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International Law

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General overview

- The relationship between International and National Law
- Problems which arise in national courts
- Elements of a happy relationship



Sources of International Law

- Treaties
- Customary international law
- General principles of law
- Jus Cogens (Peremptory Norms)
- United Nations Security Council Resolutions



International Law and Internal Legal Systems

Two general approaches:

- **Monism:** international law and domestic law = same legal system. International law at the top of a hierarchy.
- **Dualism:** international law and domestic law = separate legal systems. Each State has to determine how international rules are applied at the national level.

States can adopt approaches that may include a mix of the two!



Monist Approach to International Law

Example:

Switzerland

International instruments become part of Swiss law and are binding on state authorities when ratified. They do not require to be transposed into Swiss law to have effect in the Swiss legal order.

Germany

General Rules of international law are seen as an integral part of German Federal Law.



United Kingdom: Dualist Approach to International Law

Parliament is Sovereign

Parliament has to apply international law domestically in order to have any domestic effect.

A treaty ratified by the Government does not alter the laws of the UK **unless and until it is incorporated into national law by legislation.**

International law **still applies to the UK on the international level.** The UK is still bound by obligations because it has accepted them.

Customary international law and UK courts: one of the sources of common law, accepted by the courts



Dualism





Lord Kerr in R (S G) v Secretary of State for Work and Pensions (2015)

“Two dominant principles have traditionally restricted the use of international treaties in British domestic law. The first is that domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law; that they are effectively non-justiciable. The second is that such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law”.



European Communities Act 1972

- Act that brought the UK into the European Economic Community (EEC) European Atomic Energy Community (Euratom), and the European Coal and Steel Community (ECSC)
- It gave EU law supremacy over UK national law
- It gave legal authority for EU law to have effect as national law in the UK
- In case of doubt, the Act required UK courts to refer judgment to the European Court of Justice.
- Courts were obliged to strike down legislation which is inconsistent with EU law.
- 1993: European Community
- 2009: European Union

Attention! **This Act is repealed by the EU Withdrawal Act 2018!**





European Communities Act 1972 2(1)

General implementation of Treaties

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ; and the expression " enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.



Dualist approach and the role of Parliament

Miller v Secretary of State for Exiting the European Union, 2017

Overview of the Case:

About constitutional requirements for the UK to give notice of its intention to withdraw from the EU pursuant to Article 50 of the Treaty on European Union.

Article 50: voluntary and unilateral withdrawal of a country from the European Union (EU).

- An EU country wishing to withdraw must notify the European Council of its intention to do so.
- The European Council is then required to provide guidelines for the conclusion of an agreement setting out the arrangements for that country's withdrawal.



- 3 November 2016: for the High Court, without parliamentary consent, the UK government did not have the authority to trigger article 50 of the Treaty on European Union.
- The UK government appealed the decision
- On 24 January 2016 the UK Supreme Court upheld the decision of the High Court.

landmark case: for the parameters of the UK government to act without
Parliamentary consent

Importance to have a clear strategy for the negotiations



Overview of the case

“In December 2015, the UK Parliament passed the European Union Referendum Act, and the ensuing referendum on 23 June 2016 produced a majority in favour of leaving the European Union. UK government ministers (whom we will call “ministers” or “the UK government”) thereafter announced that they would bring UK membership of the European Union to an end. The question before this Court concerns the steps which are required as a matter of UK domestic law before the process of leaving the European Union can be initiated. The particular issue is whether a formal notice of withdrawal can lawfully be given by ministers without prior legislation passed in both Houses of Parliament and assented to by HM The Queen”.

Main issue: the ability of ministers to bring about changes in domestic law by exercising their powers at the international level



Judgement

Miller v Secretary of State for Exiting the European Union, 2017

“International law and domestic law operate in independent spheres [...] treaties between sovereign states have effect in international law and are not governed by the domestic law of any state”.

“the dualist system is a necessary corollary of Parliamentary sovereignty”



Judgement

Miller v Secretary of State for Exiting the European Union, 2017

About the European Communities Act 1972

“EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented [...]. Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal”.

“EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign”.



The Relationship between International and National Law

- UK
 - The executive may conclude treaties which do not involve changes in domestic law – for example, Treaties of Friendship or Investment Promotion and Protection Agreements.

„A treaty is a contract between the governments of two or more sovereign States. International law regulates the relations between sovereign States and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty’s Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into or alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual.“

JH Rayner v. Department of Trade and Industry (1988)



Customary International Law and National Law

Acceptance of customary international law as an integral part of national law

- Customary international law was incorporated into English law so that when its rules changed, English law also changed.

Lord Denning said: *"International law does change, and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law..."*

Trendtex Trading Corporation Ltd v. Central Bank of Nigeria (1977)



Treaty and Inconsistent National Law

- Aim: to avoid conflict between national rules and international obligations.
- The approach of English courts was set out by Lord Denning in *Saloman v Commissioners of Customs and Excise (1967)*, where he said of a treaty which could not directly be relied on but which formed part of the background to the statutory provisions in issue:

“I think we are entitled to look at it because it is an instrument which is binding in international law and we ought always to interpret our statutes so as to be in conformity with international law.”



Treaty and National Constitutional Norms

- The French and German Constitutions were each amended to ensure the compatibility of the **Treaty on European Union** signed at Maastricht and succeeding EU Treaties with the national constitutional order.
- By the **European Communities Act 1972** the UK also amended its constitution in order to accept features of the European Community's legal order – in particular direct applicability and direct effect – which were inconsistent with its own general approach to the implementation of international obligations.
- **European Union (Withdrawal) Bill** provides that *'the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made after exit day.'*



International Law and National Courts

- Principle of ‘**judicial restraint**’
 - Sometimes, where a question of international law is central to the claim, US or UK courts have held that they are in effect not competent to answer it.
 - In **Pinochet** cases Lord Lloyd said assumption of jurisdiction would imperil relations between governments and that:

”We would be entering a field in which we are simply not competent to adjudicate. We apply customary international law as part of the common law, and we give effect to our international obligations so far as they are incorporated in our statute law; but we are not an international court.”



International Law and its practice

- 1) Close involvement in the treaty-making process of lawyers with knowledge both of their own legal systems and of international law;
- 2) Close attention to questions of national implementation during the treaty-making process and before ratification;
- 3) Detailed parliamentary scrutiny of important treaties before national ratification;
- 4) Teaching of international law as a compulsory element of a law degree and of professional training; and
- 5) Involvement of specialist international lawyers as counsel and as *amici curiae* whenever difficult questions of international law arise in national courts.



Revision

- Common law- history and features
- History of Equity Law
- Law of Property Act 1925
- Trust Law



Law of Property Act 1925





Two main objectives of the legislation:

1. Land must be freely alienable – that is, it must be possible to transfer it (and interests in it) to others.
2. Land must be capable of fragmentation of ownership, for both family reasons and commercial reasons - that is, it must be possible to create numerous different interests in land in favour of others.



Property Act 1925

Property was divided into two categories:

- **Real property**: «it was recoverable specifically by a real action» (included most of the interests recognised by the law)
- **Personal property** (chattels real) = interests in land for a term of years (leaseholds), contractual rights. Chattels personal consist either of tangible goods, or of intangible rights as patents, stocks or shares

In Civil law: division between immovables and movables



There are now two legal estates in land under Property Act 1925:

- **the fee simple absolute in possession (freehold) and**
- **the term of years absolute (leasehold).**



Parties to the trust

