United States* v. *Belmont*, the Court interpreted *Curtiss-Wright* to mean that

"the external powers of the United States are to be exercised without regard to state laws or policies ... Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them

can be interposed as an obstacle to the effective operation of a federal constitutional power".[18]

In *Zschernig* v. *Miller*, the Supreme Court was called upon to test the validity of an Oregon law denying statutory inheritance of Oregon property to nationals of countries where the inherited property would be subject to confiscation. The Court found that the statute was "an intrusion by the State into the field of foreign affairs which the constitution entrusts to the President and the Congress." The intrusion was held unconstitutional:

"It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way ... The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy".[19]

Some commentators have critiqued the Court's consistent rulings in favour of the national government in the field of foreign policy as constitutionally untenable. According to these critics, invoking merely the "logic of the federal system" and the necessity to "speak with one voice" as grounds of such a bias in favour of the national government, was an insufficient argument against state action which was imperative in the integrated world economy.[20]

The basic realities of the integrated global economy are all too obvious. Peter Spiro describes the situation as one in which states have acquired the status of "demi-sovereigns under international law" (Spiro, 1999, 1223 at 1225). Marshalled in support of the thesis, inter alia, is the fact of the growing economic strength of the

sub-units in the modern federations such as the United States. If they stood as independent nations, seven states of the Union would be counted among the top 25 countries in terms of Gross Domestic Product (GDP). Spiro argues that even Vermont, with the smallest economy among the states, would outrank almost 100 nations. It is common practice now for sub-units of modern federations to court and get courted by foreign investors (Spiro, 1999, 1223 at 1249). In fact, sub-federal jurisdictions now see international trade and foreign investment as critical to their economic well-being. As Spiro notes, they compete ferociously for foreign investment in the United States, with tax breaks and other incentives (Spiro, 1999, 1223 at 1248).

### 1.5. Doctrine

Doctrine has lent legitimacy to this accretion of power to the states in the United States. Writing in the *University of Colorado Law Review,* Martin S. Flaherty, reiterates that federalism, at least in terms of state sovereignty, has been a "backward-looking" doctrine since its inception, and that a forward-looking interpretation of the jurisprudence suggests that "states' rights at the end of the day would be reduced to irrelevance." Citing Barry Friedman in support, Flaherty concludes: "The march of globalisation cannot help but have an overall nationalising effect on our polity. In the end, the sovereignty of New Jersey simply makes less sense in the new world order" (Flaherty, 1998). There is evidence to the contrary.

The study of state constitutions even in countries with advanced federal structures has been of only recent origin. It is now widely recognised that sub-national constitutions play an important role, and that a system of constitutional federalism

cannot be fully understood without analysing the constitutional arrangements within the constituent units. The benign neglect is seen as incompatible with the realities of national lives of people living in advanced federal structures in which daily lives are governed much more directly by state than by federal laws. The complementarities of the state constitutions render to the federal nation a finite status. This realisation has led to greater emphasis in the law school curricula in the United States, Europe and Australia.

In the United States federal system, states are not required to have a constitution of their own, and are relatively free to devise and change governmental institutions and arrangements as their citizens wish. They are free, in the words of Justice Louis Brandeis, to “serve as a laboratory” for social experiments (Williams, 1997, 339). The state constitutions occupy a unique place in the political structure of the United States federation,

“unique in their origin and function as well as in their hierarchical place in the pecking order of its legal system. State constitutions have a chameleon-like quality. They are at once supreme, constitutional documents, taking precedence over all other forms of state law, and at the same time subservient, lesser forms of law, giving way to any kind of valid federal law, authorized by the federal constitution, including federal common law and administrative regulations” (Williams, 1997, 339)

The Swiss federation in which its cantons have hammered out almost every conceivable experiment in political mechanics has served as “the democratic workshop of Europe” (Williams, 1997). Many other federal systems have their own constitutions, incorporating important government powers, not necessarily similar or

identical in ambit and scope. In Germany, for instance, the Länder constitutions contain differing provisions, reflecting in some cases the influence of the post-War occupation forces, but mostly conforming to the "homogeneity principle" contained in the German Basic Law. On the other hand, the Belgian constitution does not permit regions to have their own constitution. In Australia, state constitutions predate the federal, and even though they can be changed by mere legislative acts of the state parliaments and do not contain bills of rights, they nevertheless lend great authority to the sub-units. And although Brazil received the gift of devolution from the erstwhile unitary national government, its sub-units have adopted constitutions that are repetitions of the national constitution.

Contacts between federal units are not necessarily limited to units across borders, but extend to distant centres of industrial and investment power.[21] Given the fact that most of the federal constitutions assign a monopolistic power over the conduct of foreign affairs to the federal government, such contacts have led to interesting compromises, yielding to the imperatives of the contemporary interdependence of a globalised world. In the United States, the constitutional provision barring states from entering into any agreement or compact with a foreign power has not prevented states from energetically pursuing their investment and trade interests beyond the national borders, generally with the consent and encouragement of the Federal Department of Commerce. The Canadian provinces have, for a long time, asserted their right to act internationally in their areas of constitutional jurisdiction, which include control over natural resources. The cantons of Switzerland and the Länder of Germany have engaged in direct contact with foreign governments. Even centrist France, which entertained contact between foreign powers and local authorities only

through the Ministry of External Affairs, had to establish a special office to coordinate the “external activities of local collectivities” (Michelmann and Soldatos, 1990). The Swiss constitution specifically provides for such mediation in Art. 56:

“3. The Cantons may deal directly with lower ranking foreign authorities; in other cases, the relations of the Cantons with foreign countries shall be conducted by the Confederation acting on their behalf”.

Federal intervention, however, takes place only when the cantons’ contact engages the national capital of the foreign state, but not when the canton enters into direct contact with the representatives of local communities, comparable to the Swiss cantons.

The post-industrial integrated international economy witnesses a curious phenomenon in which foreign policy formulation and implementation has engendered both centralisation of the federal structures, and decentralisation or localisation of foreign policy. One finds federal units acting as agencies of the federal government in the global market place, negotiating trade and investment arrangements with similar sub-units of government in other countries. Japan and China, with completely different political economies, find virtue in internationalising their regions and provinces to secure better economic results (Hocking, 1993a, 15). The tilt in favour of states’ rights in matters of economy has found resonance in a completely different field, i.e. the power of the sub-units in the administration of criminal justice.

## 2. States and administration of justice

The United States has of late found itself in the unenviable position, when faced with the power of its states in the administration of justice, of failing to perform its international obligation, inviting charges of violating its consular notification duties under the Vienna convention.[22] In April 1998, for example, Angel Francisco Breard, a Paraguayan national, was executed in Virginia. In March 1999, two German nationals, Karl and Walter LaGrand, were executed in Arizona. Joseph Stanley Faulder, a Canadian national, was executed in Texas on 17 June 1999. In each of these cases, the states involved admitted that they had not advised the foreign nationals of their right to speak with their nations' consular officers. In every case, the executions were carried out despite pleas from the United States Department of State, the International Court of Justice (ICJ), and each of the nations to which the accused belonged. In each of these cases there was a clear violation of the Vienna Convention.

One hundred sixty three states are parties to the Vienna Convention on Consular Relations. Its provisions are widely thought to embody customary international law. Article 36 of the Convention confers three rights upon consuls and foreign nationals. The first is the right of the consul to assist fellow nationals who have been arrested or detained. The second is the right of the nationals to determine whether they desire such consular assistance. The third is the right of the national to be notified of the right to seek consular assistance. Article 36 instructs state parties to ensure that their laws and regulations give "full effect ... to the purpose for which ... Article [is] intended." The original draft of the Convention provided for mandatory consular

notification when a foreign national was detained in a foreign country. The provision was found unacceptable to several countries which argued that such an automatic notification would infringe an individuals' right of privacy (Thornberry, 2000, 117).

The Supreme Court's affirmation of the treaty power of the national government does not square up with the powers of states in the administration of criminal justice. In recent years, the Court has tilted in favour of the rights of states. In *New York* v. *United States*, for example, the Court struck down a federal statute that in effect compelled state disposal of radioactive waste. In *United States* v. *Lopez*, the Court invalidated a federal statute that made the possession of firearms near school zones a federal crime. And in *Printz* v. *United States* it invalidated a federal statute requiring state law enforcement officials to conduct background checks on prospective handgun purchasers.

As is well known, criminal punishment, especially the death penalty, is a state subject in the United States. "Under our federal system", stated the Supreme Court in the *Lopez* case, "the States possess primary authority for defining and enforcing the criminal law."[23] This federal feature of the constitution has put the United States into adversarial relations with other states, including its allies. In a recent case, *Breard* v. *Virginia,*[24] the obligation of the federal government to respect the provisional measures indicated by the ICJ was resisted by both the federal government and the state authorities invoking the federal character of the United States. The governor of the state took the position that law enforcement being a matter of state concern he could not cede such responsibility to the ICJ. It was argued that complying with its provisional measure to delay the execution of Breard

would have the practical effect of transferring responsibility from the state to the International Court. The federal government communicated the view that the measures indicated by the ICJ were non-binding, and urged the stay of the execution if the state governor wished to do so. And the Supreme Court found "nothing in our existing case law [that] allows us to make that choice for him."[25] While indicating the interim measures, the ICJ went out of the way to enter the disclaimer:

"[T]he issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and ... further, the function of this Court is to resolve international legal disputes between States, inter alia, when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal".[26]

A number of commentators have contested the state and federal authorities' position in the *Breard* case, and find that such federalism concerns were in violation of *Holland.*[27] It is pointed out that federalist concerns, have yielded in favour of the federal government in commerce and trade, and in environmental protection.

Diplomatic and consular relations play an important role in providing a cultural bridge between states and their nationals abroad. The United States record in this field has been one of consistent concern, epitomised by its traumatic 1979 experience in Tehran when Iranian students and the revolutionary guards held hostage its diplomatic staff for 444 days. It has also demonstrated extra sensitivity to its citizens travelling or resident abroad. Manifesting the latter, the State Department has stressed the importance of consular access as codified in Article 36 of the Vienna

Convention on Consular Relations of 1963.[28] This Article recognises that communication is essential for facilitating the exercise of consular functions relating to nationals of the sending states. Article 36 (1)(a) provides that consular officials shall be free to communicate with and have access to nationals of the sending state. And nationals of such states are provided reciprocal rights. In cases of detention, the receiving state is obliged to provide such access, and inform the detainee of his right of access to the consular authorities of his state. The United States has viewed the above provision of the Vienna Convention as containing an obligation of the highest order not to be taken lightly. It has affirmed its right of consular access in numerous cases.[29] The United States sedulously pressed for an affirmation of its rights in this regard before the ICJ, and obtained a clear ruling from the Court.[30]

The zealous protection by the United States of the rights of its citizens resident abroad does not seem to be reflected by a matching concern for the rights of foreign residents living on its territory.

## 3. Conclusions and issues

The above presentation offers the hypothesis that the supremacy of the federal government in matters relating to the conduct of foreign policy can no longer be taken as a given. A century of United States practice and the jurisprudence of its courts seem to have yielded to the economic and other realities of an integrated world. The participatory role of the states in the conduct of foreign policy has been grudgingly conceded. Similar developments have taken place in other federal systems in Europe, Australia, Canada, India and elsewhere. Recognition of this reality, in theory and practice, raises the corresponding assumption about the

responsibility of the sub-units of a federation to implement international and supra-national law. The recent United States practice of yielding to states' rights in the field of administration of criminal justice, even at the cost of commitments made under international conventions is apparently inconsistent with its constitutional scheme of division of powers.

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[1] 175 US 677, 700-21 (1900), at 700.

[2] See, Restatement (Third) of the Foreign Relations Law of the United States (1987), which defines customary international law as "result[ing] from general and consistent practice of states followed by them from a sense of legal obligation" and proceeds to state that: "[i]nternational law and international agreements of the United States are law of the United States and supreme law over the law of the several states"; and finds it in conformity with the supremacy clause of the United States Constitution (Art VI, cl 2) which posits: *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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding* (Art 102 (2), at 30, and Art 111 (1), at 42).

[3] The US State Department publishes a list of treaties and other international agreements of the United States in force. Assessment and analyses of the treaty-making practice and power are abundant. For an authentic account, one turns first to Henkin (1996).

[4] For an analysis of the *Reichskonkordat* case, see McWhinney, 1962, 36-38 and 46-49.

[5] 252 US at 435.

[6] For a comprehensive account of the Court's jurisprudence on the subject, see Swaine, 2000, 1-128.

[7] Curtin and Mortelmans, 1994, 732-733.

[8] Swaine, see above note 6, 89.

[9] Swaine, see above note 6, 97.

[10] For an exhaustive comparative analysis of the Indian federal structure, see Basu, 1987.

[11] *Zschernig* v. *Miller*, 389 US 429, 440 (1968). For a discussion of the consensus on the subject, see Henkin, 1996*,* n.3 *supra*, 151-65; Maier, 1989; Ramsey, 1999.

[12] 1996 Mass. Adv. Legis. Serv (Law Co-op.); *National Foreign Trade Council* v. *Baker*, 26 F. Supp. 2d 287, 291-92 (D. Mass. 1998), *aff'd, Natsios*, 181 F. 3d at 45.

[13] Schmahmann and Finch, 1997; Price & Hannah, 1998; Denning & McCall (Jr), 1999.

[14] 92 US 275 (1875).

[15] 130 US 581 (1889).

[16] 130 US 581 (1889) at 605-06.

[17] 299 US 304 (1936), at 317.

[18] 301 US 324 (1937), at 331-32.

[19] 389 US 429 (1968), at 440.

[20] For an analysis of the debate, see Ramsey, 1999, n. 12.

[21] For an extensive list of such contacts between the United States and European federal units, see Michelmann and Soldatos, 1990.

[22] For an assessment see Thornberry, 2000, 107.

[23] *United States* v. *Lopez*, 514 US 549, 561 n.3.

[24] 445 S.E.2nd 670 (1994). The case concerned a Paraguayan national who was charged and convicted of rape and murder of a woman in Arlington County, Virginia. The case was unsuccessfully litigated in the domestic courts and found its way to the ICJ on the ground that the petitioner was denied the benefit of consular assistance guaranteed under Article 36 (1) (b) of the Vienna Convention on Consular Relations of 1963.

[25] 445 S.E.2nd 670 (1994), at 1356.

[26] *Case concerning the Vienna Convention on Consular Relations (Para. v. US)*, 3 April 1998, para. 38.

[27] See for example Henkin, 1998, 679; Vazquez, 1998, 683.

[28] 596 UNTS 261.

[29] For an enumeration and analysis of such cases, see Aceves, 1998, 257.

[30] *Case Concerning United States Diplomatic and Consular Staff in Tehran (US* v. *Iran*), IJC Reports (1980).