did not give Laker Air any grounds to challenge the Order made under statutory authority for the benefit of BA and BC, making it unlawful for them to cooperate in the US proceedings without UK consent.

(ii) treaty-making and the Crown prerogative

As a matter of English constitutional law, treaty-making (and the foreign affairs power, more broadly) is a prerogative power of the Crown. Reviewing the government's power to make and enter treaties remains beyond the jurisdiction held by the courts. Whereas the rule may have once been stated as the courts generally having no jurisdiction to supervise an exercise of the prerogative, such a broad brush exemption of the prerogative is no longer completely safe following the shift in justiciability from the source of public power to the nature of its application and effects.[64] Rather, the making of treaties, and other aspects of relations and transactions (in war and peace) between sovereign powers, pertain so directly to the constituent elements of sovereignty and retain such a high degree of political policy and responsibility as to confound any easily discernible and manageable legal test and standards. In that respect, the rule as stated in *Rustomjee v The Queen* remains valid, "[The Queen] acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts."[65] Following a war between China and Great Britain, an 1842 peace treaty stipulated that China would pay Britain a sum of money on account of Chinese debts owed and owing to British creditors as at the start of the conflict, before the British were expelled. The British government received the funds promised. A British creditor sued the government to recoup out of those funds the debt owing, as yet unpaid. The Court of Appeal rejected the claim. The Crown did not owe its subjects a legally enforceable duty to administer funds received under the treaty according to the terms of the treaty, whatever political or moral duties may otherwise exist.[66] The Crown did not treat on behalf of its subjects as agent or trustee. In the making and performing of a treaty with another sovereign the Crown is not and cannot be a trustee or agent for a private party, whether or not the Crown would also expressly assume those roles (in the context of national law).

It follows from this that when concluding or acting under a treaty, such as receiving funds or property thereunder, the Crown is acting as a sovereign power on both the national and international planes.[67] It does not have the status of a private party, or one subject to private law. Thus the seizure of the Raj and the Rajah's

[64] Originating in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 375: see above, Chap. 2.

[65] *Rustomjee v The Queen* (1876–77) LR 2 QBD 69 (CA), 74 (per Lord Coleridge).

[66] See also *Phillips Bros. v Sierra Leone* [1995] 1 LLR 289 (or proceedings in international law).

[67] Or indeed even when no treaty is in issue: see, e.g., *Rahimtoola v Nizam of Hyderabad* [1958] AC 379; *USA v Dollfus Mieg* [1952] AC 582.

property in *Sect. State India v Sahaba* constituted an act of state against which no accounting or inheritance claims in private law could be raised. Likewise in *Rustomjee* immediately above, the Crown received and held money under the British–Chinese treaty in its sovereign capacity, immune from private law rights and obligations. Nothing in the constitutional position between sovereign and subject has changed so as to allow similar actions on similar claims. In *Civilian War Claimants Assoc. v The King*, the assignees of claims against Germany arising out of war damage to person and property failed in their action against the British government to obtain payment out of funds received under the Treaty of Versailles for war damage.[68] This, notwithstanding the government's statements in Parliament that claimants would be duly compensated, and their filing of the necessary claims. The House of Lords dismissed the action on the authority of *Rustomjee* that the Crown received and held such funds as neither agent nor trustee for claimants. While the Crown could adopt such obligations under private law, it would require express and certain terms in the supporting instruments.[69] Likewise in *Lonrho v Export Credits Guar. Dept*. funds credited to the ECGD, as agent of the Crown, under a debt restructuring agreement with Zambia represented transfers as between sovereigns in accordance with the rule articulated in *Rustomjee* and *Civilian War Claimants*.[70]

The immunities at play in these circumstances can be extended to foreign sovereigns as well: *Administrator of German Property v Knoop*.[71] Pursuant to the Treaty of Versailles Act 1919 and related Order, property held by German nationals in the UK was charged with payment of certain war debts owing by Germany, and thus was liable to public seizure and sale. Two subsequent agreements in 1929 altered Germany's obligations to the UK under the Treaty, in final settlement of German war debts, and allowing for a retransfer of any residual property to the former owners. The beneficial owners of subject property held in trust sought to avoid transfer to and liquidation by the Administrator, relying in part on the two supplementary agreements. Because the agreements between the UK and Germany had not been incorporated or otherwise implemented by statute, they had no force in domestic law. The claimants aimed to circumvent this infirmity by arguing that the agreements, having been incorporated into German domestic law, were properly understood to show the German government acting in their making as trustee and agent on behalf of property holders in the UK. Finding no express and clear terms in the agreements to support that reading, Maugham J. considered that the rule in *Rustomjee* and *Civilian War Claimants* to presume that sovereign parties in general do not act on behalf of private parties in treaty matters.

The significance of allowing for the possibility of the Crown as agent or trustee rests most likely in the implied judicial understanding of a difference between relations and conduct of a state within the domestic context, and those of a state in

---

[68] *Civilian War Claimants Assoc. v The King* [1932] AC 14.

[69] *Civilian War Claimants Assoc. v The King*, per Lord Atkin, 26–27.

[70] *Lonrho Exports v Export Credits Guar. Dept.* [1999] Ch 158.

[71] *Administrator of German Property v Knoop* [1933] Ch 439.

an international one. There is a divide between the national and international orders: in short, the dualist position. As a matter of UK law, the Crown may and does subject itself to rights and obligations enforceable before a municipal court. But this requires a specific act done under domestic law to draw the sovereign into the municipal legal system. When the state enters into further relations with citizens, those between sovereign and subject, it commits to the domestic legal order which defines and enforces private and public law rights and obligations. Moreover, this necessary invokes the separation of powers, in which state power is divided as between the classic three representatives. Legitimate and valid legal power—the making and enforcing of law—remains an extension of constitutionalised sovereignty, one for which no domestic organ is entirely responsible. But when the state treats with another power, it acts as the undivided representative of a sovereign polity. There is no continuation of such constitutionalised sovereignty on the international plane.[72] Hence the Crown acts in a different, separate capacity. It also accords with the treaty law understanding that treaties are agreements between sovereign powers, whereas agreements between states and individuals are contracts subject to national law.

Recent judicial consideration of this divided status of the state, as a sovereign body exercising a prerogative power and as a public organ engaged on private level, is to be found in *Lonrho Exports v Export Credits Guar. Dept*.[73] The ECGD, an agency of the Crown, received funds under a UK–Zambia debt restructuring agreement from Zambia. The ECGD provided a form of insurance to UK exporters, in the form of export guarantees, under which those exporters could claim a percentage reimbursement for unpaid foreign sales. The question arose under the export guarantees and under the general law of insurance and guarantee whether those funds constituted recoveries on which interest was payable to the insured, the exporters. Lightman J. held that the Crown, by its agent, had received the Zambian funds under a treaty and in its sovereign capacity. Accordingly, until it actually earmarked the funds as subject to the guarantees, it held the funds free and clear from those obligations. Its private capacity as contractor under the guarantees was not yet engaged by specific and express action. The divided status of a state as treaty power and as a public organ engaged on private level also arises in the context of bilateral investment treaties. A state can enter such a treaty and thereby also undertake certain private law obligations regarding foreign investors which are subject to arbitration as between commercial parties and perhaps also judicial review.[74]

The general rule was restated and confirmed in *Blackburn v AG*.[75] Blackburn claimed that by signing the Treaty of Rome, and entering the EEC, the British government would irreversibly surrender the sovereignty of Parliament to make

[72] See Lord Hoffman's pointed rejection of such a constitutional continuity in the face of the separation of powers in *R v Lyon* [2003] 1 AC 976, 995.

[73] *Lonrho Exports v Export Credits Guar. Dept.* [1999] Ch 158.

[74] *Ecuador v Occidental Exploration* [2006] QB 432 (CA); *Czech Republic v European Media Ventures* [2007] 2 CLC 908 (QB).

law, which was contrary to law and the constitution. Denning MR reiterates that an exercise of the prerogative in signing a treaty, even one of paramount importance, cannot be challenged before the courts. Stamp LJ clearly identifies the separation of powers underscoring, "The Crown enters treaties; Parliament enacts laws; and it is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general terms regarding the powers of Parliament…. Nor ought this court at the suit of one of Her Majesty's subjects to make declarations regarding the undoubted prerogative power of the Crown to enter into treaties."[76] More recent attempts to revisit and revise the rule—also in the context of the EU—have met with failure.[77]

These recurring attempts at subjecting the Crown's treaty powers to some form of judicial review, as indeed its powers in foreign affairs more generally, track the gradual narrowing of immunity for all prerogative powers in the wake of the GCHQ case, *Rehman*, and *Bancoult*.[78] For the moment, the courts continue to show restraint in areas of "high policy", including foreign affairs and treaty-making.[79] But the Crown's prerogative power remains nonetheless susceptible to creeping judicial review. Moreover nothing in principle prevents Parliament in the future from subjecting the treaty power to statutory control, thereby channelling the executive treaty-making power within legislative norms and boundaries. Judicial review in the ordinary course and pursuant to the standard principles and process would obtain, subject to any special provisions to the contrary. Steps towards this end might already be said to exist in the *Constitutional Reform and Governance Act 2010* which crystallises into legislation the Ponsonby rule. Of course, that Act pertains to the process of submitting a treaty for parliamentary approval prior to ratification by the Crown (government). It does not purport to control or limit what may be agreed to under a treaty, nor does it confer, as for example in France or even the Netherlands, domestic legal effect upon treaty provisions. Specific legislation to that end is still required.

(iii) Legislative power and legal force

The constitutional counterpoise to this prerogative power denies treaty provisions any direct legal effect within the domestic legal system. Although no constitutional

---

[75] *Blackburn v AG* [1971] 1 WLR 1037 (CA). See also *McWhirter v AG* [1972] CMLR 882 (CA), on the same issue and with a similar result.

[76] *Blackburn v AG*, 1039–40 (per Denning MR) and 1041 (per Stamp LJ).

[77] *R (McWhirter and Gouriet) v Sect. State Foreign and Commonwealth Affairs* [2003] EWCA Civ 384 (5 March 2003); *R v Sect. State Foreign and Commonwealth Affairs Ex p. Southall* [2003] 3 CMLR 18 (CA).

[78] *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 375; *Sect. State Home Dep't. v Rehman* (2001) [2003] 1 AC 153; *R (Bancoult) v and Commonwealth Affairs* [2008] 3 WLR 955; see above, Chap. 2.

[79] *R (Gentle) v The Prime Minister et al.* [2008] 1 AC 1356; *R v Jones (Margaret)* [2007] 1 AC 136.

limit or prohibition restricts the Crown on what treaties it may conclude, the constitution does not empower the government thereby to interfere with private rights and obligations without some parliamentary enactment in support. A treaty may provide for certain private rights and obligations but only an Act of Parliament can legitimately and validly alter established rights or create new ones. Treaty-making is an executive act; an act of the Legislative Branch is necessary to transform it into binding law. As Maitland pointedly expressed it, "Suppose the queen contracts with France that English iron or coal shall not be exported to France—until a statute has been passed forbidding exportation, one may export and laugh at the treaty."[80] Thus a senior naval officer charged with enforcing an UK-France agreement concerning the Newfoundland lobster fishery—not implemented through any enactment—could not rely on it in defence of unlawfully seizing a lobster factory contravening that agreement, even though the government had approved and confirmed his deed.[81] The Crown had no general power to compel obedience to a treaty.[82] Likewise, a separate and subsequent agreement between the UK and Italy regarding the disposition of property held by Italians and charged with the repayment of war debts arising from WWII could not override or modify the provisions of the WWII Peace Treaty with Italy, where the latter treaty had brought into domestic law, and the former, not so.[83]

The leading statement of the general rule is to be found in *Rayner (Mincing Lane) Ltd v DTI* ("the ITC case"), specifically in the speeches of Lords Templeman and Oliver.[84]

> [A]s 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 upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

The ITC case has significance well beyond its precedent for the general rule on the bounds of the prerogative power in foreign affairs, as examined below. Nevertheless, as the quotation makes amply and unquestionably clear, the constitutional

---

[80] Maitland 1961, p. 425.

[81] *Walker v Baird* [1892] AC 491 (PC).

[82] The Privy Council expressed no opinion on a further submission arguing for the Crown's power to compel obedience to a treaty so as to avoid imminent war or to put an end to war; the facts did not support consideration of the point.

[83] *Italy v Hambros Bank* [1950] Ch. 314.

[84] *Rayner (Mincing Lane) Ltd v DTI* [1990] 2 AC 418 (Lord Templeman, 476–77, recited above; Lord Oliver, 500, here recited).

separation of powers in the UK reposes law-making power principally in Parliament; the prerogative powers of the executive do not include legislative powers. Hence judicial rule of recognition requires some form of standing Parliamentary authorisation, conferring domestic legal force upon treaty provisions.

This rule on legislative power and legal force has received its greatest exercise in connection with the EConvHR, prior to the Human Rights Act 1998 being declared in force. Up to that point, the 1953 EConvHR had the status of a treaty signed by the UK but was as yet unincorporated by statute into the domestic legal system. (Of course, it was an additional complicating factor that the EConvHR applied within the UK's participation in the Council of Europe (1949) and wider context of (what became) the EU. This European element—peer pressure if you will—can be read to add extra moral and political weight to arguments involving the EConvHR, over and above any "anxious scrutiny" aroused in the Judicial Branch.[85]) Thus in *R v Sect State Home Dept Ex p. Brind* the claimants could not rely on an alleged breach of the EConvHR (Article 10) as grounds for judicial review of government directives which restricted for public broadcast matters involving persons related to specified terrorist organisations.[86] Moreover, the courts will not read a statute conferring an administrative discretion upon the government as implicitly subject to and bounded by the EConvHR, absent the clear and certain direction of Parliament. As Lord Bridge remarks, this would involve a "judicial usurpation of the legislative function".[87] Likewise, in *R v Lyons*, Lyons' challenge to his 1990 conviction as unsafe could not rely on the EConvHR nor a 2000 ECtHR judgment in his favour.[88] Whether the conviction was unsafe was to be considered in light of the law as it stood in 1990, and according to the tests and standards prescribed by statute. The EConvHR was not part of domestic UK law at the time, nor could Convention rights be read into the otherwise definite and clear statutory terms.

In re McKerr revisited the issue on somewhat different terms.[89] The case originated out of the 1982 fatal shooting of the applicant's father by police in Northern Ireland. Although a police investigation reported at length in 1987, the requested formal, public inquiry was never conducted. In 2000, the Human Rights Act 1998 came into force. In 2001 the ECtHR awarded the applicant damages for a violation of his Article 2 rights by the UK, arising from the failure to hold a public

---

[85] Deriving, *inter alia*, from *R v. Sect. State Home Dept, ex p. Bugdaycay* [1987] AC 514 (per Lord Bridge, and Lord Templeman).

[86] *R v Sect. State Home Dept ex p. Brind* [1991] 2 WLR 558 (HL). See also e.g., *R v Chief Immig Officer Ex p. Salamat Bibi* [1976] 1 WLR 979 (CA) (also cited by Lord Ackner in *Ex p. Brind*, 760–1).

[87] *Ex p. Brind*, 748. And Lord Bridge also notes there that the canon of construction by which ambiguities in statutes are read in conformity with international law is not an importation of international law into the domestic legal system.

[88] *R v Lyons* [2003] 1 AC 976.

[89] *In re McKerr* [2004] 1 WLR 807 (HL).

investigation on the shooting death. The applicant sought to compel the government to conduct that inquiry, based on the 1998 Act and the ECtHR judgment, by characterising the government's failure (since 1982) as a continuing breach. The House of Lords rejected the claim. It made clear the constitutional point that the domestic legal force of rights and obligations found in a treaty issue from an Act of Parliament which thereby constitutes those rights as domestic, UK, law. The source of legal authority being a domestic legal act, their legal status was accordingly as domestic UK law, and not as international law having national legal effect. Consistent with dualism, the two sets of rights—EConvHR and Human Rights Act—coexist, the former on the international plane and the latter on the domestic.[90] The Human Rights Act did not transpose or incorporate Convention rights into the UK system, but instead created new statutory rights based on, or drawing upon, the EConvHR. Moreover, it did not grant these any retrospective effect, their legal force commencing only as of October 2000.[91]

The resilience of the rule is however subject to continuing test, given the developing internal perspective of international law, and particularly in the field of human rights. By way of example, Lord Steyn has suggested in *In re McKerr* that human rights treaties enjoy a special status which, setting them apart from other treaties, allows their provisions incorporation into domestic law without prior express legislative authority.[92] Human rights are present in most every legal system. Their universality makes them part of the "law of nations". The law of nations, customary international law by another name, is presumed part of national common law. The treaty form to human rights merely repeats what is already in effect at the customary international law and national law levels. In Lord Steyn's view, the rationale of dualism is to avoid an abuse of power by the government to the detriment of citizens. Human rights being expressly designed to prevent such abuses, the rationale no longer has validity. With great respect to Lord Steyn, this argument cannot withstand the trenchant rejoinder of Sales and Clement.[93] Neither authority nor principle justifies differentiating in this way between human rights treaties and any other treaty which would confer rights on individuals. The rationale of dualism is misstated: the constitution establishes Parliament as the supreme, sovereign law-maker; the executive may exercise no prerogative law-making powers effective in the national legal system. Inasmuch as the potential for abuse of power by the executive exists, it is met by this separation of powers. Nor

[90] *In re McKerr*, 815 (Lord Nicholls); 826 (Lord Hoffman); 830 (Lord Rodger); 833 (Lord Brown).

[91] Reiterated in *R (Hurst) v London Nthrn Dist Coroner* [2007] 2 AC 189 (no retrospective application of the Human Rights Act).

[92] *In re McKerr*, 822–824. Lord Steyn appears to have been attracted by criticism of the general rule as applied in the ITC case, found in Jennings 1990, Cunningham 1994, and Higgins 1993. Moreover, Lord Hoffman in *R v Lyons*, 993–994, might be taken to allow for indirect incorporation of treaty rights where rules of common law or judicial implication in a statute were concerned.

[93] Sales and Clement 2008, pp. 398–401.

is it for the courts, therefore, to decide which treaty provisions are directly enforceable and which are not. Human rights treaties impose burdens as much as benefits on the exercise of rights and freedoms, which calls for a political, policy appreciation of acceptable limits. And this in addition to any financial and fiscal burdens, regarding which Parliament has a necessary constitutional voice.

3.3.3 Judging the Bounds of Recognition

Assuming that "[t]he interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an English court of law",[94] the central, critical issue becomes the boundaries or limits to that statement of law. Specifically, to what extent is a statutory grounding necessary for the UK courts to introduce or rely on treaty provisions in a valid and legitimate way?

It is common ground that parliamentary incorporation of treaty provisions occurs by way of statute. The precise mechanism of transliteration can occur in a number of ways. Aust has conveniently categorised them into four types.[95] First, a statute may incorporate the treaty in whole or in part. And it may do so by simply annexing the treaty to the Act and according the desired provisions force of law in England, or by restating the operative terms with legal force in the body of the statute, or by making the necessary legislative changes without any express reference to the treaty in issue. Second, the Act may confer on the government the umbrella powers necessary to implement any present and future treaty commitments, so that fresh legislation is not required each time a new or revised allied agreement or treaty comes into being. Bilateral air services agreements, as Aust notes, are a prime example. Following upon this, is the third class, in which an Act authorises the making of secondary, subordinate legislation (by the government) to implement a particular class or type of treaty. Aust differentiates between regulations which annex the treaty and implement it, and those which simply implement the situation or results contemplated in the treaty without appending it to the regulation. The latter subset is analogous to an Act converting treaty provisions into self-standing sections of the statute itself, using its own legislative terms and concepts. The last category represents the exceptional situation of Orders (that is, a form of direct subordinate legislation) issued on authority of the Crown which are not subject to any parliamentary procedure or assent. Aust gives the example of the United Nations Act 1946 empowering the Crown to make such orders as necessary to implement UN Security Council measures.

---

[94] *British Airways v Laker Airways* [1985] AC 58, 85–6 (Lord Diplock).

[95] Aust 2007, pp. 189–192; Aust 2009, pp. 476, 479–481 (subsuming the last into the third as a further subset).

Regarding justiciability and the constitutional position of the courts, this dualism framework of legislative incorporation of treaty provisions attracts three observations. The first point is that the statute purporting to transliterate the treaty provisions must expressly confer legal force upon those provisions. It cannot necessarily be concluded that the provisions become part of domestic law and obtain legal force simply by virtue of being referenced in a statute. In drawing attention to this, Aust points out the example of the Geneva Conventions Act 1957 which, while scheduling the four 1949 Geneva Conventions and two 1977 Protocols, only gives particular legal effect to one article in each of the four (relating to prosecution for "grave breaches" of them).[96] A further example would be the United Nations Act 1946, which, while providing for the implementation of Security Council resolutions, does not thereby incorporate the UN Charter. Equally therefore, an Act can achieve the same ends desired by a treaty—and in a sense indirectly give effect to all or a discrete part of an undisclosed treaty—by creating or amending legislative schemes. It is not the presence or absence of the treaty in particular legislation that is determinative of its legal effect, but the intention of Parliament as reflected in the statutory language.

A second point addresses their ultimate legal status. Aust's typology reflects the specific manner in which treaty provisions are brought into the national system. Their incorporation may proceed by way of primary legislation (recitation, scheduling, transliteration) or by way of secondary legislation. This status bears upon their legal force. Legislation sits at the top of legal hierarchy. English courts have no jurisdiction to review the conformity of primary legislation with constitutional rights, except in the manner and to the extent prescribed by the Human Rights Act 1998. Nor do the courts have jurisdiction to assess whether the statute duly and fully converts the content of a treaty into national law.[97] On the other hand, the route of secondary legislation opens a potential way for judicial review of the regulation or Order converting the treaty into domestic law. Specifically, the challenge would cover such issues as whether the incorporation of the treaty (and hence the treaty itself) was *ultra vires*, or whether some aspect of unreasonableness tainted its incorporation. Equally, it follows that any administrative acts taken pursuant to that subordinate legislation also become open for judicial review. This again would open a further route to address the scope and content of the treaty provisions introduced into national law. Whether or not such a challenge is well-founded will of course depend upon the tests and standards in UK administrative law.

---

[96] Aust 2007, p. 190; A. Aust 2009, p. 480 (and citing Rowe and Meyer 1996).

[97] *Mortensen v Peters* (1906) 14 Scot. Law Times 227, 213 "In this Court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly Passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms." (per the Lord Justice General).

The third, and most important, point of law goes to the substance of the legislation itself. What scope and content a treaty provision takes on as domestic law will depend upon what language Parliament uses to implement it. First, and recalling the first point above, it does not necessarily follow from the implementation of treaty provision that justiciable private rights are thereby conferred.[98] Second, the statute may also in principle add to and expand, or limit, or otherwise alter what is conferred in the treaty depending on the language used.[99] It is that which may be read in the legislation which governs, and not the treaty itself. Moreover, the UK courts will naturally take account of the government's understanding of treaty and other international commitments, but they are not bound thereby nor will they necessarily defer thereto (as may be the case in, say, France).[100] The government's position represents simply an aspect of the overall argument pressing one particular interpretation over another. The final decision is for the courts. As a matter of constitutional law, it is the will of Parliament which governs. But that same constitutional prescription allocates definitive interpretative jurisdiction to the courts. The interpretation of legislation (or "law" more generously) is a primary function of the courts under the separation of powers. That principle runs consistently through all four legal systems studied here. The differences among them, inasmuch as they may signify, would seem to rest in the accepted limits to the interpretative jurisdiction of the respective courts exercise. Put another way, under the allocation of law-making powers arising from English dualism, Parliament sets the principal boundaries concerning what treaty rights and obligations form part of the English legal system. But working the elasticity of those boundaries rests with the courts, and is reflected in how rigid or accommodating they are persuaded to be when aspects of international law arise or are argued before them.

(i) Canons of construction[101]

Where an Act of Parliament clearly and expressly intends to give force of law to an international convention, the courts will consider the terms of that convention to ascertain the governing meaning of the provisions in issue. The courts avoid a

---

[98] Aust 2009, p. 491.

[99] See, e.g., *UBS AG v HM Revenue & Customs* [2006] Brit. Tax Cases 232 (Ch) (whether corporate tax legislation fully extended tax exempt status to dividends pursuant to double taxation convention with Switzerland); *R (Quark Fishing) v Sect'y State FCO* [2005] 3 WLR 837 (PC) (coverage of the First Protocol to the EConvHR not extended to the colonial territory of South Georgia and South Sandwich Islands for the purposes of a remedy under the Human Rights Act 1998); *In re State of Norway's Application (No.2) [1990] 1 AC 723* [1990] 1 AC 723 (1970 Hague Convention not restricting broader UK meaning to "civil and commercial" in Evidence (Proceedings in Other Jurisdictions) Act 1975).

[100] Unless the matter is one which falls within the Crown's exclusive jurisdiction, as with territorial limits: *The Fagernes* [1927] P 311 (CA); *Post Office v Estuary Radio* [1968] 2 QB 740 (CA).

[101] See generally Warbrick 2003, Gardiner 1995, Higgins 1987, pp. 137–139, Mann 1986, p. 97ff; and the summary found in *UBS AG v HM Revenue & Customs* [2006] BTC 232 (Ch).

strictly literal approach or one too tightly bound by the rules of interpretation applied to purely domestic legislation. In the words of Lord Wilberforce, it is an approach "unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation".[102] Courts will be inclined to apply a broader, purposive construction in light of the whole enactment, including the convention.[103]

To that end, the courts will apply the VCLT, taking particular account of Article 31 (good faith interpretation, ordinary meaning of the terms in context, in light of object and purpose). This, even though the VCLT is not implemented in the domestic legal system by Act. If authentic versions exist in other languages, expert evidence, dictionaries, and other reference material are also admissible to assist in determining the meaning.[104]

If the terms of the treaty are unclear or ambiguous, cautious regard may be had of the *travaux préparatoires*, commentaries or decisions of foreign courts.[105] In particular, Lord Wilberforce suggests accepting reference to the drafting history and *travaux préparatoires* on the two conditions that those materials are publicly available and that they clearly and indisputably point to definite legislative intention.[106] But in any event, all these are merely possible aids to construction, whose weight depends upon the circumstances.

English courts are not bound by nor constrained by the interpretations of a treaty by foreign courts.[107] Practically speaking, there is a limit to domestic understanding of foreign languages, foreign legal systems and practice, the role and position of national courts and consistency and coverage of law reporting. On principle, a treaty is an international agreement among various states, rather than "regulatory regimes established by national institutions. It is necessary to determine the autonomous meaning of the relevant treaty provision."[108] Lord Steyn continues:

> In principle therefore there can only be one true interpretation of a treaty. ... In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in so doing it must search, untrammelled by notions of its national legal

---

[102] *J. Buchanan & Co v Babco Forwarding & Shipping* [1978] AC 141, 152. And see *Stag Line v Foscolo, Mango & Co* [1932] AC 328 (id).

[103] See, e.g., *Sidhu v British Airways* [1997] AC 430; *Adan v Sect. State Home Dept* [1999] 1 AC 293, 305 (per Lord Berwick).

[104] See, e.g., *Corocraft v Pan American Airways* [1969] 1 QB 616 (CA).

[105] *Fothergill v Monarch Airlines* [1981] AC 251; *Jindal Iron v Islamic Solidarity Shipping* [2005] 1 WLR 1363 (HL) (contractual redistribution of liability under the Hague–Visby Rules); *JI Macwilliam Co v Mediterranean Shipping* [2005] 2 AC 423 (interpretation of "bill of lading or any other similar document of title").

[106] *Fothergill v Monarch Airlines*, 278. Gardiner 1995 points to some of the unhappy results if the conditions are less than strictly observed.

[107] See, e.g., *Jindal Iron v Islamic Solidarity Shipping*; *JI Macwilliam Co v Mediterranean Shipping; Corocraft v Pan American Airways; R (Abbasi) v Sect. State Foreign and Commonwealth Affairs.*

[108] *R v Sect. State Home Dept Ex p. Adan* [2001] 2 AC 477, 515, 516–17, 518 (per Lord Steyn).