PART I

SOURCES

1 FUNCTION

> To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view.
>
> Lord Bridge of Harwich, *ex p Bennett* [1994] 1 AC 42, 67

A The function of law in foreign relations

1 Contesting the law's exclusion

What is it about the conduct of the state in its external exercise of public power that provokes such controversy within contemporary Anglo-Commonwealth legal systems? The appellate courts are pressed on all sides with foreign relations issues – on the legality of foreign affairs decisions by the executive;[1] on the protection of the individual affected by the foreign exercise of public power;[2] on the extent of the duties of the state on behalf of its citizens affected by the public power of foreign **1.01**

[1] *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356, 140 ILR 624.
[2] *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, 133 ILR 499; *Al-Skeini v United Kingdom* (App No 55721/07) (2011) 53 EHRR 18, 147 ILR 181 (ECtHR GC).

states;[3] on the external scope of public regulatory power;[4] and on the treatment of the public interests of the foreign state in domestic litigation.[5] Nor are the issues confined to the courts. The treatment of foreign relations has been a contemporary preoccupation of the legislature[6] and in public inquiries.[7]

1.02 Yet a persistent refrain in the thinking of common lawyers about foreign relations has been that it is not a question of law at all: that foreign relations lie outside the municipal legal system in a zone of non-law, a 'forbidden'[8] or 'no-go'[9] area. Indeed, the very language of the core concepts so often invoked in this field – the language of non-justiciability, act of state and immunity – suggests the exclusion of law and legal enquiry. The same pattern of thought can be seen in academic commentary. As one leading public law text puts it, 'foreign parts are beyond the pale (in Kipling's words "without the law")'.[10] There has been, as a leading historian of political thought has put it, 'a fundamental assumption that there were two distinct realms, called variously the internal and the external, the domestic and the foreign or (in a more legalistic idiom) the municipal and the international. That dichotomy remains perhaps the least investigated of all the fundamental divisions in our political lives.'[11]

1.03 This failure to investigate the division between the domestic and the foreign has specific legal implications. A recent commentator on one aspect of the field writes:

> If "rights cases with foreign elements" were a discipline, it would be one with both an often shameful history and a crucially important present. But it is not, and . . . this fact is an essential reason why decisions on the fundamental rights of foreigners, or of those outside states' territories, are so often so problematic.[12]

The point is a more general one. Thirty years ago, writing the last general monograph in the field in English law, F. A. Mann observed:

> In writing this book peculiar difficulties were encountered. They arose in the first place from the fact that in the field covered by it the law displays much confusion of

[3] *Khadr v Canada (Prime Minister)* 2010 SCC 3, [2010] 1 SCR 44, 143 ILR 225; *Hicks v Ruddock* [2007] FCA 299, 156 FCR 574.
[4] *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300.
[5] *United States Securities and Exchange Commission v Manterfield* [2009] EWCA Civ 27, [2010] 1 WLR 172; *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 3 WLR 273.
[6] House of Commons Public Administration Select Committee (UK) 'Taming the prerogative: strengthening ministerial accountability to Parliament' HC (2003–4) 422; House of Lords Select Committee on the Constitution (UK) 'Waging war: Parliament's role and responsibility' HL (2005–6) 236-I; Ministry of Justice, Ministry of Defence and Foreign & Commonwealth Office (UK) 'The governance of Britain: war powers and treaties: limiting executive powers' (CM7239, 2007).
[7] Commission of Inquiry into the actions of Canadian officials in relation to Maher Arar (Can) 'Report of the events relating to Maher Arar' (2006); Baha Mousa Inquiry (UK) 'The report of the Baha Mousa Inquiry' HC (2011) 1452–I.
[8] *R (Abbasi) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1598, 126 ILR 685, [106].
[9] *R (Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (DC), [53].
[10] Wade & Forsyth 2009, 716. [11] Armitage 2013, 10. [12] Bomhoff 2008, 42.

> thought and lack of precision ... Secondly, the legal disarray pervading many decisions has led to serious problems of classification.[13]

What is needed is a new legal framework within which the many pressing problems that straddle the divide between the domestic and the foreign, the municipal and the international, may be analysed.

1.04 This work analyses three broad sets of issues as the central concerns of foreign relations law: the distribution of the foreign relations power between the three organs of government; the implications of the foreign relations power for the rights of the individual; and the treatment of the foreign state within the municipal legal system. It advances three central propositions as the basis for the framework that it presents: (a) that the conduct of foreign relations is, like other exercises of public power within a constitutional state, regulated by law; (b) that the function of foreign relations law is allocative; and (c) that foreign relations issues cannot be resolved on an all-or-nothing basis, but must be disaggregated so that fine-grained solutions to the problems that they present can be found. Each of these propositions requires elucidation.

1.05 *Foreign relations as law*. The first proposition is that foreign relations, despite their political dimension, are governed by law. They are not a zone of non-law within the municipal legal system. Lauterpacht observed as long ago as 1933 that, of course,

> [E]very international dispute is of a political character, if by that is meant that it is of importance to the State in question. Thus viewed, the proposition that some legal questions are political is an understatement of what is believed to be the true position. The State is a political institution, and all questions which affect it as a whole, in particular in its relations with other States, are therefore political ... [but] it is equally easy to show that all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognised, they are capable of an answer by the application of legal rules.[14]

Lauterpacht's point concerns the function of law in the international community. This work argues that the same is true for issues of foreign relations within the municipal legal system.

1.06 This is not to say that, within a municipal legal system, all questions of foreign policy must be subject to adjudication by the courts. In the first place, the role of the courts is to adjudicate legal disputes and not matters of policy. In the second place, neither within nor without the polity are local municipal courts necessarily the competent authorities to apply the law. Lauterpacht himself sought to explain exclusionary doctrines in English law not as an absence of the rule of law, but as part of the allocation of functions within the constitutional state:

[13] Mann 1986a, vi. [14] Lauterpacht 1933, 161, 158.

> [These] limitations upon the freedom of judicial decision, far from amounting to a suspension of the rule of law, are the expression of a differentiation of functions, which for reasons of obvious expediency is unavoidable in the modern State.[15]

Such an allocation between the executive, the legislature and the judiciary, which was not to be regarded as immutable, was part of the 'superstructure of functions' within the state.[16] But the fact that deliberative power on certain issues was allocated to the executive and not to the judiciary did not of itself give cause to indicate an absence of the rule of law.

1.07 *Allocative functions*. The real choices to be made in this field are not between regulation by law and a lawless Alsatia. Rather they are choices as to the *allocation* of the appropriate jurisdiction and applicable law for the resolution of foreign relations issues. Such choices have to be made in three dimensions: as between the respective organs of government within the municipal constitution; as between the municipal legal systems of different states; and as between the municipal and the international legal system.[17] As this is the central technique utilised in this work to resolve foreign relations law questions, the concept of the allocative function will be explained further in section 2 below.

1.08 *Disaggregated solutions*. The third general proposition is that treating foreign relations law as a discipline in its own right facilitates the development of common and consistent legal techniques for analysing both current and new legal problems (analogous to the umbrella function of private international law). But, equally, it permits *disaggregation* – so that different problems relating to the external exercise of the public power of states may be addressed differently, without seeking one-size-fits-all solutions based on generalised notions of extraterritoriality.

1.09 These are large claims, which can only be made good through the detailed analysis that is to follow in subsequent chapters. But, in order to frame that discussion, it is necessary to define more closely the scope and basic premises of the enquiry. The first task (section 2) is to develop what is meant by the central idea of the allocative function of foreign relations law. Section 3 will outline the basis for the focus on the law of the four Anglo-Commonwealth states: the United Kingdom, Australia, Canada and New Zealand. Section 4 will introduce the exclusionary doctrines that had served to exclude the law from this field in Anglo-Commonwealth states and the forces that have combined to produce a new approach. Section 5 will then examine how a modern law of foreign relations fits with the related bodies of public international law, private international law and public law. Finally, part B of this chapter will outline the scope and structure of the rest of the work.

[15] Ibid, 397. [16] Ibid, 404.
[17] In the context of the European Union, the allocative principle also has to be applied as between the Union and the member states, see Ch4 ptE below.

2 The allocative function of foreign relations law

1.10 The rules of foreign relations law perform an allocative function. What is meant by this expression? More generally, why is it necessary to interpose an intermediate set of rules between public international law, whose central concern is the relations between states, and the substantive rules of municipal law? Undoubtedly, the outlines of the solutions to problems of foreign relations law are supplied by public international law. But a law of foreign relations requires more than the simple transposition of such principles. The international law principles of jurisdiction are, for example, not capable of answering the question of the liability of the state to individuals affected by its conduct when it has in fact already acted outside its own borders. Nor are the answers to these problems sufficiently to be found from an internal examination of the reach of municipal laws, since they involve problems of the *interaction* of different legal systems (both international and the laws of other states). It is necessary to work out a more detailed set of rules consistent with international law principles in order to provide workable solutions to current problems. In short, the task done so elaborately for private international law must be done for public law as well.[18]

1.11 Foreign relations law therefore performs two interrelated allocative functions. It provides for choice of jurisdiction and determination of the applicable law in the external exercise and control of the public power of states, both as between states and as between the municipal and the international plane. It also provides for the allocation of foreign affairs competence between the three organs of government (executive, legislative and judicial) within the municipal constitution.

1.12 Adopting a conflict of laws methodology helps to solve cross-border public law problems for at least the following five reasons. In the first place, the rules of the conflict of laws are specifically concerned with the interaction between legal systems. That is to say, they recognise and respect the fact that every legal system has its limits. But where a given problem spans those limits, it is necessary to have a set of rules that determine which court has jurisdiction and which law applies. Although it is customary to consider the conflicts method in its application as between municipal legal systems in international private law matters, the method itself is not inherently limited in this way. On the contrary, its techniques are capable of application in contexts in which the respective spheres of municipal and international law, and of municipal and international tribunals, must be determined.[19]

1.13 Second, foreign relations law requires consideration of the legitimate interests of foreign states and of their law, as well as of the applicable rules of international

[18] For a related argument for the application of conflict of laws techniques to explain the relationship between national law and international law see Knop, Michaels & Riles 2008 and Knop, Michaels & Riles 2010.
[19] See, e.g., Douglas 2009.

law, which shape and constrain the interactions between states. In that sense, the subject is, like private international law, by its nature cosmopolitan.[20] But, by the same token, like private international law foreign relations law remains part of the municipal legal system of the forum. That is to say, it provides a set of rules by which the forum determines for itself when and to what extent it will, for example, cede jurisdiction to a foreign court or apply international law. As Crawford has written, 'Each legal system has its own rules of reception: that is what it is to be a legal system.'[21]

1.14 The third general insight derived from the conflict of laws is that questions of jurisdiction and the application of laws are not susceptible to monist answers. Rather, the issues must be disaggregated so that suitable specific solutions for specific foreign relations problems may be found. Simplistic notions of territoriality have, for example, proved inadequate both as a basis for the exercise of prescriptive jurisdiction and in determining the human rights responsibilities of the state for its external exercise of public power. Instead, jurisdiction must be divided and tailored to recognise the real and substantial connections between the state and the conduct in question.

1.15 Fourth, the conflicts method provides a methodology for tackling such problems, in which one begins by characterising the issue, and then identifies the rule of jurisdiction or choice of law applicable to it. Brownlie considered that such an approach best explained the approach of municipal courts to determinations of the application of international law:

> It would seem that the courts must first make a choice of law depending upon the nature of the subject-matter .... [C]ourts, both municipal and international, will often be concerned with the more technical question as to which is the *appropriate* system to apply to particular issues arising.[22]

1.16 The fifth insight that application of a conflicts approach provides for foreign relations law is that it does not proceed from a notion of foreign relations as a zone of non-law. Rather, it serves to allocate legal competence and applicable law. F. A. Mann made this point in relation to the foreign act of state doctrine, in arguing that the situations in which it had been invoked were better explained simply by the application of the ordinary rules of the conflict of laws:[23]

> [I]t is suggested that it is private international law which provides the solution and that, accordingly, the foreign act of State ought to be recognized and allowed effects in this country if it is done subject to or is recognized by that legal system which governs the legal relationship concerned.

[20] For development of this idea in the field of private international law see Mills 2009.
[21] Crawford 2009, 6. [22] Brownlie 2008, 41, 54 (emphasis in original).
[23] Mann 1943b, repr. in Mann 1973, 438; *Dicey* 2012, [5-047].

Private international law cannot always itself supply the answer to problems involving the exercise of the public power of states. But foreign relations law rules themselves perform an allocative function. For example, as Hazel Fox has put it, a principal function of the rules of state immunity is to serve **1.17**

> as a method of allocating jurisdiction between States relating to the prosecution of crimes and the settlement of claims by private litigants relating to State activities . . . [I]t serves both as a sorting device between competing jurisdictions and as a holding device by which confrontation between States is avoided.[24]

The point is one of much more general application. Using the conflicts tools of jurisdiction and determination of applicable law will also provide a better, because more principled, basis for dealing with other foreign relations issues where reliance is otherwise placed on exclusionary doctrines. The adequacy of solutions to particular problems of foreign relations law (whether they relate to the conduct of the home state or of a foreign state) may be assessed according to whether the outcome does in fact serve to allocate jurisdiction or applicable law to the proper legal system, or whether, instead, it serves to license non-accountability. **1.18**

That said, the analogy with private international law is not, and cannot be, exact. Neither the exercise of the external public power of the home state nor the treatment in domestic law of the foreign state, necessarily involves the systematic application of choice of law rules leading to the application of either domestic or foreign law. Thus the issues that arise in the public law field require the application of their own specific solutions. Moreover, the determinations of jurisdiction and applicable law in this sphere are not, as in private international law, primarily two-dimensional, determining horizontally the application of two competing systems of municipal law. They may also involve a three-dimensional consideration, both of the application of public international law and its systems of dispute settlement, and internally within the state, determining the competence of the respective organs of government. **1.19**

In this latter respect, foreign relations law also serves an allocative function between the organs of government within the municipal constitutional order. It does so in order to ensure application of the basic principles of constitutional government – the distribution of powers and the rule of law – to the conduct of a state's international relations. This has both an internal and an external aspect. Internally it achieves a balance between the powers of the three organs of government on foreign relations matters. Externally it controls the exercise of power within the international legal system in order to protect the same principles. As Lord Hope put it in *Ahmed v H M Treasury*, holding that the implementation of UN terrorist freezing regulations offended fundamental principles of legality, **1.20**

[24] Fox 2008, 2, 751.

> [T]he full honouring of these obligations is an imperative. But these resolutions are the product of a body of which the executive is a member as the United Kingdom's representative. Conferring an unlimited discretion on the executive as to how those resolutions, which it has a hand in making, are to be implemented seems to me to be wholly unacceptable. It conflicts with the basic rules that lie at the heart of our democracy.[25]

3 The foreign relations law of the Anglo-Commonwealth states

1.21 This book examines the issues of foreign relations as treated in the law of the four Anglo-Commonwealth states: the United Kingdom, Australia, Canada and New Zealand. In doing so, it pursues the thesis that the commonality of the common law approach to these issues, actively reinforced by a community of shared judicial reference, continues to outweigh the differences.[26]

1.22 The rules of foreign relations law are undoubtedly shaped by the specific elements of each state's constitution. But, in the case of the Anglo-Commonwealth states, this does not mean that the foreign relations law of each country is necessarily unique to it and that approaches adopted in one state are inapplicable in others. Why is this so? Within the legal traditions of the common law, constant reference is made to judicial decisions and law reform solutions adopted elsewhere in the Commonwealth across a wide range of fields of law. But the argument has been made that the solutions found in other Commonwealth common law countries do not translate in this field in view of its dependence on the distinctive features of each country's constitutional compact.[27] To this, four answers may be given.

1.23 In the first place, as will be shown in Chapter 2, the key elements of common law thought on foreign relations issues stem from a common historical root, in the form of the ideas of John Locke, of Blackstone and Mansfield, of Dicey and of F. A. Mann. This point is important, since foundational principles have a greater tendency to endure hard-wired into inter-generational thinking than do detailed rules. So, the Supreme Court of Canada can cite Dicey as authority for the proposition that the foreign affairs power is a matter of the prerogative in 2010.[28] A leading commentary on Australian foreign-policymaking in 2007 cites Locke's insights on the role of Parliament.[29] In 2006, Lord Bingham referred to the 'old and high authority' of Lord Mansfield and Blackstone for the proposition that 'the law of nations in its full extent is part of the law of England and Wales'.[30] In 2011, the High Court of Australia adopted

[25] *Ahmed v H M Treasury* [2010] UKSC 2, [2010] 2 AC 534, 626, 149 ILR 641, [45].
[26] For a similar argument applied to the law on states of emergency see Dyzenhaus 2006, 5.
[27] Sales & Clement 2008, 392.
[28] *Khadr v Canada (Prime Minister)* 2010 SCC 3, [2010] 1 SCR 44, 143 ILR 225, [34].
[29] Gyngell & Wesley 2007, 145.
[30] *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136, 132 ILR 668, [11], citing inter alia *Triquet v Bath* (1764) 3 Burr 1478, 1481, 97 ER 936 (per Lord Mansfield); Blackstone 1783, IV, 67. Though Lord Bingham added: 'I would for my part hesitate, at any rate without much