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TREATY-MAKING AND THE BRITISH PARLIAMENT

THE RIGHT HONOURABLE THE LORD TEMPLEMAN

I. INTRODUCTION

Under English law the capacity to negotiate and conclude treaties falls entirely to the executive arm of government. Nominally Parliament plays no role at all in this process. This paper will explain the British system, the different functions of the executive and legislature, the process of concluding and implementing treaties, and finally the role played by the courts in upholding this system. An understanding of how treaties are entered into and implemented in British law depends on an appreciation of the division between the international aspects of treaty-making and the domestic aspects of implementation. Parliament has very little involvement in the former but almost complete control of the latter aspect.

Geography, economics and personalities have influenced the evol-
tion of the United Kingdom constitution in a form which a constitu-
tionmaker would not now invent or imitate slavishly. The size and shape
of the United Kingdom have been conducive to a centralized administra-
tion albeit that each government pays lip service to the desirability of
local autonomy.

Financial requirements of a modern centralized state whose wealth
is vested in the population generally has produced a democracy domi-
nated by a lower house of the legislature elected by universal suffrage.
The effective power of the legislature and the executive rests in the hands
of the Prime Minister and Cabinet, a committee restrained from illegality
by an independent legal system and restrained from excess by accounta-
bility to the legislature and to the electorate. The concentration of power
in the hands of the leaders of the executive and the legislature includes
the right to make treaties subject to the limitation that the courts will
only enforce the common law and laws enacted by Parliament and sub-
ject to the limitation that a treaty which lacks the support of Parliament
or the approval of the electorate may bring down the government. It
follows that the treaty-making powers of government are powerfully in-
fluenced but cannot in practice be directly fettered by Parliament.

The theoretical powers of Parliament in relation to treaty-making
may be summarized as follows:

(1) Parliament may prevent the conclusion of a binding treaty by
refusing approval where the treaty provides that the treaty shall only
take effect subject to the approval of Parliament. In practice, the exercise
of this power will bring down the government.

(2) Parliament may prevent a treaty being ratified if the government
submits the treaty to Parliament before ratification. However, if the
House of Commons carried a vote against ratification, this result would
also lead to the fall of the government.

(3) If treaty provisions affect private rights or otherwise conflict
with English common law or United Kingdom statutes, Parliament may
ensure that such provisions are not effective by refusing to pass the neces-
sary statute which gives effect to the treaty. There again the failure of the
government to obtain the enactment of the necessary provisions would
lead to the fall of the government.

The threat of defeat means that a government will always do all in
its power to ensure when negotiating a treaty that the provisions of the
treaty will be acceptable to the majority party in the legislature and to
the electorate. There will be a long process of consultation between gov-
ernment departments and private and public interests. Proposals for a
treaty will be given wide circulation at an early stage. Interested parties will submit memoranda to government departments and also enlist the support of Members of Parliament. From a mass of contradictory advice the government will then determine its own policy and will negotiate a treaty which gives effect to that policy. The policy will of course have been influenced by Parliament and public opinion but once the government has finally agreed upon the terms of a treaty there is no effective means for Parliament to introduce a reservation or to bring about a change in the provisions of the treaty. In practice a treaty approved by a government which retains the support of a majority in the House of Commons will be ratified and effect to the treaty will be given, if necessary, in English law by the passage through Parliament of a statutory incorporation of the provisions of the treaty.

II. NEGOTIATION AND CONCLUSION OF A TREATY

In the United Kingdom it is the executive which has the power to make treaties. This is done by the exercise of prerogative powers, the power that in former times was inherent in the Crown and could be exercised without the consent of Parliament. Today the power is exercised by the government or even a government department on behalf of the Crown though, strictly speaking, it is still the Crown that enters into a treaty acting on the advice of ministers. Not only does Parliament have no involvement in the international negotiation and conclusion of the treaty but the exercise of the prerogative power is also beyond the review of our domestic courts. The United Kingdom courts will not review an act of state under which heading falls the exercise of treaty-making powers. Whatever problems may arise concerning the effect of a treaty once concluded on domestic law and its enforceability in domestic courts, the case law has always upheld the traditional system whereby the executive alone, acting on advice, can bind the United Kingdom on an international plane.

By international law the head of the state represents the state in foreign relations. By English law the Crown occupies the position of head of state for the purpose of representing the community in foreign relations. In the first edition of Blackstone's _Commentaries on the Laws of England_ published in 1765, the following passages appear:

> With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with

another community equally numerous as themselves. Unanimity must
be wanting to their measures, and strength to the execution of their
counsels. In the king therefore, as in a centre, all the rays of his people
are united, and form by that union a consistency, splendor, and power
that make him feared and respected by foreign potentates; who would
scruple to enter into any engagements, that must afterwards be revised
and ratified by a popular assembly. What is done by the royal author-
ity, with regard to foreign powers, is the act of the whole nation: what
is done without the king's concurrence is the act only of private men. 3

It is also the king's prerogative to make treaties, leagues, and alli-
ces with foreign states and princes. For it is by the law of nations
essential to the goodness of a league, that it be made by the sovereign
power; and then it is binding upon the whole community: and in Eng-
land the sovereign power . . . is vested in the person of the king.
Whatever contracts therefore he engages in, no other power in the
kingdom can legally delay, resist or annul. And yet, lest this plenitude
of authority should be abused to the detriment of the public, the con-
stitution . . . has here interposed a check, by the means of parliamen-
tary impeachment, for the punishment of such ministers as advise or
conclude any treaty, which will afterwards be judged to derogate from
the honour and interest of the nation. 4

In Rustomjee v. The Queen 5 a treaty provided for three million
pounds to be paid by the Emperor of China to the Crown for debts due to
British subjects by Chinese merchants. The money was paid to the
Crown and the plaintiff, claiming to be a creditor of the Chinese
merchants, sued unsuccessfully to enforce payment. Lord Coleridge,
C.J., said that 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, as 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. 6

By the convention of the unwritten constitution of the United King-
dom, the sovereign must now act on advice tendered to her by her Cabi-
net headed by the Prime Minister. The sovereign appoints a Prime
Minister who is a Member of the House of Commons, and appoints such
Cabinet Ministers as the Prime Minister recommends. The theoretical
control of the House of Commons over the Cabinet is based on the fact
that the House of Commons cannot be obliged to grant supplies and if
supplies are not granted then government cannot be carried on. The
House of Commons also exercised control in the past by impeachment or

4. Id. at *257.
5. 2 Q.B. 69 (1876).
6. Id. at 74.
the threat of impeachment. Thus in 1678 the Earl of Danby was impeached for having *inter alia*:

... traitorously encroached to himself regal power by treating in matters of peace and war with foreign ministers and ambassadors, and giving instructions to His Majesty's ambassadors abroad without communicating the same to the Secretaries of State and the rest of His Majesty's counsel.\(^7\)

But no minister now fears impeachment.

The minister charged by the Sovereign and the Cabinet with the conduct of external affairs is the Secretary of State for Foreign and Commonwealth Affairs. Parliamentary control over the Secretary of State is less strict than in the case of other heads of executive departments owing to the secrecy often necessary in the conduct of foreign affairs. Even the Cabinet habitually exercises only a very general control over the Secretary of State, but this will depend on the personality and policy of the Prime Minister. As early as 1825, before the conventions had been fully established and when George IV was in some respects attempting to conduct his own foreign policy, Canning, when he became Foreign Secretary, wrote saying:

"I should be very sorry to do anything at all unpleasant to the King, but it is my duty to be present at every interview between His Majesty and a foreign Minister."\(^8\)

**III. PARLIAMENTARY APPROBATION OR APPROVAL OF TREATIES**

Broadly speaking, Parliament will need to be involved where taxation is imposed or where a grant from public funds is necessary to implement the treaty, where the existing domestic law is affected, where important territories are ceded or where new states and dominions are created outside the United Kingdom and territory transferred to them, where a peace treaty interferes with the private rights of the individual and where a multinational or commercial convention requires a change in domestic law in order to implement international commercial practice.

Though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign powers are generally conceded to be binding upon the nation without express parliamentary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory. Thus statutory assent was obtained for the agreement to the cession of the island of Heligoland to the German empire in 1890; see the

\(^7\) See *R. v. Earl of Danby* (1685) 11 State Trials 600 at 621, 622 H.L.

Anglo-German Agreement Act 1890. In the case of Damodhar Gordhanp Deroiam Kanji,9 it had been held by the judges of the High Court of Bombay that it was beyond the powers of the Crown without the concurrence of the Imperial Parliament to make any cession of territory within the jurisdiction of any of the British courts in India, in time of peace, to a foreign power; the Privy Council did not decide whether this ruling was right, but expressed grave doubts as to its soundness.10

In practice the approbation or approval of Parliament is sometimes stipulated for in treaties, just as their entry into operation may be made dependent on the procuring of legislation. Thus treaties which affect the rights of the Crown subjects are made subject to the approval of Parliament, and are normally either submitted for its approval before ratification or ratified under condition. For example, the Convention with Prussia for the mutual surrender of criminals was concluded in 1864 but failed to come into operation for lack of statutory approval and was terminated by protocol. The Treaty of Commerce and Navigation with Portugal of 1914 provided that the Treaty was not to come into force until the British Parliament had approved article 6 which imposed criminal penalties for the importation and sale of port or madeira wine not produced in Portugal or Madeira. Legislative effect was given to the Treaties of Peace in 1918-1924 because of the interference with private rights under the clearing house system of liquidation between nationals of the powers which were parties to the Treaty. Similarly, treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods or extradition treaties which confer on the executive the power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here, cannot be made operative without legislation.

IV. Ratification of Treaties

The term ratification may mean the obtaining of approval of Parliament for a treaty or more strictly refer to the acts of the appropriate organ of state bringing about the treaty. The expression ratification can also be used to designate the formal exchange of documents or even the document itself. Such a variety of different meanings springs from the idea that after the initial negotiation and formulation of the terms of the treaty, some formal act signifying that the state wishes to be bound by the treaty is to be carried out. It is also envisaged that between the time

9. (1876) 1 App. Cas. 332 P.C.
10. Id. at 373, 374.
of negotiation and the act of ratification, the legislature of the state may require to be given an opportunity to scrutinize the proposed international agreement, even in those states where legislative involvement is greater than in the United Kingdom, in order to give the necessary approval to the treaty.

Article 14 of the Vienna Convention states that in the situation where ratification is required, the act of ratification itself constitutes the consent of the state to be bound by the treaty. This is the moment when the agreement takes effect, the moment from which the states are bound, and the formal starting point of the treaty. Ratification, once an opportunity for the sovereign to confirm that the representative did in fact have full powers to conclude a treaty, is now a method of submitting treaty-making powers of the executive to some control of the legislature so that the state may give proper scrutiny to a treaty before it allows its government to bind the state to it.

V. THE PONSONBY RULE

British governments have imposed on themselves a modern fetter whereby a treaty which requires ratification will be laid before Parliament in the form of a White Paper and will not be proceeded upon for 21 days. This practice is known as "the Ponsonby rule" having its origin in a statement made by Mr. Arthur Ponsonby, the Under Secretary of State for Foreign Affairs in the House of Commons. He said, *inter alia*:

11. 171 PARL. DEB., H.C. (5th ser.) 2001 (1924). Mr. Ponsonby prefaced his suggestion as follows:

It has been the declared policy of the Labour Party for some years past to strengthen the control of Parliament over the conclusion of international treaties and agreements, and to allow this House adequate opportunity to discuss the provisions of these instruments before their final ratification . . . . As matters now stand there is no constitutional obligation to compel the Government of the day to submit treaties to this House before ratification except in cases . . . where a Bill or financial resolution has to receive parliamentary sanction before ratification. But as a rule formal publication of a treaty does not take place until after ratification unless parliamentary action is necessary with regard to it . . . . I think we shall carry the general approval of the House with us if we endeavor so to adjust the practice with regard to the submission of treaties as to give Parliament, nor arbitrarily in this or that case, but completely in all cases, an opportunity for the examination, consideration and if need be the discussion of all treaties before they reach the final stage of ratification. . . . There are three possible methods and the first is legislation. The second method is by resolution of the House which in this instance would have to take the form of an address to the Crown which constitutionally speaking is the treaty-making power. The third method is by the inauguration of a new custom, accompanied by the arrangement of the appropriate machinery for giving effect to the new procedure. I will dismiss in a few words the idea of proceeding by means of legislation. An Act of Parliament may be the most imposing method of effecting a constitutional change, but no Act of Parliament can be so worded as to prevent its being altered by another Act of Parliament. Moreover, we shall plunge the House into a morass of constitutional controversy, in which, no doubt, we might be accused of invading the prerogatives of the Crown, and the underlying principle, about which I believe, there is general agreement, will be lost sight of. I therefore rule out
I come therefore to the inauguration of a change in custom and procedure. At first sight this may appear to be an inadequate method of carrying out the Government's intentions. I would however remind the House of the paradox that under the British constitution it is rules that depend solely on practice and usage which are the most immutable. A change effected by Acts of Parliament is not likely to last so long as one effected solely by ministers as a change of practice and dependent only on the will of the members of the legislature for the time being. There are two sorts of treaties. There is the present treaty, out of which a bill and a financial resolution arise which necessarily comes before Parliament and in regard to which no change is necessary. But there is another sort of treaty out of which no bill arises, and that is the sort of treaty which, according to present practice, need never have been brought before this House at all. It is the intention of His Majesty's Government to lay on the table of both Houses of Parliament every treaty, when signed, for a period of 21 days, after which the treaty will be ratified and published and circulated in the treaty series. In the case of important treaties, the Government will, of course, take an opportunity of submitting them to the House for discussion within this period. But as the Government cannot take upon itself to decide what may be considered important or unimportant, if there is a formal demand for discussion forwarded through the usual channels from the Opposition or any other party, time will be found for the discussion of the treaty in question. By this means secret treaties and secret clauses of treaties will be rendered impossible. Public treaties in these days do not come with surprise before Parliament. The Government's intentions are made known, the work of conferences is given a great deal of publicity, there are discussions on the Foreign Office vote, and there are also parliamentary questions. Nevertheless, it seems to the Government necessary that the instrument in its final shape should in all cases be submitted to Parliament which ultimately is the supreme governing body of the nation.

The Ponsonby rule has been followed by all governments ever since it was pronounced. There has been one modification. On 6 May 1981 it was announced that bilateral double taxation agreements would no longer fall under the Ponsonby rule but would be published after entrance into force.

The Ponsonby rule is a rule of limited value. The government is not bound to find parliamentary time to devote to a motion deploring the government's intention to ratify a treaty. If time were found it is unlikely that the government would be defeated in the House of Commons. The government might in the face of parliamentary disapproval change its mind but this is unlikely.
VI. TREATIES AND DOMESTIC LAW

In addition to the power exercisable by Parliament in relation to a treaty which requires parliamentary approval, and in addition to the powers exercisable by Parliament as a result of the Ponsonby rule, Parliament controls the effectiveness of a treaty in the United Kingdom because a treaty cannot alter existing domestic or statute law.

In Attorney-General for Canada v. Attorney-General for Ontario, Lord Atkin said, "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action." In Walker v. Baird, the Crown entered into a treaty with France whereby it was agreed that no lobster factories which were not in operation on 1 July 1889 on the coasts of Newfoundland should be permitted unless by the joint consent of the commanders of British and French naval stations. The respondent Baird, worked the lobster factory while the agreement was in force and in breach of the agreement. The appellant, Walker, the chief naval officer of the ships employed on the Newfoundland fisheries enforcing the treaty, took possession of the lobster factory and was sued by Baird. Walker pleaded that what he had done consisted of acts of state arising out of the political relations between the Crown and France and involved the construction of treaties. Lord Herschell delivering the judgment of the Privy Council said:

The learned Attorney-General, . . . conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement that was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether or in both or either of

13. Id. at 347.
15. Id. at 495.
these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.16

In the Parlement Belge,17 the plaintiffs, the owners of the steamship The Darling, brought an action against the steamship Parlement Belge and her freight for damages alleging that the Parlement Belge had negligently damaged The Darling. The Parlement Belge was a Belgian steamship carrying mail and by clause 6 of the Convention made between the Crown and the King of Belgium was to be considered as a man-of-war. The Crown, intervening in the action, claimed that as a man-of-war the Parlement Belge was immune from private suit. Sir Robert Phillimore giving judgment in favor of the plaintiffs held that it was not competent for the Crown to place the Parlement Belge, while in British ports, in the category of a public ship of war and exempt her from the process of an English court. The Convention effected private rights and could not be enforced without parliamentary sanction. The attempt to place a Belgian steamship in the category of a ship of war while in a British port was "a use of the treaty-making prerogative of the Crown which I believe to be without precedent, and in principle contrary to the laws of constitution.18

In Republic of Italy v. Hambros Bank,19 the Italian Government failed in an attempt to enforce a financial agreement made between the Crown and the Republic of Italy concerning assets in this country which had been vested in and disposed of by the custodian of enemy property.

In Blackburn v. The Attorney-General,20 the "plaintiff brought an action against the Attorney-General claiming declarations to the effect that, by signing the Treaty of Rome," thereby making the United Kingdom a member of the E.E.C., the "Government would irreversibly surrender in part the sovereignty of the Crown in Parliament and in so doing would be acting in breach of the law." In refusing to make any order Lord Denning M.R. said:

Mr. Blackburn points out that many regulations made by the European Economic Community will become automatically binding on the people of this county: and that all the courts of this country, including the House of Lords, will have to follow the decisions of the

16. Id. at 497.
17. (1879) 4 P.D. 129.
18. Id. at 154.
European court in certain defined respects, such as the construction of the treaty...

... [n]evertheless, I do not think these courts can entertain these actions. Negotiations are still in progress for us to join the Common Market. No agreement has been reached. No treaty has been signed. Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us.21

VII. THE ROLE OF THE COURTS

In the United Kingdom the courts will neither enforce nor interpret treaties. According to United Kingdom law and practice, the government decides whether to enter into a treaty; the individual is protected because the courts will not enforce a treaty against an individual. According to United Kingdom law, a treaty is no more than an agreement between sovereign powers. The agreement may provide for disputes to be referred to a specified tribunal or to arbitration but cannot be controlled by a domestic court of law. These principles were illustrated by the International Tin22 case in which an attempt was made to enforce treaty rights. In that case a large number of States, including the United Kingdom, had entered into a treaty which established an international organization known as the International Tin Council, (I.T.C.). The United Kingdom Parliament passed a law which provided that the I.T.C. “shall have legal personality.” The I.T.C. became insolvent and its creditors brought actions in the United Kingdom courts claiming that each of the treaty Member States was responsible for the debts incurred by the I.T.C. The House of Lords held that the I.T.C., being endowed with legal personality by Parliament, contracted under English law with and incurred debts to its creditors in its own name and that no one else was liable on its contracts. The treaty which created the I.T.C. was not part of English law and could neither be construed nor enforced so as to create a liability on the Member States. If creditors had a moral claim (as to which there were discordant voices), that claim could only be pressed through diplomatic channels. In Arab Monetary Fund v. Hashim,23 the House of Lords held that where an international organization was incorporated under the law of a foreign state the corporate body was recognized by and could sue in the English courts. Where Parliament has provided the courts will look no further. Where Parliament has not pro-

21. Id. at 1039.
vided the courts will not construe or enforce treaty rights but will recognize a treaty organization which has been incorporated by a foreign state.

In other countries treaties may be self-executing and directly applicable and may take priority over domestic law as from the date when the domestic parliament has expressed approval. Practices vary from country to country. In the European Community the difficulties of enforcement and construction have been overcome by the creation of the European Court of Justice. Under the Treaty of Rome all questions of Community law are referred to the European Court of Justice and its decisions must be carried into effect by the domestic courts. It follows that there is no room for conflict between the decisions of different courts of different countries or for any conflict of interpretation of the treaty.

The European Convention on Human Rights falls into a separate category. The United Kingdom Government adhered to the Convention and in 1966 accepted the compulsory jurisdiction of the European Court of Human Rights. The government takes the view that English domestic law complies with the Convention and has therefore not incorporated the Convention into English law by statute. This means that any complainant must first exhaust his remedies (if any) under English law. If, under English law, the complainant does not receive satisfaction, the complainant may petition the European Commission on Human Rights which may refer the complaint to the European Court. If that court finds that there has been an infringement of the rights of the complainant under the Convention, then the United Kingdom Government is bound to pay compensation to the complainant and to grant him any other relief awarded by the court. For example, the court has held that the right of a prisoner to private life and correspondence guaranteed by Article 8 of the Convention was infringed by a prison rule which prevented him from corresponding with a lawyer about a claim for a loss of a leg in prison; *Golder v. U.K.* 24 The government has so far resisted pressure to incorporate the Convention into English law. English judges therefore do not apply the Convention as a matter of law but endeavour to construe and apply English law in a manner which is consistent with the treaty obligations entered into by the government. For my part, where rights covered by the Convention are in question, I endeavour to apply the principles of the Convention as construed by the European Court on the grounds that the English common law is compatible with the Convention, for example as found in *A.-G. v. Guardian Newspapers,* 25 *Lord Advocate v. Scotsman*

Publications, and Brind v. Secretary of State. Some of my colleagues hold, however, that the exercise of an administrative discretion can only be reviewed by the courts in this country in accordance with English conventional principles of judicial review. Thus, the English court will interfere with a decision which is perverse but not with a decision which only offends conventional principles of proportionality, as seen in Brind v. Secretary of State.

VIII. PARLIAMENTARY INFLUENCE

Both in the case of treaties which require ratification and in the case of treaties which do not require ratification, the practical influence of Parliament as opposed to the power of Parliament is substantial, though it may be uncertain and not capable of quantitative or qualitative analysis. The announcement of the Ponsonby rule in 1924 itself referred to the fact that governments' intentions are made known, the work of conferences is given a good deal of publicity, there are discussions on the Foreign Office vote, and there are also parliamentary questions.

Whenever the Government is contemplating entry into a treaty, the ministers who must face re-election are anxious to ensure that the treaty will be palatable to all sections of the electorate. If the treaty will affect interests which are powerful in wealth or powerful in numbers, for example, captains of industry and trade unions, the views of the persons principally affected will be sought at the very outset. Drafts will be circulated, memoranda will be submitted, and delegations will be afforded interviews. Consumer and other pressure groups will be alerted and a good deal of discordant advice will be given to the department of state responsible for the negotiation of the treaty. Different pressure groups will alert different Members of Parliament who will in turn bring pressure to bear upon the government. The hope is that the government, before agreeing to enter into a treaty, will be fully apprised of all the consequences and will already have taken steps to negotiate improvements and will then have made a policy decision which must be left within their power to enter into the treaty subject to ratification.

IX. THE PARLIAMENTARY RESERVE

The most important treaty of the twentieth century was the Treaty of Rome whereby on the 1st January 1973 the United Kingdom became

a Member State of the European Economic Community. Of equal importance are the treaties negotiated by the Member States of the Community which become part of Community law implementing and expanding the provisions of the Treaty of Rome. Parliamentary control and influence over Community legislation illustrates parliamentary control and influence over treaty-making generally and incorporates an extension of the Ponsonby rule.

Special machinery has been devised associating Parliament with the evolution of European Community legislation. The Treaty of Rome which established the Community with a written constitution provides, and the United Kingdom Parliament has accepted, that all the provisions of the Treaty and subsequent Community legislation based on the Treaty shall be incorporated into English law and shall prevail in cases of inconsistency between Community law and domestic law or practice. Section 2 of the European Communities Act 1972 provides as follows:

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 recognized and available in law, and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

By this subsection, the treaties, principally the Treaty of Rome, cease to be mere treaties as far as the United Kingdom is concerned and became part of the law of the land. But in several particulars the Treaty of Rome is not self-executing and subsequent Community legislation has not always been self-executing. To give effect to the Community legislation which is not self-executing section 2 of the European Communities Act 1972 provides as follows:

(2) . . . Her Majesty may by Order of Council, and any designated minister of department may by regulations, make provision -

(a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above; and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instruments, the person entrusted with the power or duty may have regard to the objects of the Communities, and to any such obligation or rights as aforesaid.
The effect of these provisions is that Community laws which are directly applicable become, under section 1 of the Act of 1972, part of the law of the United Kingdom and are enforceable by private individuals in the courts of the United Kingdom. Other parts of Community law, including fresh Community legislation designed to give effect to the Treaty, may be implemented in the United Kingdom either by an Act of Parliament or by a regulation made pursuant to section 2(2) of the Act of 1972.

Community legislation is negotiated like a treaty, i.e., by representatives of the governments of the Member States. By the European Communities Act 1972, once European legislation has been passed then, unlike a treaty, its provisions become binding so far as they are of general application under Community law. Hence the negotiation of Community legislation is of great theoretical and practical importance. A recent striking example of the supremacy of Community legislation once enacted is to be found in Reg. v. Secretary of State ex Parte Factortame No. 2. In that case the House of Lords, having obtained a preliminary ruling from the European Court of Justice, made an interlocutory order suspending the application of certain provisions of section 14 of the Merchant Shipping Act 1988 and regulations made thereunder on the grounds that those provisions were incompatible with Community law.

Since Community legislation is negotiated rather as a treaty is negotiated by representatives of governments of the Member States, the process whereby the power and influence of the United Kingdom and of the public is brought to bear on the evolution of Community law is instructive for the study of treaties. The Community institutions which are concerned with the evolution of Community legislation are the Council, the Commission and the European Parliament. The European Parliament consists of delegates elected by each Member State and is therefore itself a democratic body. The European Parliament is however the least powerful of the political institutions of the Community.

The Council is made up of ministerial representatives of the governments of Member States. Its actual composition varies according to the subject of the business under discussion. The Single European Act established a European Council consisting of the heads of the governments of the Member States. It meets at least twice a year. The European Council has no formal legislative powers but materially influences Community policy. It follows that there is a diluted democratic influence on Community legislation because under the constitutions of each of the Member

States, the members of the European Council and the Council are accountable to their respective national legislatures and electorates.

The Commission is the executive institution of the European Communities. There are seventeen Commissioners. They are bound to be completely independent and neither to seek nor to take instructions from any other body in the performance of their duties. Amongst the functions of the Commission are the right and duty to initiate Community action to propose policies and to put legislative proposals before the Council. The Commission also has power to implement Community policies by delegated legislation conferred on it by the Council. The Commissioners being appointed are not elected by any democratic process.

The European Parliament is elected by direct universal suffrage. The electoral procedures are determined independently by each Member State. Each Member is elected for a term of five years. The total membership of the European Parliament is now 518 of whom 81 represent United Kingdom constituencies. A Member of the United Kingdom Parliament may also be a Member of the European Parliament. The European Parliament discusses an annual general report submitted to it by the Commission and gives a discharge to the Commission in respect of the Community budget. It also has powers (by a two-thirds majority vote) to require the resignation of the Members of the Commission as a body.

The influence of the European Parliament on Community legislation is exercised through a consultation procedure or form of co-operation. Where consultation is prescribed, the Council is required to obtain the opinion of the European Parliament on the Commission’s proposal before it proceeds to adoption. The co-operation procedure was introduced by the Single European Act. The Council, after obtaining the opinion of the Parliament on the Commission’s proposal reaches a common position. The common position is then communicated to the Parliament. If the Parliament proposes amendments, the Commission then submits to the Council a re-examined proposal taking into account the amendments proposed by the Parliament. The Council may then adopt the Commission’s re-examined proposal or amend it.

Before legislation is proposed to the Council by the Commission, the proposal will usually be discussed with national experts and interested organizations. Following the formal submission of a proposal to the Council by the Commission, the proposed measure is considered by the Council of Ministers after preliminary consideration by their official representatives at various levels. Expert discussion takes place in Council
working groups. When finally adopted a measure frequently differs from the text as originally proposed by the Commission.

In the United Kingdom the procedures of both Houses of Parliament have been used to enable Members to exercise a measure of control and influence over the activities of the institutions of the Community. This is in addition to and distinct from the work of the European Parliament. In the United Kingdom Parliament the ministers of the government who are also members of the Council and responsible for the activities of their officials are accountable for their Community activities. Ministerial statements keep Parliament informed. The government presents White Papers to Parliament describing developments in the Community every six months. Debates take place in both Houses on specific Community legislative proposals and also more generally on European Community affairs.

About the time that the United Kingdom acceded to the Community in 1973, the government undertook to deposit with Parliament copies of all proposals submitted to the Council for decision and not to agree to any such proposal in the Council (save in exceptional circumstances, which must be explained to Parliament) until each House had had an opportunity to consider the proposal. Thus, the Ponsonby rule was extended and employed.

The ministerial undertaking not to agree in the Council of Ministers to legislative proposals until Parliament has been afforded an opportunity to consider them is embodied in a resolution of the House of Commons of 30 October 1980:

Resolved, That, in the opinion of this House, no Minister of the Crown should give agreement in the Council of Ministers to any proposal for European Legislation which has been recommended by the Select Committee on European Legislation, etc., for further consideration by the House before the House has given it that consideration unless:
(a) that Committee has indicated that agreement need not be withheld, or;
(b) the Minister concerned decides that for special reasons agreement should not be withheld;
and in the latter case the Minister should, at the first opportunity thereafter, explain the reason for his decision to the House.\(^{30}\)

This resolution was supplemented by a reply given by the Leader of the House, Mr. Biffen, to a special report from the European Legislation Committee of the House of Commons\(^{31}\) which included the following observation:

31. Office Report, 29 October 1984, cols. 800-802W.
By convention, Ministers are able to agree to certain confidential, routine or trivial proposals before the scrutiny process has been completed. So far as other proposals are concerned, while in principle the Resolution of the House of 30 October 1980, being addressed solely to documents that the Committee has recommended for debate, does not bear on proposals yet to be scrutinized, the Government consider that its spirit should apply to all proposals. Departments will therefore be asked to ensure in future that when consideration is being given to the adoption of unscrutinized proposals, exception (b) of the Resolution of 30 October 1980 is satisfied.\(^3\)

When a proposal for Community legislation is submitted to the Council, the Government of the United Kingdom, pursuant to its undertaking with regard to parliamentary reserve, deposits copies of the proposals with the two Chambers of the United Kingdom Parliament, namely, the House of Commons and the House of Lords.

The House of Commons has appointed a Committee to consider proposed Community legislation and the issues raised by the proposals are debated on the floor of the House. The House of Lords has appointed a Select Committee to consider all proposals for Community legislation. This Committee, sometimes known as the Scrutiny Committee, examines the proposals and, where appropriate, conducts investigations and draws up reports which may be debated in the House of Lords and are, in any event, published and form part of the process of influencing the amendment to and the content of the Community legislation ultimately brought into force by the Council.

The terms of reference of the House of Lords Select Committee are:

To consider Community proposals whether in draft or otherwise, to obtain all necessary information about them, and to make reports on those which, in the opinion of the Committee, raise important questions of policy or principle, and on other questions to which the Committee consider that the special attention of the House should be drawn.\(^3\)

The Committee must consider Community proposals and report to the House on those of importance. The Committee may report on the merits of specific Community proposals and draw the attention of the House to "other questions." The Committee has considered the staffing of Community institutions, fraud against the Community and relations between the Community and Japan.

Most of the work of the House of Lords Select Committee is on specific Commission proposals soon after they are submitted to the Council of Ministers. These proposals number about 1,000 a year. The

32. *Id.* at Appendix IV xxvi.

Chairman of the Select Committee with a Clerk who is a senior official of the House and a Legal Adviser, undertakes a brief preliminary examination of every proposal deposited with Parliament. The Chairman then submits to the fortnightly meeting of the Select Committee a list of proposals thought to call for no further consideration or action if the Select Committee agrees. About 750 out of 1,000 proposals in each year are dealt with in this manner. The remaining proposals are referred to an appropriate sub-committee. There are six standing committees: “A” dealing with finance, trade and industry, and external relations, “B” dealing with energy, transport and technology, “C” dealing with social and consumer affairs, “D” dealing with agriculture and food, “E” dealing with law and institutions and “F” dealing with environmental matters. The Committee has a permanent membership of 25 but other peers are co-opted for their expertise on particular issues. About 90 peers take part in the deliberations of the various sub-committees. Occasionally an ad hoc or special sub-committee is formed for an important topic as, for example, the proposal for the Single European Act.

Sub-committees consider each proposal sifted to them. They have three possible courses of action. Which course they adopt will depend partly on their assessment of the proposal’s importance, and partly on other factors such as the time available before the proposal is due to come to the Council for decision.

(i) They can clear the proposal without further scrutiny.
(ii) They can conduct a small scale examination of the proposal, taking a little evidence, which may be followed by a letter to the minister concerned. Correspondence between the Committee and ministers is published on a six-monthly basis.
(iii) They can conduct a full scale inquiry into the proposal, taking oral and written evidence from a variety of sources and then publish a report to the House.

The procedure which the Sub-Committee follows in its full scale inquiries is similar to that of other select committees in Parliament. Written evidence is invited from various sources followed by oral evidence with questions and answers recorded verbatim for later publication with the findings of the Committee. When the taking of oral and written evidence is complete, a draft report is prepared by the Sub-Committee and submitted to the Select Committee for approval. When this approval has been granted the report is made public with a recommendation whether it should be the subject of a debate in the House of Lords or simply be “for information.” If the report is “for information,” the scrutiny process ends with the publication of the report and ministers are free to
reach a decision on the proposal in the Council. If the report recommends a debate, then a debate must be held in the House, the Government minister responsible will indicate his response to the report, and the document is not cleared until the debate has taken place.

In 1975, for example, the Select Committee in the course of scrutinizing proposals submitted by the Commission to the Council noticed a large number of cases in which the Community was exercising its external competence, that is to say, the right to conduct international negotiations and to enter into international treaty obligations binding on the Member States, so far as the treaties deal with commerce and trade and other matters within the purview of the Treaty of Rome. Sub-Committee E was instructed to consider the external competence of the Community. Written and oral evidence was presented by officials of the Foreign and Commonwealth Office, the Department of Trade and Industry, the Home Office, the Department of Environment, H.M. Customs and Excise, the Chairman of the European Parliament's Committee on Legal Affairs and Citizens' Rights, the Director-General of the Legal Service of the Council, and Professor Francis Jacobs who is now the United Kingdom Advocate-General at the European Court of Justice. A report was accepted by the Select Committee, published with all the evidence, and debated in the House. Recommendations were made to ensure that the exercise of external competence was initiated, defined and subjected to scrutiny procedure.

A recent illustration of the work and independence of the Select Committee is to be found in its 6th Report for the 1989/90 session entitled "Voting Rights in Local Elections." With encouragement from the European Parliament, the Commission has proposed a Directive which will require Member States to grant nationals of other Member States the right to vote and stand for election in local elections where they are resident, subject to a residence qualification which may be several years. The franchise in local elections in Great Britain is confined to Commonwealth and Irish citizens; the Home Office gave oral and written evidence to Sub-Committee E that Government policy did not envisage an extension of the franchise to all Community citizens. The proposals of the Commission were justified by a witness on behalf of the Commission. The Association for the Rights of Britains Abroad supported the Commission. The Report of the Select Committee recommended that all Community citizens, irrespective of nationality, should be given the right to vote and to stand for office in local elections without any qualifying

34. H.L. Paper 25.
period of residence differing from the qualification of national voters. Thus the Committee differed from the Government in important respects.

The Select Committee also considered and reported on the Delors Committee Report on Economic and Monetary Union in the E.C. The witnesses who appeared included the Commissioner, Sir Leon Brittan, and a former Commissioner, Lord Cockfield. Other witnesses were the Director-General of the Confederation of British Industry, the Governor of the Bank of England, representatives from two major merchant banks, the President of the Association of the Monetary Union of Europe, a professor from the London School of Economics and the Financial Secretary to the Treasury. Written evidence was received from I.C.I., the Institute of Directors, the British Banking Federation, U.N.I.C.E. the European employers' federation, and a professor from the I.N.S.E.A.D. Business School in Fontainebleau.

When the Committee considered the proposals of the European Court of Justice for its reorganization in 1979, evidence was given by a judge and an advocate-general of the Court. The Committee heard from members of the European Parliament and officials of the Council of Ministers and received full co-operation from the Commission and its officers. Senior officials have given oral evidence in London or been interviewed in Brussels.

The reports of the Select Committee are read and digested far outside the House of Lords—within the United Kingdom, in other Member States and at the highest level of the Community institutions. The reports of the Select Committee of the House of Lords have acquired a high reputation for impartiality and helpfulness.

A Select Committee's report influences and attracts the support of members of the House of Lords in debates which take place on the floor of the House when the report is considered. A well argued report, well supported in the House of Lords, will incline the government to accept if possible the recommendations of the Select Committee in whole or in part, although of course the ultimate decision will lie with the Cabinet which enjoys the support of the majority of the House of Commons. The procedure of the Select Committee achieves an examination of proposed Community legislation which Ministers find informative and helpful whether or not they accept the conclusions set forth in the report.

The reports of the Select Committee may be influential in determining the negotiating position of the United Kingdom Government in the Council. It is clear from the published correspondence between the
Committee and government ministers that the views of the Committee are taken very seriously. In cases where the government agrees with the Select Committee, it has been known for the Select Committee report to form the negotiating text taken by the United Kingdom minister to a meeting of the Council.

There are occasions when the views of the Committee are at variance to those eventually adopted by the government. For example, the entry of the United Kingdom to the Exchange Rate Mechanism of the European Monetary System was advocated by the Select Committee in 1982 without success until 1990. Representatives from other Member States in the Council and the European Parliament sometimes use the reports of the Select Committee in argument.

The influence of the Select Committee has been acknowledged by Community institutions. The proposals prepared by the European Parliament on Immunities and Privileges of M.E.P.s, appeared in their original form to seek immunity from civil as well as criminal proceedings. The House of Lords' report on the proposals criticized this. The revised proposals of the European Parliament expressly excluded civil proceedings from the scope of immunity, and the rapporteur said that this revision was recommended as a result of considering the report of the Select Committee.

In 1982 the Select Committee examined the practice of the Commission in competition cases and made various suggestions for improvement. Most of the suggestions have been adopted. The scrutiny of proposed Community legislation by the House of Lords Select Committee thus influenced the negotiation of Community legislation, just as the activities of Parliament can influence negotiations for treaties.

The other Member States have their own machinery for the scrutiny of proposed Community legislation. All Member States except Luxembourg and Greece have at least one committee for this purpose. On the initiative of the President of the French National Assembly, there was a meeting in November 1989 of representatives from all the Scrutiny Committees of the Member States and regular meetings are to take place in future. No doubt the exchange of information between the various Scrutiny Committees will result in a general improvement and enhancement of the machinery of exercising democratic influence on the institutions and legislation of the Community.

35. 8th Report of 1981-82.
X. THE INCORPORATION OF TREATIES

Under United Kingdom constitutional law the power to make treaties belongs solely to the executive. Parliament may take a limited part in this either using the opportunity to look at the treaty under the Ponsonby rule or because the executive decides to consult Parliament or even makes ratification conditional on the approval of Parliament because it knows that the co-operation of Parliament will be necessary at a later stage in order to implement the treaty. But it is at the point when the executive has concluded the treaty, binding the United Kingdom to international commitments with minimal Parliamentary involvement, that the scope of Parliament’s operation in the treaty process in theory begins. Lord Atkin in Attorney-General for Canada v. Attorney-General for Ontario\(^ {36} \) distinguishes between the formation of the treaty and performance of the treaty; it is in the performance that Parliament becomes theoretically involved. This occurs predominantly where the treaty has an effect in the domestic sphere. If the obligation concerns matters outside the state, Parliament has little involvement. If the treaty concerns domestic law or individuals or bodies in the United Kingdom, Parliament will need to be involved before the treaty can have any effect.

There are two contrasting systems by which states may provide for treaties to take effect in their internal legal systems. In a “monist” system, e.g., in Belgium, France and the United States, the treaty once approved by the state automatically becomes part of domestic law and as such is immediately enforceable by the courts in all domestic matters concerning the treaty. In contrast, a dualist system does not receive the treaty directly into domestic law once the state is internationally bound. Before the national courts can consider and apply the treaty as law, the legislature of the nation must take some action to incorporate the treaty. Some states, of which Italy is cited as an example, simply pass incorporating legislation after which the treaty itself passes directly into internal law. The United Kingdom, however, takes a slightly more complex approach; rather than enacting the whole treaty into domestic law, the United Kingdom may enact a part of the treaty or draw up independent legislation intending to give effect to the provisions of the treaty in different terms. In theory the executive can freely bind the state in the international arena while the legislature can refuse to accept the treaty or to implement it internally, leaving the treaty unenforceable in the domestic sphere and the state in default of its obligations. The United Kingdom may incorporate treaty rights and obligations by either primary or dele-

\(^{36} \) [1937] A.C. 326.
gated legislation. The treaty incorporated by primary legislation will receive the detailed attention of Parliament by undergoing the full legislative process including two readings, debate, report, amendment and consideration. A treaty obligation, including the legislative obligations of the United Kingdom pursuant to European Community legislation, may be authorized under general legislative powers given to a government minister or department by Parliament. This delegated legislation will allow a Minister to put a treaty into effect in English law by issuing a statutory instrument. The statutory instrument will be presented to Parliament but receives no real scrutiny unless a motion is introduced to discuss it.

When a treaty is incorporated into United Kingdom domestic law it is very likely to be enacted in different terms or perhaps included as a Schedule to legislation. The legislation passed to implement the treaty does not always refer to the treaty. The court may refer to the treaty as an aid to interpretation. Thus, in *Westinghouse Electric Corporation Uranium Contract Litigation*, where the Evidence Act 1975 had been passed with effect to the Hague Convention on taking evidence abroad, the court referred to the intention that the Act should implement the Convention even though the statute made no reference to the connection between them.

The inclusion of the treaty as a Schedule to an Act does not solve all problems for there may still be an inconsistency between the Act and the Schedule. In the *Ellerman's Lines* case the judges held various opinions on the Schedule treaty, but decided that the treaty did not help matters or that it was merely a matter of interest, or that the statute was the really important part of the legislation and that the treaty did not detract from the natural meaning of the statute.

In construing a statute or statutory instrument which is intended to give effect to a treaty or to Community legislation, however, the courts will strive to conclude that the English legislature has given effect to its treaty and Community obligations.

In so far as the rules of international law allow, the executive has the power on behalf of the United Kingdom, when concluding a treaty, to attach qualifications to the treaty. The exclusion of Parliament from the treaty-making process, however, means that Parliament has no power to limit executive action by the addition of qualifications.

Apparently it is not the practice of the United Kingdom Govern-

ment to inform Parliament of any reservations which it attaches to a treaty even if these reservations are substantial. In April 1957 the United Kingdom Government introduced an automatic reservation to the statute of the Permanent Court of International Justice signed in 1929 which excluded from the jurisdiction of the court any question which "in the opinion of the United Kingdom affects the national security of the United Kingdom or any of its dependent territories." Parliament was not consulted about this reservation which was made and came into force before Parliament was even informed. Just as it is for the executive to make treaties, the question of reservation or any other form of qualification appears to rest with the executive also.

XI. General

There is an inherent conflict between the exercise by the executive of its negotiating powers with regard to treaties, and the exercise by Parliament of its influence with regard to the content of treaties. In any negotiations confidentiality or secrecy is necessary to preserve the bargaining position of the executive as against the other States and in some cases to preserve the national interest of the country. Parliament needs to know as much as possible, as soon as possible, in order to influence the negotiating stance of the executive and thus the eventual terms of the treaty.

Similar conflicts between the exercise by the President of the United States of his negotiating powers and the exercise by Congress of its rights to advise and consent are illustrated in the papers submitted by contributors from the United States to this Symposium. Other countries which, with some modification, are similar to the United Kingdom and United States models, also involve conflicts of power.

The general principle that negotiation of treaties should be subject to democratic control and influence must be reconciled with the need for speed and efficiency. The executive must by necessity consult and take into account the views of persons likely to be affected by a treaty under negotiation. The finances of Parliament available for conducting its own investigation are limited. The difficulties which would arise if the executive were dependent on a doubtful majority in Parliament for approval of a treaty in detail, as well as approval in principle, could obstruct the due negotiation of treaties and the reputation of the negotiators in international affairs.

So far as the United Kingdom is concerned, I doubt whether the protection afforded to Parliament by the Ponsonby rule with regard to all treaties, and by the parliamentary reserve with regard to European Com-
munity legislation, is susceptible of improvement in practice. This Sym-
posium, however, will enable comparisons to be drawn of the practices of
different countries and could indicate some desirable harmonization of
practice and policy. It may be, for example, that international law
should require all parties to a treaty to agree that a treaty shall expressly
make clear which, if any, of its provisions are to be self-executing. It may
be that the international law should require all parties to ensure that self-
executing provisions are made directly applicable by the law of each
country. It may be that, in order to give the proper effect to its interna-
tional obligations, the United Kingdom should provide for self-executing
treaties statutory provisions corresponding to the European Communi-
ties Act 1972 which made the Treaty of Rome enforceable in the courts
of the United Kingdom. In that case it may be desirable for an interna-
tional court to be given the functions and powers corresponding to those
of the European Court of Justice. It seems unlikely, however, that the
variety of national laws with regard to treaties indicated and discussed in
the essays and during the course of the Symposium will be much reduced
or harmonized in the foreseeable future.