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WHY SO DUALIST? :
CRITICAL VIEW ON THE STATUS AND EFFECT
OF TREATIES IN THE LEGAL SYSTEM
OF THE UNITED STATES

*This article aims at discussing an issue of proper “categorization” of the United States in regard to the status and effect of international treaties in the national legal realm. It is a question that does not have only theoretical value and purpose, but rather a possible significant practical impact especially in light of recent developments such as *Roper v. Simmons*, named by some authors as creeping monism. However, here it is argued that the reasoning in this case is just a continuation and acceptance by the Supreme Court of what is stipulated in the Constitution and proper understanding of specific provisions and the international treaty law. It is the analysis of the theoretical framework of the relationship between national and international law that is at the core and through which the author tries to show that the United States is more of a monistic country than dualist. The argumentation is presented in three parts. Part I presents the monistic and dualist theories through a comparative analysis. Part II focuses on the textualist aspect by going into the relevant constitutional provisions. Part III discusses the judicial interpretation of these provisions and the new phenomenon of “creeping monism”.*

Key words: *status of international treaties; Roper v. Simmons; Supreme Court of the USA; national and international law*

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INTRODUCTION

International law is becoming ever more important as globalization brings an increasing need for international response and coordination when regulating issues that are of equal concern for all countries. It has entered a new era where it is expanding its subject matter to include relations between a nation-state and its own nationals.¹ However, international law does not have a centralized enforcement system or structure and regardless of the latest developments of monitoring systems still heavily depends on national institutions to fulfill their international obligations². It is particularly for this reason that the relation between domestic and international law and the attitude of national institutions toward international law, as well, have been in the focus of scholarly debate all over the world for so long. This point is even more important when the most powerful and influential country is concerned.

The United States has been a case that is hard to categorize and explain in terms of the status and effect of treaties in its legal system. One might pose the question why does it even matter to categorize the United States as either monist or dualist? If it were to be proved that the United States were actually a monist country that would mean that the notion of non-self-executing treaties does not relate to the point of whether these treaties are law or not, but only to their direct applicability in courts in case they are invoked by one of the parties. Thus, the vigorous debate over this question filled with extreme positions on both the “internationalist” and “nationalist” side makes the endeavor of tackling this issue more challenging, especially when an outsider is concerned. Sometimes one cannot avoid the impression that the discourse is being intentionally complicated without a particular reason except for the introduction of new, and not rarely obscure, arguments and evidences that are just used as proof of some kind of “numerical” superiority of the “true” position. This argumentation ranges from the original intent of the Founders that is sought for in the ratification conventions of different states to recent case law of the Supreme Court and public policies justifying one or the other view.

Under this idea, the author intends to question some of the arguments presented in the debate so far and try to bring a different perspective to the issue. The main thesis here is to prove the rigid interpretation of the United

¹ Julian G. Ku, *Treaties as Laws: A Defense of The Last-In-Time Rule For Treaties and Federal Statutes*, 80 *Ind. L. J.* 319, 329 (2005) [hereinafter Ku, *Treaties as Laws*].

² Armand de Mestral and Evan Fox-Decent, *Rethinking the Relationship between International and Domestic Law*, 53 *McGill L.J.* 573, 588 [hereinafter Mestral and Fox-Decent, *Rethinking*].

States as a purely dualist country³ wrong while presenting arguments to show that it is at least hybrid⁴ if not modified monistic system. Therefore, all arguments presented in this article will be viewed through the lenses of this dichotomy and thesis. This article will be confined only to an analysis of the role of treaties in the United States system and will consist of three parts.

The first part will cover the basic theoretical framework of the relationship between the national and international law and will discuss some basic misconceptions through a brief comparative analysis.

The second provides a short overview of the relevant constitutional provisions and explains the treaty making power and procedure in the United States. A short overview of the particular reasons for drafting of each provision will be presented.

Basically these two parts serve the purpose of setting the stage for the core argumentation of this article presented in the third part. Building on the previous discussion, here the most contentious issues will be argued such as the status and effect of non-self-executing treaties and the “creeping monism” concept, the role of the courts in determining the type of treaty provisions and how tradition is used and misused.

I. Theories explaining the relationship between national and international law

There are two dominant theories dating from the eighteenth and nineteenth century that try to explain the interaction between the national legal order and international law. Those are monism and dualism.⁵ Many authors are of the opinion that this dichotomy has no practical value and it is

³ Curtis A. Bradley, Breard, Our Dualist Constitution, and the Internationalist Conception, 51 *Stan. L. Rev.* 529, 531 (1999); George Slyz, *International Law in National Courts*, 28 *N. Y. U. J. Int'l L. & Pol.* 65, 71 (1996); William Burnham, *Introduction to American Legal System of The United States* (4th ed. 2006), 674; John M. Rogers, *International Law and United States Law* (1999);

⁴ See Louis Henkin, Plenary session: The U.S. Constitution in Its Third Century: Foreign Affairs, 85 *Am. Soc'y Int'l L. Proc.* 191, 191 (191), Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Right Treaties*, 107 *Colum. L. Rev.* 628, 638 [hereinafter Waters, *Creeping Monism*].

⁵ David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 *U. C. Davis L. Rev.* 1,9-10 (2002) [hereinafter Sloss, *Non-Self-Executing Treaties*]. He makes a very interesting distinction on this point. He distinguishes terms “monist” and “dualist” from monist and dualist domestic legal systems. In his view a country has a monist legal system if international treaty provisions are automatically converted into domestic law without the need for implementing legislation and in contrast dualist if country's law requires conversion of treaty obligations into domestic law. In this sense the United States' system is largely (but not entirely) monist.

anachronous, especially in an era where international and foreign law is treated to be as authoritative as domestic law.⁶ The very fact, according to these scholars, that a constitution contains a provision determining the status and effect of international law, customary or conventional, is in its very essence dualistic. Thus, there is no need to distinguish between the two since every country in the world has such a provision in its domestic legal order.

However, I do not totally agree with these statements because this dichotomy still has a practical value, and it is not purely an academic distinction. I believe that a categorization based on this dichotomy eventually makes a difference in the treatment of international law by national institutions. That is why one has to start discussing this topic by first addressing theories explaining the relationship between national and international law. Basically, this is the framework through which I will analyze the United States system and try to prove that only the relatively recent practice of the political branches and to some extent the passive attitude of the judiciary have led to change in the paradigm and the attitude towards international treaties and their relationship with the domestic legal order. This shift, which I do not think follows the true meaning of the constitution, has developed the notion that the United States is a dualist country.

In essence, monism perceives national and international law to be part of one single integral legal system. Nevertheless, there are different currents of thought based on the role of the state within this theory itself. In the nineteenth century, the German etatist legal doctrine declared international law to be inferior to domestic law since the source of both of these is commonly rooted in the state sovereignty. In that sense, international law is just “external state (national) law”⁷. Opposing this rather nationalistic concept in the twentieth century, Hans Kelsen developed the internationalist view. In his view, within this unitary system of law the “Grundnorm” is international law, and it should prevail in any conflict with other sources of law⁸.

However, neither of these is the prevailing view today as most countries have opted for a kind of modified version of monism. Even Austria and its constitution dating from 1921, that is actually the brainchild of

⁶ Mattias Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement* in Choudhry, S.(ed.), *The Migration of Constitutional Ideas*, (2007), p.2; Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 *Int'l J. Const. L.*, 397, 398(2008); Waters, *Creeping Monism*, supra note 3 at 630.

⁷ Antonio Cassese, *International Law* (2d. ed. 2001), p. 217-234.

⁸ Malcolm N. Shaw, *International Law* (6th ed. 2008), 132.[hereinafter Shaw, *International Law*].

Kelsen himself, have adopted this modified doctrine.⁹ It is easily concluded that the United States fits more into this group than into the group of countries that embraces the dualism. This modification of the theoretical form of monism is expressed in the constitutions and legal systems of numerous countries through the enactment of constitutional provisions dealing with the status and role of treaties and declaring, most frequently, that treaties are to be of a higher or equal normative value as statutes in the domestic legal order, but in each case inferior to the constitution. Under the pure monistic approach no such provisions would be needed and international law would be automatically incorporated and superior to all forms of domestic law, constitutional or statutory, with its adoption, validity and entry into force on international level only. This trend is evident particularly in constitutions enacted after WWII and in the post-socialistic regimes. Both groups of constitutions have influenced constitutional making process in the world. On the other hand, sovereignty is in a more or less, transitional phase and the role of international law has changed since those days. Absolute sovereignty today represents just an idealistic thought of nationalist thinkers.

In contrast, dualism perceives the national and international legal order as two separate orders and systems. Dualists view these orders separately because they differ in terms of their sources, objects and subjects, or, simply put, there are fundamental differences in the nature of inter-state and intra-state relations¹⁰. As a result, international law has no validity in the national legal order unless it is transformed into a domestic legal act, most usually an act of the Parliament. The most prominent example of this system is the United Kingdom as well as the other Commonwealth countries. However, one has to bear in mind that certain modification is visible in these countries as well. Namely, the United Kingdom under pressure from the European Union and the rulings of the European Court of Justice on primacy of EC law and of the Council of Europe and the European Court of Human Rights has “relaxed” the supremacy of the Parliament doctrine¹¹. The United Kingdom enacted statutes, European Communities Act 1972 and Human Rights Act 1998, which made incorporation of international law possible regardless of its source, European Community, European Community or Council of Europe.

⁹ Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds.), *National Treaty Law and Practice* (2005): Franz Cede and Gerhard Hafner, Austria, p. 69.

¹⁰ Shaw, *International Law* supra note 7, at 131.

¹¹ Mestral and Fox-Decent, *Rethinking*, supra note 2, at 605. Tom Ginsburg, Svetlana Chernykh and Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. Ill. L. Rev. 201, 205 (2008) [hereinafter Ginsburg, Chernykh and Elkins, *Commitment*].

Even though on its face this dichotomy seems to be very simple it became quite complicated when trying to categorize particular countries. Some of the countries even apply different types of theories to different sources of international law¹². Additionally, there are also misconceptions that occur when analyzing the theories. Some authors¹³ argue that the *differentia specifica* of the either monism or dualism is a hierarchy of legal norms, national and international. Thus, stating that one country is dualist because its treaties are on an equal footing with the statutes in the hierarchy of legal norms without first defining whether international law is directly applicable or not, is unacceptable. All in all, one cannot discuss hierarchy of norms if the treaties are not directly applicable in a specific country. Therefore, one cannot discuss the hierarchy of norms in a country that treats international law as separate legal system and requires an act of transformation before it can directly apply it¹⁴. Just the mere fact of looking at the issue from this perspective makes the point monistic. If you have a dualist system, then you will have two parallel hierarchies of legal norms since you have two separate legal systems. Treaties in a dualist system are not treated as law, because they can never be self-executing. Therefore using hierarchy in such circumstances means that the different sources from the two different and separate legal orders are put into one single hierarchy. Furthermore, if one distinguishes only based on hierarchy, then today there is not one single country that is truly monistic in the world. Even the Netherlands would not be monistic as its constitution requires the same majority, even if not the same procedure, for adopting a treaty that conflicts with the constitution such as the one dealing with amending the constitution.¹⁵ It is also the constitution itself that declares treaties to derogate it, so the highest legal act has allowed for the possibility of changing its own text.

Another misconception frequently made is connected to the act of incorporation, also referred to as legislative approval. Namely, a great majority of countries that accept monism, or the modified version of monism do require for their respective parliaments to have a say through an act of

¹² Ginsburg, Chernykh and Elkins, Commitment, supra note 10, at 205; They give several examples of countries that adopted this mixed type of system when different sources of international law are concerned. For example: Germany, Italy, Austria, Netherlands, France, Switzerland and others.

¹³ Curtis A. Bradley, Breard, Our Dualist Constitution, and the Internationalist Conception, 51 Stan. L. Rev. 529, 531 (1999); George Slyz, International Law in National Courts, 28 N.Y.U.J. Int'l L. & Pol. 65, 71 (1996); William Burnham, Introduction to American Legal System of The United States (4th ed. 2006), 674.

¹⁴ John H. Jackson, Status of Treaties in Domestic Legal System: A Policy Analysis, 86, Am. J. Int'l L. 310, 314-315 (1992); Mestral and Fox-Decent, Rethinking, supra note 2, at 581-582.

¹⁵ The Constitution of Netherlands, Article 137 and article 91 (3).

incorporation or parliamentary approval. Such acts or approvals of the legislature basically serve only the purpose of expressing consent for the treaty to become an integral part of the domestic legal order. In those cases the act of incorporation or approval has no normative value and if one is to invoke a specific treaty provision it will refer not to the act of the parliament but to the treaty itself.

II. Constitutional provision, original intent and treaty making power and procedure

While the first section has presented the general theoretical framework the next two sections will turn to the actual United States practice regarding the status and effect of treaties. This article does not attempt to cover the entire debate, nor does it aim to provide answers to all contentious matters. Indeed, methodologically, might be termed selective. However, I believe that selectiveness is part of the debate as well, since there are no objective standards and criteria to follow. Therefore, this part will start with a brief overview of relevant constitutional provisions. Further it will analyze constitutional provisions envisaging the basic rules of treaty making. As an addendum the argumentation is followed up by the original intent debate.

Every analysis of an issue dealing with the status and effect of international law in a particular country has to involve its relevant constitutional provisions since, as previously stated, every country has such rules. In the United States Constitution, the Supremacy clause is in the middle of every inquiry of this kind. Article VI Clause 2 stipulates “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”.¹⁶ The phrase “made under the authority of the United States” actually points out to the constitutional limits put on treaty making power. In essence, treaty makers cannot introduce a treaty that is unconstitutional either because the federal government lacks the power to enact such a domestic act in a particular area or the matter to be regulated by the treaty actually is exclusively reserved for Congress such as the appropriation of funds or maybe declaring a war.¹⁷ The wording of the provision that all treaties are supreme law of the land means that there is a general presumption of self-execution of treaties but also that even non-self-executing treaties do represent law particularly when an inconsistent state statute is concerned.¹⁸ Lastly, when analyzing the wording of the supremacy clause, great debate has been caused by the fact that this provision uses the

¹⁶ U.S. Const. Art. VI cl. 2.

¹⁷ Sloss, *Non-Self-Executing Treaties*, supra note 4 at 48.

¹⁸ More on this point see in the next section discussing on the character of non-self-executing treaties as law.

phrase “shall be” when it is regulating treaties as supreme law of the land. But from a textual viewpoint the meaning is more than evident. The phrase generally addresses all acts in the provision, the constitution, the statutes, and the treaties, and there is no logical reason in to claim that it means that treaties necessarily need an implementation act in order to become supreme law of the United States.¹⁹ On the contrary treaties are automatically incorporated in the system notwithstanding the nature of the provisions as self-executing or not.

The wording of the provision is evidently monistic, and it seems to be obvious that there is no need of transformation treaties in domestic acts as treaties themselves are part of the “Law of the Land” once they are ratified and enter into force. In this sense, totally departs from the British dualistic model.²⁰ Thus “all” treaties are law and they, or better said, their provisions are directly applicable if they are of that nature²¹. This view and interpretation for every lawyer coming from a civil law system would be more than obvious, and every attempt to argue differently would seem dead-ended. Therefore, it is no surprise how a renowned scholar of international law, Armin von Bogdandy, can reach such a conclusion and state that the United States is a monist country in one of his articles.²² Arguments that the actual intent of the drafters was to adopt the doctrine of transformation does not hold ground because if they truly wanted to adopt they would simple not mention treaties or explicitly refer to transformation²³.

Another point of contention between the two currents of thought within American discourse is connected to the role of Congress in the treaty making procedure. The Constitution in Article II Section 2 Clause 2 states 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.” Therefore the treaty-making power lies in the hands of the President and the Senate. From this provision, it is evident that there is no particular reason for the adoption of dualism. Namely, the separation of powers reasoning that is present in the United Kingdom for upholding the transformation doctrine is not applicable in this case. While the Crown is the

¹⁹ John C. Yoo, *Globalism and The Constitution: Treaties, Non-Self-Executing, and The Original Understanding*, 99 Colum. L. Rev. 1953, 1962 (1999) [hereinafter Yoo, *Globalism*].

²⁰ Shaw, *International Law* supra note 7, at 158-159; Waters, *Creeping monism*, supra note 3 at 638-639; Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds.), *National Treaty Law and Practice* (2005): Robert E Dalton, United States, p. 765.

²¹ Carlos Manuel Vazquez. *Laughing at Treaties*, 99 Colum. L. Rev. 2154, 2171 (1999) [hereinafter Vazquez. *Laughing at Treaties*].

²² Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 Int'l J. Const. L., 397, 401-402(2008).

²³ Vazquez, *Laughing*, supra note 20 at 2171

sole organ in negotiating, signing and ratifying treaties, the Parliament has no say and no role. This reason for the separation of powers is quite convincing especially bearing in mind the balance that needs to exist between the executive and legislative power.²⁴ The latter is achieved in the United States through the involvement of the Senate in the whole procedure. Objections to the exclusion of the House from process have legitimate, above all, democratic grounds. Yet, the rationale of some Founders sounds equally convincing. Madison, objecting to Governor Morris's opinion about involving the House in the procedure, simply said that it would be too difficult to enter into treaty if the House would have an actual role.²⁵ Apparently, there was a great deal of concern about how the United States would stand on the international plane. Just imagine how long would it take for these three bodies to coordinate. Seen in today's context and circumstances, this point is even more valid. Applying the latter-in-time rule²⁶, the House can together with the Senate abrogate and overrule treaties by enactment of a new statute that contradicts the treaty. Beside the separation of powers or structural concerns, when the executive and legislative powers are concerned, in the sense they are being used in the United Kingdom²⁷ are not a compelling point for defending a dualist conception in the United States.

Opponents of this interpretation of the constitutional provisions, put the focus on the original intent of the Founders, thus, diluting the textualism. Namely, they claim that the Founders never intended to adopt a monistic stand point and they actually wanted to adhere to the British model. Frankly, the support of these and similar arguments is rather confusing²⁸. According to this view, treaties are presumed to be non-self-executing, and, by it they are not the law in the domestic system until Congress enacts an implementing statute. Through this they insist on the role of the House in this whole process of treaty making.²⁹ Paust and Vazquez provide numerous documents that undoubtedly show the rationale of the Founders to be different from the way it is interpreted by those who claim a presumption of non-self-executing treaties. Framing debates, several state constitutional conventions, the Federalist papers and so on are only some of the sources

²⁴ Shaw, *International Law*, supra note 7 at 139.

²⁵ Vazquez, *Laughing at Treaties*, supra note 20 at 2160

²⁶ More on the development of the last-in-time rule Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va. L.Rev. 1071, 1103-1110 (1985).

²⁷ The same conclusion applies for most of other Commonwealth countries see Waters, *Creeping monism*, supra note 3.

²⁸ Yoo, *Globalism* supra note 18

²⁹ Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 408 (2000).

that they use in support of the idea that the original intent was consistent with the departure from the British model and, that treaties are law of the land without the need for implementing acts and that most of them were to be self-executing unless in rare situations when the language of the treaty or some exclusive congressional power required otherwise.³⁰

Obviously, from this overview there are no strong reasons to argue for dualism in the United States either from the constitutional provision or original intent's perspective. Authors arguing for the dualist position unquestionably fall short in supporting their point as neither textualism nor originalisms prove their thesis. However, the debate is more vigorous and fierce once case law comes at question. The judicial rollercoaster, as I term it, seems to be a lot more ambiguous in this sense. The next part will show why.

III. Self-executing v. Non-self-executing: Law v. Non-law

Within the whole setting of the status and effect of treaties one thing is crystal clear. There are treaties that are defined as self-executing and others that are defined as non-self-executing. I do not see this as unique feature of the United States legal system. Even in the Republic of Macedonia, there is a provision in the Judiciary Act stating that courts will apply international treaties if they could be directly applicable implying that some treaties could not.³¹ The main difference however, is that there is a dominant view in the United States that does not treat non-self-executing treaties as law, in the domestic legal system. Thus, it is upon the answer to this question of the status and effect of non-self-executing treaties that will enable us to determine if we can talk about a hybrid or a monist system that has gone through some sort of modification and deformation based on "tradition".

Under the authority of Article III Section 2 Clause 1 that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and the treaties made, or which

³⁰ Jordan J. Paust, *Self-Executing Treaties*, 82. *Am. J. In't L.* 760, 761-764; Vazquez, *Laughing at Treaties* supra note 20, 2158-2168.

³¹ Article 18 Judiciary Act Official Gazette nr. 58/06 from 11.05.2006; For other examples of monistic countries applying the same division and rule see Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds.), *National Treaty Law and Practice* (2005); Franz Cede and Gerhard Hafner, *Austria*, p. 69.; Peirre Michel Eisemann and Raphael Rivier, *France*, p.253, Francisco Orrego Vicuna and Francisco Orrego Bauza, *Chile*, 123, Jan G. Rouwer, *Netherlands*, p.483.

shall be made, under their authority.” Thus, in connection to the Supremacy clause, early case-law suggests that there was no reference to any kind of distinction between treaties as “all treaties” were “law of the land”, and this depicted the intent of the Founders accurately. In a series of cases in the early eighteenth century, Justice Marshall has affirmed the prevailing view at the time that treaty law was directly applicable.³² However, in 1829 in a landmark case, *Foster v. Nelson*, frequently referred to, Chief Justice Marshall wrote:

*Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates itself, without the aid of any legislative provision. But when the terms of stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become the rule for the court.*³³

This statement reveals several conclusions. First, this is further proof that the United States has a different approach to treaties than in the United Kingdom. The same conclusion could be also derived from another quote from Lord Oliver in the House of Lords’ decision in *Maclaine Watson v. Department of Trade and Industry* in which he noted that: as a matter of the constitutional law of the United Kingdom, the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individual of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing.³⁴

The Court clearly stated that United States treaties are to be directly applicable without the need of enactment of any legislative provision, and this is something that has been held ever since when self-executing treaties are in question. This fact alone without additional discussion of other aspects related to non-self-executing treaties would be enough for one to conclude that this system is monistic where these treaties are concerned. However, the challenge for arguing the same point also in regards to non-self executing treaties is greater and more tempting.

³² See Paust Self-Executing Treaties supra note 30 at 765 referring to *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) Chief Justice Marshall stated that “If the law [there, a treaty] be constitutional, . . . I know of no court which can contest its obligation” and in *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809) “Whenever a right grows out of, or is protected by, a treaty, . . . it is to be protected.”

³³ *Foster v. Nelson* 27 U.S. (2 Pet.) 253, 314 (1829).

³⁴ Shaw, *International Law*, supra note 7 at 149.

Second, Chief Justice Marshall has based the distinction between the two types of treaties on the wording or language of the treaty provisions. In this sense, the search for the intent of the parties as seen through the lenses of domestic contract law was not examined. This is a valid point because treaties are to be interpreted according to international rules for treaty interpretation whether they are either customary or from the Vienna Convention on the Law of Treaties. The Vienna Convention in this sense represents a codification of international customary rules whose authority has been accepted by the State Department. Articles 31 and 32 of the Convention clearly state that language test is the primary test to be employed.³⁵

What actually is closely related to this issue of interpretation, and perhaps one of crucial points to be made here, is the role of the Senate in defining or declaring what will be a non-self-executing treaty. Namely, Foster is a case where the Court clearly demonstrated that the Senate is the

³⁵ The emphasis in these provisions should put on the intent of the “parties”. Not only is the intent of the treaty makers of the United States relevant in interpreting specific treaty provisions but also of all the other contracting parties. Vienna Convention on the Law of Treaties, 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331.

Article 31, General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with

the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of

the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the

application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

most suitable forum to conduct such an analysis. In the actual case the Court held that the provisions of the treaty were not to be enforceable by the courts and acknowledged that there is an obligation coming out of the treaty provisions that the “legislature must execute”. Thus, affirming the position that indeed the Court made a distinction and categorized the treaties in two groups and set the relevant test thereto, how could the Senate make a declaration taking over the role of the Court in saying what is not to be a directly applicable provision.³⁶ Basically, by this practice, the Senate through its non-self-executing (NSE) declarations, which are of suspicious normative nature within the domestic legal system³⁷, first deprives the citizens of the United States of certain rights coming out of a treaty that obviously is directly applicable³⁸ and second goes counter to constitutional provisions and encroaches on the judicial power of the application of the law. As a matter of fact Article II and the Supremacy clause confer to the Senate and to treaty makers in general to “indirectly” enact domestic law by international legal provisions they adopt through the treaty making procedure. This means that there is no implied power for the Senate to declare a specific treaty not to be “Law of the Land” even though it is in total conformity with the Constitution. The NSE declaration essentially represents a solely domestic act since it does not have any effect in the international realm and, as such, it runs counter to the legislative power stated in the Constitution to be solely in the hands of the Congress and thus not only the Senate’s power. In this way, the Senate can legislate a domestic law only through adoption or by giving its consent to an international treaty. As such, it cannot create a purely domestic duty, which furthermore does not arise from treaty provisions and therefore does not influence in any way international law, for the Congress to enact an implementing legislative act. However, what the Senate can legitimately do is to put the ratification of the treaty on hold until a specific implementing act is enacted that is required as an international obligation coming out of the nature of the treaty provisions.

³⁶Waters, *Creeping monism*, supra note 3,

³⁷ Stefan A. Reisenfeld and Frederick M. Abbot, *The Scope of U.S. Senate Control Over The Conclusion and Operation of Treaties*, 67 *Chi.-Kent L.Rev.* 571, 595-596 (1991), citing Restatement section 303, Reporter’s Note 4: A condition imposed by the Senate that does not seek to modify the treaty and is solely of domestic import, is not part of the treaty and hence does not partake of its character as ‘supreme Law of the Land’. . . It was once assumed, therefore, that a Senate proviso that a treaty shall not take effect for the United States until Congress adopts implementing legislation could not have the force of law necessary to prevent the agreement from automatically taking effect as law in the United States. See *Power Authority of New York v. Federal Power Commission*, 247 F.2d 538 (D.C. Cir.1957), vacated and remanded with instructions to dismiss as moot, 355 U.S. 64, 78 S.Ct. 141, 2 L.Ed.2d 107 (1957).

³⁸ Louis Henkin, Michael J. Glennon and William D. Rogers (eds.), *Foreign Affairs and The U.S. Constitution* (1990); Richard B. Lillich, *The Constitution and International Human Rights*, at 154-155; Stefan A. Reisenfeld and Frederick M. Abbott, *The Scope of U.S. Senate Over The Conclusion and Operation of Treaties*, 67 *Chi.-Kent L. Rev.* 571, 599(1991).

By this it would not infringe any international obligations since the treaty has not entered into force in the United States. In contrast, allowing the Senate to adopt NSE declarations “gives the treaty makers the power to enter into binding obligations internationally while simultaneously taking steps to undermine U.S. compliance with those obligations.”³⁹ I definitely do not read the relevant constitutional provision in this manner nor do I believe that this practice was the intention of the Founders.

The Senate, on the other hand, has justified the making of NSE declarations by stating that United States laws do provide the same or even higher standard of human rights protection so there is no need for human rights treaties to have a self-executing character.⁴⁰ This argument is simply false. If this justification was to be true than there would be no reason for declaring these treaties as non-self-executing since they would not be in any conflict with domestic legal norms and acts and there would be no reason to fear them overriding the previous statutes according to the later-in-time rule. The last-in-rule in fact is applicable only to those situations where an evident conflict exists between provisions of a federal statute or legislative act and ratified treaty⁴¹ as any other situation should be resolved according to the Charming Betsy rule⁴².

This argumentation totally opposes Yoo’s view on the separation of power issues between the judiciary and the legislative, which if his point is followed will totally legitimize the role the Senate has taken. Yoo states that, in *Foster* it was the separation of powers that dictated that political branches should have the last word in relation to treaties as it has the preeminent role in foreign affairs also as result of judiciaries “incompetence beyond the adjudication of individual rights” and that political branches have the choice of implementation policy.⁴³ On the contrary, I would argue, that it is precisely this situation that goes against the separation of powers and the Constitution. He claims, supporting his argument by quoting *Foster*, which the judiciary’s role is “to decide upon individual rights, according to those principles which the political departments of the nations have established.” This is exactly why, if the role of the judiciary is to decide upon individual rights, the Senate should not interfere in this way, unless the Congress enacts a statute that explicitly stipulates this intention and overrides a previous treaty. Furthermore, this will certainly not represent any kind of involvement by the judiciary in implementation policy, as Yoo claims, since it will only

³⁹ Sloss, Non-Self-Executing Treaties, supra note 4 at 60.

⁴⁰ Curtis A. Bradley and Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399, 419-421 (2000).

⁴¹ Ku, Treaties as Laws, at 325.

⁴² *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁴³ Yoo, Globalism, supra note 18 at 2088-2089.

rule on whether a treaty is self-executive or not. If, hypothetically, we concur that non-self-executing treaties are not law in the domestic legal order, then this would mean that the Senate has taken the power to declare what is not “Law of the Land”. I believe this particular point is definitely a separation of power issue not permissible under the Constitution. This is even more the case when bearing in mind that, according to Article III of the Constitution, as stated in the previous section, the judicial power is conferred solely to the Supreme Court, and it has the ultimate power to interpret treaties even when President’s interpretation is challenged before it and also decide on the nonjusticiability of issues or interests at stake under specific treaty.⁴⁴

Fourth, in the United States treaties are to be self-executing unless the language or a certain exclusive congressional power does not require otherwise. However, even then a non-self-executing treaty carries an obligation for the legislature and executive, most frequently a positive obligation. On this point, Henkin argues that even if a non-self-executing treaty is not a rule for the Court it still creates obligations and is in that sense binding law for the President or Congress.⁴⁵ Denying any effect to these acts in the domestic legal order leaves a huge space for violations of international law since, regardless of national law, these treaties and international obligations are valid in international law. Even though courts cannot directly apply a non-self-executing treaty, they can acknowledge that there is an obligation coming out of the text of the treaty especially when there is an obligation of further legislation within the national realm. Actually, the latest development in the case law shows that the Supreme Court realized the importance of the previous point. Basically, it has followed what has already been stated by other federal courts that as a matter of fact “treaties to which non-self-executing declarations are attached are the Law of the Land, notwithstanding the declaration.”⁴⁶ Some authors have encouraged this development and claimed this to be a sign of a “creeping monism” as Waters refers to it. Creeping monism is actually the trend of abandoning the strict dualism and attaining a more flexible, monistic approach in the case-law, especially when human rights treaties are concerned as in their case dualism

⁴⁴ Reisenfeld and Abbott, *The Scope of U.S. Senate*, supra note 35 at 583; Paust, *Self-Executing Treaties* at 777.

⁴⁵ Vazquez, *Laughing at Treaties*, supra note 20 at 2184.

⁴⁶ Sloss, *Non-Self-Executing Treaties* supra note 4 at 38; referring to several cases in FN 169 *United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000) (when the United States became a party to the ICCPR, “the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land”); *United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1040 (S.D. Fla. 2001) (stating that ICCPR “is the supreme law of the land”); *Maria v. McElroy*, 68 F. Supp. 2d 206, 231-32 (E.D.N.Y. 1999) (“Although the ICCPR is not self-executing, it is an international obligation of the United States and constitutes a law of the land.”); *United States v. Benitez*, 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998) (stating that ICCPR “is the supreme law of the land”); *State v. Carpenter*, 69 S.W.3d 568, 578 (Tenn. 2001) (stating that ICCPR “is the supreme law of the land”).

has been present more than for any other group of treaties.⁴⁷ It was in *Roper v. Simmons*⁴⁸ that the Supreme Court used even unratified and unincorporated international human rights treaties in support of the majorities' holding of declaring a state statute providing for juvenile death penalty unconstitutional.⁴⁹ Skeptics would say that this was just because the Court found it convenient to support its argumentation since the holding was solely based on the Constitution. Just as Waters writes, they had no reason to do that if they were so convinced of their rationale⁵⁰. The signal that has been sent, in my view, signifies that these treaties do actually have effect. They can be used to trump a state legislative act in contradiction of treaty provisions, especially bearing in mind the ruling of the Court in *Missouri v. Holland*.⁵¹ It might sound like wishful thinking, but I believe that this view is strengthened by Justice Scalia's dissent where he stated: "Acknowledgment of foreign approval has no place in the legal opinion of this Court unless it is part of the basis for the Court's judgment--which is surely what it parades as today."⁵² Practically, it is to be concluded that non-self-executive treaties, although not conferring rights to individuals, still bare significance and effect within the domestic legal system due to the obligation they carry for the legislature or other national institution. Thus, they cause an indirect effect in this sense, but also through the interpretation of domestic law. If this pattern of thought prevails in future case law then the "dualist days" of the United States are definitely near their end.

Additionally, even some authors arguing for monism are doubtful if non-self-executing treaties represent law. In this regard, Vazquez has classified this type of treaties into four categories: 1) Unconstitutional treaties that "purport to accomplish what is beyond the powers of the treaty makers under our Constitution"; 2) Nonjusticiable treaties that do not regulate or foresee explicitly a certain individual right and usually refer to obligations that are enforceable by the political branch, but are not directly

⁴⁷ Waters, *Creeping Monism* supra note 3 at 643; see also at 644 about the Bangalore Principles adopted on the Interights Colloquia and the dialogue between common law courts. The emphasis is put on human rights treaties because the actual practice of making NSE declaration by the Senate started with human rights treaties during President Carter's administration.

⁴⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁹ Sloss, *Non-Self-Executing Treaties*, supra note 4 "The NSE declaration purports to preclude the defendant from invoking the treaty to invalidate the state law that permits capital punishment. Even so, the court should ignore the NSE declaration because the state law is invalid by virtue of the Supremacy Clause, and the Due Process Clause prevents the state from relying on an invalid law to impose a criminal sentence". This comment was made even before the *Roper* decision which is just another support that his thesis turned out to be true.

⁵⁰ Waters, *Creeping Monism*, supra note 3 at 658

⁵¹ *Missouri v. Holland*, 252 U.S. 416 (1920).

⁵² Waters, *Creeping Monism* supra note 3 at 659

addressed to the legislature; 3) Third, treaties addressed to the legislature imposing an obligation to pass domestic legislation; and 4) Treaties that do not create a private right of action for individuals. He reasonably, concludes that unconstitutional and nonjusticiable treaties are actually invalid law as the same argument for their invalidity applies to constitutional and statutory provisions. The fourth category, he states, is law because invocability is not related to whether a treaty is law or not and eventually their enforceability could be achieved by some domestic law provisions giving this right. However, when treaties addressed to the legislature are concerned, regardless of the complexity of the question, ultimately he declares them not to be law.⁵³

Vazquez bases this notion on his understanding of law, as being one that is determined by the sanctions its breach imposes.⁵⁴ However, I do not agree with this concept of law, as many declaratory norms, or ones that do not have the power to sanction to support their application, in Roman law referred to as *leges imperfecta*, will be deprived of the attribute of them being law. Actually, an analogy with federal statutory law at this point would be very helpful to make my point here. Namely, if treaties are declared to be non-self-executing and hence deprived of any attribute of being law within the domestic system because they are ambiguous and vague or because they require enactment of an implementing act in order to be “executed”⁵⁵ then statutes that have all these characteristics would be deprived of being law. The First Circuit in *United Shoe Mach* noted that:

*[T]here is no practical distinction whatever as between a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective.*⁵⁶

⁵³ Vazquez, *Laughing at Treaties*, supra note 20 at 2176- 2184.

⁵⁴ *Id.* at 2176

⁵⁵ Sloss, *Non-Self-Executing Treaties*, supra note 4 at 19 :He makes an interesting distinction of treaty provisions on “executed” and “executory” based on a concept from contract law. Executed treaty provisions are those that promise immediate performance. Executory treaty provisions are those that promise future action.

⁵⁶ *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 155 F. 842, 845 (1st Cir. 1907) cited in Sloss, *Non-Self-Executing Treaties* supra note 4 at 26-27.

If there “is no practical distinction whatever” then, just as federal statutes that are not judicially enforceable, non-self-executing treaties should be treated as domestic law.⁵⁷

CONCLUSION

In sum, I believe that there are several points that this article aimed to prove by presenting the reasoning elaborated on the previous pages. First, the United States under its constitutional provisions is definitely not a dualist country regardless on the insistence of several scholars and reference in the case law to traditionally the dualist concept present in this country. From this article, it becomes completely obvious that the tradition, ironically enough, completely departs from the British doctrine and, thus, dualism. Not only, does a constitutional provision clearly refer to the monism, but also the case-law is deeply rooted in the conclusion that self-executing treaties are to be directly applicable without the need of any transformation, which in its essence is monistic as well.

However, whether one will refer to the status and effect of treaties in the United States to depict either monism or a hybrid system still remains ambiguous and will be determined by the outcome of the debate involving the status and effect of non-self-executing treaties. This article has tried to present a different viewpoint and perspective in resolving this inherent ambiguity.

⁵⁷ Louis Henkin, *Lexical Priority or ‘Political Question’: A Response*, 101 *Harv. L. Rev.* 524, 531(1987) He stated “[T]reaties are the law of the land. Cases arising under treaties are justiciable.”

Denis Preshova

ZAŠTO TAKO DUALISTIČKI?: KRITIČKI OSVRT NA STATUS I EFEKAT SPORAZUMA U PRAVNOM SISTEMU SJEDINJENIH AMERIČKIH DRŽAVA

*Ovaj članak razmatra pitanje odgovarajuće „kategorizacije” Sjedinjenih Američkih Država u nacionalnom pravnom poretku shodno statusu i efektu međunarodnih sporazuma. To je pitanje koje nema nikakvu teorijsku vrednost i svrhu, ali može imati praktični značaj, naročito posle slučaja *Roper v. Simmons*, koji neki stručnjaci nazivaju „puzajući monizam”. Međutim, u radu se razmatra da li je rezonovanje suda u pomenutom slučaju samo prihvatanje shvatanja Vrhovnog suda o odredbama Ustava i međunarodnih ugovora. Analiza teorijskog okvira odnosa između nacionalnih i međunarodnih izvora prava je suština ovog pitanja i kroz nju autor pokušava da prikaže da su Sjedinjena Američke Države više monistička nego dualistička država.*

Rad se sastoji iz tri dela. Prvi deo predstavlja monističke i dualističke teorije kroz uporedne analize. Drugi deo svoju pažnju usmerava na tekst pojedinih ustavnih odredbi, dok je treći deo posvećen sudskom tumačenju tih odredbi i fenomenu tzv. „puzajućeg monizma”.

Ključne reči: *monizam, Ustav, Sjedinjene Američke Države, pravni poredak.*