A CASE REVEALING THE INTERACTION AND MULTIPLICITY OF LEGAL ORDERS IN THE MODERN WORLD

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MULTIPLICITY OF LEGAL ORDERS

The existence of rules and of inducements to obey them is characteristic of a legal order. The rules alone do not necessarily make up a legal system, nor on the other hand do means of inducing obedience. A system of rules and of inducements to obey them, which aims at producing regularity, predictability and order, may be called a legal order. The existence of one legal order does not necessarily exclude the existence of another and the same dispute may be dealt with in more than one legal order. A law student often conceives of the law as that system of territorial law under which he has grown up, and in which he usually hopes to be able to predict, for the benefit of his clients, the legal results of their actions and promises. Usually the English student thinks of English law as *the* legal order with which he is concerned, but an American, Australian or Canadian student will think of the law as primarily the law of the state or province in which he has grown up, together with those rules which govern federal matters — in the U.S.A. for example, rules governing matters of inter-state trade and commerce, and the fundamental rights of property and to liberty. Between a system of state law and a system of federal law there can of course be tensions where the two legal orders conflict, for example over the seizure of property by a State legislature without due process of law or without due compensation, or even over the nature of property itself as in the *Dred Scott* case, decided by the U.S. Supreme Court before the war between the States (or the Civil War) in the U.S.A. Such tensions can lead to open conflict and even to periods of anarchy.

CONSTITUTIONAL RULES TO PREVENT TENSIONS BETWEEN SYSTEMS

The Constitutional rules for resolving possible conflicts between legal orders may therefore assume a very important role in a federal system which groups together different legal orders and contains rules for reconciling the legal order of one state with that of another — for example the «full faith and credit clause» of the U.S. constitution, whereby the judgments of one State of the Union are respected in another, and the due process clause governing procedure. Equally important are the rules which decide the respective powers of the central and state or provincial legislatures and judiciaries.

The English lawyer, however, is usually less aware of possible tensions between different legal orders, because he lives in a unitary state with a single legislature and single final Court of Appeal in the House of Lords. The British Parliament is supreme ; local ordinances of towns and country councils and of public authorities (bye-laws) are alone subject to a general test of reasonableness as applied by the High Court in *Kruse v. Johnson* (1898)2 Q.B. 91.

THE CONFLICT OF LAWS

The English law student is first made aware of possible tensions between territorial legal orders when he comes to the study of the conflict of laws : he finds for example that a man may be deemed to be married in one country and unmarried in another, or that a contract valid in England will not be enforceable abroad, or that ownership in one country may not be recognized in another. In other words he discovers that several legal orders co-exist together in the world, and that their rules do not give him or his clients uniform protection for his property, his person or his reputation. The rules of the conflict of laws may help to lessen the tensions created by this state of affairs by allowing rights acquired or recognized in one jurisdiction to be recognised in another. The existence of uniform laws, especially on different commercial matters, such as Bills of Exchange and the Sale of Goods, within the British Commonwealth and the U.S.A., can also be a most valuable means of lessening fruitless controversy. Those States which have adopted, by treaty or legislation, the Hague uniform law on the Carriage of Goods by Sea and the Warsaw rules for Carriage by Air, or the drafts on the conflicts of laws proposed by the Hague Conference on Private International Law, the draft laws proposed by the Rome Institute for the Unification of Private Law, or the laws proposed by the National Conference (US) of Commissioners on Uniform Laws, or by the United Nations, have also helped to reduce, if not to eliminate, possible matters of friction.

THE INTERNATIONAL LEGAL ORDER

But this is not all: throughout the world there is a legal order, formerly called the Law of Nations, or *Jus gentium*, or, since Jeremy Bentham invented the term, international law, or now, according to an American innovation, « world law ». The rules of international law, with the possible inducements to obedience known as retorsion, reprisals, collective measures of economic and military action, and war, constitute a growing legal order that transcends state-boundaries and, just as conflicts may arise between State and Federal legal orders, so, too, conflicts may arise between national aspirations and the international order which, if unregulated, may destroy social life and plunge large parts of the world into conditions resembling anarchy, as the bitter experience of two world wars has shown. Fortunately international law has its own methods of attempting to relieve international tensions and conflicts between national and international rules though at present, as can be seen from the experience of Korea and of the Berlin Blockade since World War II, concerted action to back up international law and order is not ease to organize but it can be effective.

A PRACTICAL CASE

The co-existence of different legal orders in the World today can perhaps be illustrated by the study of the implications of a case decided on facts which arose during the Spanish Civil War: *Société Belge des Bétons v. London and Lancashire Insurance Co. Ltd.*, (1938) 2 All E.R. 305, decided by Porter J.

The following summary is an abridgement of the judgment reported in All England Law Reports:

« This was an action by two Belgian companies and one Spanish company against the London and Lancashire Insurance Co., Ltd....on a marine insurance policy...» [Improvements of] « the harbour of Valencia had been put up to contract, and the contract was obtained by the two Belgian companies, who formed, for the purpose of carrying out the works, the third or Spanish company ».

« On July 18, 1936..., civil war began at Valencia. There was a garrison in the barracks in Valencia, which, it was feared by the populace, would join with General Franco, and on July 20 there was a general strike. The controlling power ... in Valencia, was mainly centered in three syndicates or unions ..., the U.G.T., who were the communist section, the C.N.T., who were the syndicalist section, and the F.A.I., who were the anarchist section. These bodies armed their adherents and took control of the city, in so far as one can say there was

any control at all .... Power was assumed by those who had the force to exercise it, without at that time any authority from the central government. Enemies were murdered, shot, or otherwise disposed of, and prisoners were released, and advantage was taken of the confusion to exercise private revenge and practise other criminal activities. Meanwhile, the populace proceeded from place to place in cars, fully armed and ready to shoot at any moment. Gradually, however, that state of affairs became somewhat more orderly. The garrison was defeated, the immediate threat of military government was ended, and a body called the Popular Executive Committee formed itself ... [and] exercised the function of government in Valencia .... Numerous businesses were taken over either by the Popular Executive Committee or by their own workmen ».

« On September 2, 1936, in order to avoid confiscation by the unions or the Popular Executive Committee, and fearing lest their employment and the pay attached to it should be taken from them, they determined to take over the property and the business of the plaintiff companies ».

« They told Mr. Ceresa [the Manager] that they had to find an excuse for taking over, and the excuse which they intended to put forward was that he had gone to Madrid and elsewhere without their permission. That they knew to be untrue, but none the less, whatever excuse they might put forward, they had made up their minds that the works and the property should be theirs. Thereupon Mr. Ceresa went first of all to the governor, Colonel Arin, and endeavoured to defeat the end of the workmen's committee, but was sent by him to a Senor Tejon, who was the gentleman in charge of the question of the taking over of businesses by the workmen or others. When, on September 4, M. Ceresa visited Senor Tejon, that gentleman would not deal with him alone, but sent him away telling him to come back with a delegation from the workmen's committee, and at 6:30 p.m. on September 4 Mr. Ceresa and the delegation attended before Senor Tejon. At that interview, the reasons and the determination of the men were put forward, and it was plain that they intended there and then to take possession of the works and of the plaintiff's property ».

« The question then is : Was there a seizure by the peoples ? It was undoubtedly a seizure, but it is established law that a seizure by the governing power of the country is necessary in order that the assured may recover under this head .... No doubt the seizure was originally by the workers of the Iberica, and took place in order that they might do the work, and receive the wages payable on that work, to the exclusion of the general members of the trade unions and the public generally. However, in this action they had the support of the Popular

Executive Committee, who, as Senor Colom stated, and as I find, were the *de facto* and *de jure* government of Valencia at this time, and, rightly or wrongly, legally or illegally, the central government permitted them to govern Valencia in its name, and to exercise the right of confiscation. Moreover, the central government has recorded in its archives the fact of the *incautacion* of the Iberica, and the property has remained in the same possession ever since ...».

«I think that I am entitled to draw the conclusion that the whole of the property, whether it belonged to the Belgian companies or to the Iberica, was both actually taken over and retained by the workers, and that no distinction was made between the two classes of property. Having regard to these findings, I hold that there was a loss by restraint of peoples. That opinion is decisive of the case, and I do not propose, therefore, to express any opinion as to the alternative claim for loss by persons taking part in labour disturbances or riots or civil commotions, or from any other malicious act whatsoever. The argument is open to the plaintiffs, in case my view as to loss by restraint or seizure is wrong, but I do find as a fact that, although no actual violence was used by the workers on September 4, 1936, at the meeting with Senor Tejon, yet there was always an underlying threat, and on that date an actual threat of violence which might well have been used had Mr. Ceresa attempted to exercise any control at the works, or even to return to them, and before which even a courageous man would wisely have withdrawn. In those circumstances, I give judgment for the plaintiffs for the sum claimed».

«Judgment for the plaintiffs for L5, 359 10s. with costs».

ANALYSIS OF LEGAL ORDERS RELEVANT TO THE SOCIÉTÉ BELGE

Let us analyse the legal orders involved in this case:

a/ *The Spanish legal order.* First, the legal order in which the seizures took place was undoubtedly Spanish. At that time, however, Spanish law, so far from protecting the plaintiffs, sanctioned their forcible expropriation and gave no remedy for their loss, or for the threats to which their employees had been subjected. It may indeed be said, that at the time of the seizure something resembling a state of anarchy prevailed in Valencia. There was no security for persons and property, and the acts of those in possession of force were, to say the least of it, somewhat unpredictable. In fact the seizure was by the workmen of the plaintiff's plant, this was confirmed later by the state authorities, but the Spanish legal rules nevertheless had not been complied with «the seizure of the property now under consideration was not absolutely legal» (p. 310). Nevertheless no remedy was available at that time.

b/ *The English legal order.* Fortunately for the owners, they had taken advantage of the existence of another legal order : they had insured in England with the London and Lancashire Insurance Company against loss arising from « seizure of peoples » and « restraint of peoples ». The English judge, Porter J. as he then was, held that the recovery of the property seized was « certainly unlikely within any reasonable time » (p. 312) « and that the insured property in fact had remained in the possession of the workers ever since September 2, 1936 » (the action was heard in February 1938). Consequently judgment was given for the plaintiffs on their contract of insurance which was governed by English law. Thus, by the insurance, the English legal order was used to supplement the Spanish, in the interests of the property owners. But the matter was not necessarily at an end here. By paying the claim on the insurance policy the English company became, at any rate by English law, subrogated to the rights of the insured. The English judge did not, in fact, discuss whether there might not have been claims in England, by the rules of the conflict of laws, against the persons who were actually responsible for the illegal threats to the plaintiff's employees and for the forceable seizures. The English courts themselves will, under their conflict rules, allow a claim to be brought for acts which are tortious by English law, if they are not *justifiable* [1] by the legal order under which they were performed and, therefore, if any defendant were to come into England, he might very well have been served with process, and made to pay the insurance company in England for the damage occasioned by his tort to the assured in Spain. This, however, was a somewhat hypothetical possibility in this case.

c/ *The French legal order.* It is also possible, theoretically, to conceive that the insurance company, subrogated to its customer's rights in tort, not having obtained compensation in one legal order, e.g. in England or in Spain, may sue a defendant when he enters the jurisdiction of another State, if the laws thereof permit, e.g. if any of the defendants in the *Société Belge* case had fled to France, he might well have been sued there, if French law permitted a cause of action — say in the case of any French employee who had been threatened with violence by the anarcho-syndicalists (p. 308). French law allows an action when the plaintiff is French. See *Potasses Ibéricas v. Nathan Bloch* Annual Digest I.L. Cases 1938-40, Case N° 54 [2].

d/ *The Belgian legal order.* Whether Belgian law would allow a similar action in respect of a Belgian plaintiff in this case, would be a

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1. Machado v. Fontes (1897) 2 G.B. 231.

matter to be settled by the Belgian order, in the light of its conception of public policy.

Courts will obtain, recognise and enforce rights arising out of foreign contracts and torts, but they keep public policy as a safety-valve to prevent themselves from recognising rights which might conflict with the principles of their own legal order. The matter has been put thus by Sir Hersch Lauterpacht :

« The purpose of private international law is to make possible the application, within the territory of the State, of the law of foreign States. This is an object dictated by considerations of justice, convenience, the necessities of international intercourse between individuals and indeed, as has occasionally been said, by an enlightened conception of public policy itself. But there is an obvious element of simplification in the view that the law of a State should be deemed to have consented or that it should reasonably be expected to consent in advance to the application of foreign law without any limitations, in any circumstances whatsoever, without a safety valve, without a residuum of contingencies in which, because of the very nature of its structure and the fundamental legal, moral and political conceptions which underlie it, it should be able to decline to apply foreign law » [2].

e/ *The Public International Legal Order.* If it can be shown that an individual or foreign company has suffered a denial of justice and failed to obtain redress by local remedy in the foreign country where he has attempted to obtain justice, i.e. when he has unsuccessfully exhausted *local remedies*, then, under the rules of public international law governing the international responsibility of states, it is possible for the foreigner to invoke the diplomatic assistance of his own state against the state which has failed to give him justice. This remedy which may be enforced by way of representation, protest, retorsion or reprisal, under international law [3], clearly brings into consideration the nature of yet another legal order .. the international legal order. This remedy would not, however, be open to the plaintiffs against their own state, in the absence of a treaty, such as the European Convention on Human Rights, conferring a right, and a state may only take up the case of its own national, in the diplomatic field [4].

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2. Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (*Netherlands* v. *Sweden*). Judgment of November 28th 1958, I.C.J. Reports 1958, p. 94-95 (Opinion of Sir H. Lauterpacht).

3. See the present author's work on « Expropriation in Public International Law », 1959, Cambridge University Press, p. 101.

4. *Nottebohm Case*, I.C.J. Rep. (1955), p. 4.

Moreover, in claims for the denial of justice, customary international law wisely provides that there shall be no unnecessary conflict between the local legal order and the international legal order, and that an order, for example, for the return of the plaintiff's property shall not be asked for by international procedures, except as a last resort. It has been said, for instance, by the International Court of Justice :

« The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law ; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation has occurred should have an opportunity to redress by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending » [5].

In the instant case of the *Société Belge des Bétons*, it would seem clear that, if they had wished, their respective governments might have brought diplomatic claims against Spain in respect of the injuries to the Belgian Company and the French Manager. Of course, at a time of civil war it is not always easy to decide which government is to receive a complaint but, so long as the Spanish Republican government was in existence, claims could be addressed to it, and governmental assets in French or Belgian hands, to which the Spanish Republican government claimed title, could have been made the subject of countermeasures by the claimant states, in the way for example, that at a later date, Egyptian sterling balances in London were frozen by the British government by way of retorsion for acts done in respect of the property of British subjects on the time of the Suez dispute.

Finally, the question may be asked, could the London and Lancashire Insurance Company, through the British Government, make a diplomatic claim against the Spanish government in respect of the seizures causing the claim under the policy ? It would seem to be the view of the advisors of Bulgaria, in the recent case brought by Israel against that country arising out of the shooting down of an Israeli aircraft over Bulgaria [6], that, as the insurers were the people who had suffered the loss, their state alone could sue ! The present writer however agrees that the Court was right in rejecting this contention, because

5. Interhandel Case, Judgment of 21st March, 1959, I.C.J. Reports 1959, p. 27.
6. I.C.J. Rep. 1959, at p. 131-2.

the prudence of a man in insuring should not prevent him from taking advantage of diplomatic remedies when he can do so, though, of course, if proceedings are brought on his behalf by his government, he would be a trustee for the insurers of any sums he might recover, except so far perhaps as those sums represented an interest not insured by him. Of course, if for any reason, for example because of his statelessness, the person wronged could not recover by procedures of international law, it might be reasonable then to allow the state representing the insurer to recover on his behalf, in much the same way as occurred in the dispute between the U.K. and Mexico in 1939, when the company which alleged the loss by Mexico could not recover because it had had to be incorporated in Mexico. In that case the British government brought representations on behalf of the interested shareholders [7].

It will be seen therefore that questions arising out of loss of property cannot be solved by having recourse solely to one legal system, but that as a Société Belge case shows a modern lawyer must be prepared to move into whatever jurisdiction – or legal order – may prove to be favorable to his client's claim for loss.

7. WORTLEY in Transactions of the Grotius Society, 1958, published 1959.