

The Role for Parliaments in Treaty-Making

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I Introduction

The democratic credentials of executive law-making by treaty have long been of concern. Treaties, after all, can be controversial, and the executive's ability to engage the nation in legally binding commitments without involving those elected to make laws adds to the controversy by highlighting a perceived democratic deficit in the treaty-making process.

Attempts to address this deficit, however, are not new. The framers of the United States Constitution, for example, clearly intended to involve the Senate in the making of treaties,¹ although most treaties are considered 'executive agreements' under US law and as such do not need Senate (or Congress) approval.² Similar attempts to exert a degree of parliamentary control over treaty-making have also been made in Britain, starting with the efforts of the anti-war movement in the late 1910s, which called for the parliamentary sanction of all treaties given their inflammatory effect in the lead-up to World War I.³ After the war, the desire to put an end to secret

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1 Article II(2) of 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'.

2 American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987) vol 1 § 303 ('Third Restatement'). See also Congressional Research Service, Library of Congress, *Treaties and Other International Agreements: The Role of the United States: A Study Prepared for the Committee on Foreign Relations*, S Prt 106-71 (2001).

3 See Marvin Swartz, *The Union of Democratic Control in British Politics During the First World War* (1971). Article 2 of the Union's manifesto stipulated: 'No Treaty, Arrangement, or Undertaking shall be entered upon in the name of Great Britain without the sanction of Parliament. Adequate machinery for ensuring democratic control of foreign policy shall be created'.

This is a preview. Not all pages are shown.