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Le Gouvernement de la Republique Democratique du Congo v. Venne

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Commentary

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The learned Chief Justice held that the property had not been retained to the entire exclusion of the donor.

Although a similar approach to the interpretation of section 5(1)(g) would provide an answer to the arguments of the appellants in *Re McCreath* and although it is not precluded in any way by the decision in *Wood Estate,* it would, of course, leave open the possibility of a substantial gap through which non-discretionary trusts with reserved life interests might fall. Unless the more general arguments from the structure of the Act are correct the conclusion must be that, in its present form, the legislation is seriously defective.

It is possible that by the time this note is published a decision may have been reached on the future of the *Succession Duty Act.* If a fresh start is to be made the draftsmen might do well to reflect on the following quotation:

> It should be distinctly recognized that . . . it is dangerous, if not impossible, to engraft portions of the English Act upon the Ontario Act, as they are based on different principles . . . [T]he hotch-potch which we have at present in Ontario reminds one of the famous stew which Jerome's Three Men in a Boat, on their memorable voyage up the Thames concocted from all the scraps they could find

The author of those words was writing in 1902.[41] *Plus ça change. . . .*[42]

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41 R. A. Bayly, *Succession Duty in Canada* (Carswell, 1902) at p. iv.

42 An appeal from the decision of Fraser J. was dismissed by the Court of Appeal on June 21st, 1973.

Le Gouvernement de la République Démocratique du Congo v. *Venne*
SOVEREIGN IMMUNITY — THE ROLE OF THE COURTS

In *Le Gouvernement de la République Démocratique du Congo* v. *Venne*[1] the Supreme Court again avoided having to decide whether Canada retains the doctrine of absolute sovereign immunity or whether the restrictive approach has been adopted. The respondent was an architect who claimed that he had been retained by representatives of the Government of the Democratic Republic of the Congo to prepare plans for the Congo pavilion at Expo 67. The pavilion was in fact not proceeded with and when the respondent brought

1 [1971] S.C.R. 997; 22 D.L.R. (3d) 669.

an action in the Superior Court of Quebec, Montreal District, to recover remuneration for his services[2] a declinatory exception[3] was taken by the Congolese government on the ground of sovereign immunity. This issue was dealt with in interlocutory proceedings and no evidence was placed before the Court apart from an admission by each party; the appellant Government had admitted that the representatives, with whom the respondent alleged he had dealt, were duly accredited Chargés d'Affaires of the Ambassador of the Democratic Republic of the Congo, and the respondent admitted that the Democratic Republic of the Congo was a sovereign state.[4]

In the Superior Court of Quebec Leduc J.[5] rejected the plea of immunity, deciding that the restrictive doctrine of immunity applied and that the employment of Venne by the Congolese government was in the nature of a private rather than a public act.[6] This view was accepted on appeal by the Court of Queen's Bench in Appeal[7] and Owen J. stated expressly that it was time to "abandon the doctrine of absolute sovereign immunity and adopt a theory of restrictive sovereign immunity".[8] The learned judge pointed out that although the Supreme Court of Canada had in earlier decisions adopted the doctrine of absolute immunity[9] there were recent indications of a disposition more favourable to the restrictive approach.[10] In any event, said Owen J., absolute sovereign immunity is "outdated and inapplicable to today's conditions",[11] and a defendant should not be entitled to immunity merely because it is a sovereign state. Rather, the defendant state had to show the Court why the "general rule of jurisdiction"[12] was not to be applied to it.

The Supreme Court, had indeed, in *Flota Maritima Browning de Cuba S. A.* v. *Republic of Cuba*[13] held out a hope that the restrictive theory ultimately would be accepted and there was some expectation that *Venne* would provide the opportunity for the Court to take the necessary step.[14] Yet in

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2 The initial claim for $20,000 was later reduced to $12,000, *id.*, at 999.

3 Art. 163, *Quebec Code of Civil Procedure*, see Brossard J. in the Quebec Court of Queen's Bench, Appeal Side, (1968), 5 D.L.R. (3d) 128 at 139.

4 [1971] S.C.R. 997 at 999.

5 [1968] R.P. 6, noted (1968), 14 McGill L.J. 334.

6 [1968] R.P. 6 at 12. Leduc J. also suggested that the taking of a declinatory exception amounted to a submission to jurisdiction (at 12-13), but this was rejected by both the majority ([1971] S.C.R. 997 at 1010) and the dissenting judges (at 1012) in the Supreme Court.

7 (1968), 5 D.L.R. (3d) 128.

8 *Id.*, at 130. Brossard J. concluded that the law had undergone an evolution since the development of the sovereign immunity doctrine and the rule of *stare decisis* was not so rigid as to prevent the present acceptance of the restrictive theory. Taschereau J. concurred.

9 *Dessaulles* v. *Republic of Poland*, [1944] S.C.R. 275 at 277 per Taschereau J.

10 *Flota Maritima Browning de Cuba S.A.* v. *Republic of Cuba*, [1962] S.C.R. 598 at 607-608.

11 (1968), 5 D.L.R. (3d) 128 at 138.

12 *Id.*

13 See *supra*, note 10.

14 See (1969), 15 McGill L.J. 493 at 496; see also J.G. Castel, *International Law* (Toronto: University of Toronto Press, 1965) at 686.

Venne, as in the earlier decision, the majority of the Court[15] preferred to approach the question in a rather narrow fashion and to conclude that in this case under either an absolute or a restrictive theory of sovereign immunity the defendant was entitled to immunity. Mr. Justice Laskin, on the other hand, argued in a dissenting judgment[16] that the restrictive doctrine of immunity ought to be adopted and on that basis there was insufficient evidence presented to the Court on which to come to a finding of immunity.[17]

In view of the fact the Supreme Court has again declined to lay down the proper approach to sovereign immunity and in view of the strong dissent in *Venne* both that decision and the doctrine of sovereign immunity in Canadian courts deserve closer attention.

Mr. Justice Ritchie in delivering the judgment of the Court in *Venne* treated the matter basically as a very simple one. The Superior Court Judge and the Quebec Court of Appeal were in error, he reasoned, in treating the contract as a private commercial transaction, for they had looked at the question from the point of view of the Montreal architect. The true question, he said, was not whether the architect was engaged in an act of commerce but whether the Government of the Congo was "engaged in the performance of a public sovereign act of state".[18] Since the request for services came from representatives of a department of the government of a foreign state and the ultimate purpose was to construct a national pavilion at an international exhibition, then clearly, said Ritchie J., what was involved was a "public sovereign act of state".[19] It followed from this that even if the doctrine of restrictive immunity were adopted the defendant's exception would be good.[20]

This result has been criticized[21] on the ground that the decision to grant immunity is based on the status of the defendant rather than on the function it was performing and thus is inconsistent with a steady development of judicial opinion away from a status basis for immunity. Indeed, Laskin J., indicated in his dissent that he considered function to be a ground more preferable than status for determining immunity.[22] Yet it seems a little inaccurate to characterize Ritchie J.'s view wholly as relying on status. His conclusion was not simply that the act was performed by a department of the Congolese Government; rather that the government department had made

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[15] The reasons for judgment of the Court were delivered by Ritchie J. and concurred in by Fauteux C.J. and Abbott, Martland, Judson, Spence and Pigeon J.J.

[16] [1971] S.C.R. 997 at 1010. The judgment delivered by Laskin J. was a joint judgment with Hall J.

[17] *Id.*, at 1024.

[18] *Id.*, at 1002.

[19] *Id.*, at 1003.

[20] Ritchie J. also disagreed with the implication of the Court of Appeal that where a plea of sovereign immunity is raised the burden lies on the foreign sovereign to prove that the act in question is of a public nature. The true position, he said, is that immunity is to be decided "on the record as a whole without placing the burden of rebutting any presumption on either party". (*Id.*)

[21] Chen, *Annual Survey of International Law* (1972), 5 Ottawa L.J. 499 at 500.

[22] [1971] S.C.R. 997 at 1020.

a contract "to construct a national pavilion at an internatitonal exhibition and to be thereby represented at that exhibition".[23]

In other words, the fact that the services requested were related to the representation of a foreign government at an international exhibition was vital in making the act of the government a public act. Function, therefore, was an important element. Seen in this light the substantial difference between the majority and the dissent is much more narrow and involves really only the adequacy of the evidence on which a finding of immunity could take place. Mr. Justice Ritchie had concluded that there was no evidence of a commercial venture and no onus on the Government of the Congo to rebut a presumption in favour of a commercial venture;[24] Laskin J. felt that the claim to immunity should be tested according to the restrictive theory and that there was insufficient in the record for an affirmation of immunity on that basis.[25]

Mr. Justice Laskin also appeared to base his rejection of immunity on a further ground. He argued that strictly speaking the declinatory exception taken by the appellant involved a simple assertion of sovereign immunity and did not involve a request to the court to determine whether there was entitlement to immunity based on the restrictive theory. Hence, if the Court were to grant immunity it must accept implicitly the absolute doctrine; a denial of immunity on the peremptory basis claimed, however, would still leave the defendant free to claim immunity under the restrictive doctrine.[26]

With respect, this is a little hard to follow. If a defendant claims immunity then surely the Court is free to determine the basis on which it should decide whether or not that immunity should be granted. The authority of the court to accept or reject either theory of sovereign immunity is hardly determined by the form of the pleadings of the parties, rather it is a matter for the court itself. Moreover, it would be a cumbersome procedure if a defendant after pleading sovereign immunity unsuccessfully were able to plead it again simply by rephrasing the plea of immunity according to the restrictive theory. Mr. Justice Laskin treated this argument quite separately from the question of whether there was sufficient evidence on which a finding of immunity could be made. It is submitted, however, that though his conclusion on the latter may have been compelling the argument on the former was untenable.

What, then, is the existing law in Canada on sovereign immunity? At the present the best that can be said is that uncertainty predominates. In two cases now, in spite of an apparent expression of an interest in the restrictive theory of immunity, the Supreme Court has failed to grasp the nettle. It follows that the optimistic view, expressed after *Flota Maritima*,[27] to the effect that the Court indeed preferred the restrictive approach[28] must now be treated with some circumspection. One commentator has suggested that there is an

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[23] *Id.*, at 1002.

[24] *Id.*, at 1004.

[25] [1971] S.C.R. 997 at 1024.

[26] *Id.*, at 1024-25.

[27] [1962] S.C.R. 598.

[28] See *supra*, note 14.

inconsistency between the avoidance by the Court of an expression of endorsement of the absolute doctrine of immunity and the Court's action in granting immunity in this case upon insufficient evidence.[29] This, it has been argued, is indicative of, in reality, an acceptance of the absolute immunity doctrine. On the other hand until the Supreme Court takes a decisive position the existing lower court decisions favouring restricted immunity must still stand.[30]

Yet the equivocal nature of the Supreme Court decisions and particularly the readiness with which the ground of decision was grasped in *Venne*[31] may not be simply an example of judicial vacillation, of an inability to decide which approach to follow. It may indicate a reluctance by the Court to make a decision of this kind; perhaps the refusal to make the policy choice between the two competing doctrines of immunity is an indication by the Court that the choice more appropriately should be made elsewhere. Whether or not this is a conscious view of the majority judges in *Venne* the argument that the acceptance or rejection of the restrictive doctrine of immunity ought not to be made by the courts has, I contend, some validity and definitely is worth investigating.

It will be useful to recall the reasons which have been advanced from time to time justifying the doctrine of sovereign immunity. These have been varied, but generally never satisfactory, and have included state sovereignty or independence,[32] comity,[33] the dignity of the sovereign[34] and avoiding interference with the conduct of inter-state relations.[35] Some have suggested that the grant of sovereign immunity is not merely a practice but is required by a

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29 Chen, *supra,* note 21 at 501.

30 This applies to the views expressed in *Venne* by the Quebec Court of Appeal and the Quebec Superior Court; the real difference between the majority in the Supreme Court and the lower court judges lies in different perceptions of the meaning of a "public" act. The view that the acceptance in Canada of the restrictive doctrine of immunity is still open has been expressed also by Professor J. G. Castel, see *Exemption from the Jurisdiction of Canadian Courts* (1971), 9 Can. Y'bk Int'l L. 159 at 170.

31 Just as *Flota Maritima* was taken as indicating a sympathy by the Court for the restrictive doctrine of immunity, the *Venne* decision may indicate an attitude in the other direction. In both cases the majority judgment was delivered by Ritchie J. who, in concluding that it was unnecessary to come to a decision on the appropriate doctrine to follow, used similar language in each case. (See [1972] S.C.R. 598 at 608; [1971] S.C.R. 997 at 1008). One wonders, too, why in *Venne* the learned judge felt it necessary to mention the various views concerning the two doctrines of sovereign immunity when he had already indicated that he did not have to decide between them.

32 2 D.P. O'Connell, *International Law* (2nd ed. London: Stevens & Sons, 1970) at 842. Sucharitkul, *State Immunities and Trading Activities in International Law* (London; Stevens & Sons, 1959) at 356, describes the absolute doctrine as representing the traditional rule of international law, but argues that current judicial and government practice prevent the present assertion of the absolute rule.

33 O'Connell, *supra,* note 32 at 843.

34 O'Connell, *supra,* note 32 at 842; see also J.M. Hendry, *Sovereign Immunities from the Jurisdiction of Courts* (1958), 38 Can. B. Rev., 145 at 149.

35 Hendry, *supra,* note 34 at 149. See also H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States* (1951), 28 Brit. Y.B. Int'l L. 220 at 228.

customary rule of international law,[36] although the rule probably is satisfied by the grant of immunity on a restrictive basis.[37] A number of reasons have been suggested, too, why the restrictive doctrine of immunity should be adopted. The principal of these is that of fairness to a plaintiff who may have innocently and in good faith undertaken obligations for which he will receive no recompense, or who has suffered injury at the hand of a defendant state from whom he can exact no compensation.

Concern for a plaintiff who may otherwise be denied his remedy is certainly laudatory but it is not clear that the consequence of this must necessarily be the abandonment of the absolute doctrine of immunity or of sovereign immunity altogether. The important question to ask is whether such a course of action will provide an effective remedy for the plaintiff. In this respect it is important that the distinction between immunity from suit and immunity from execution be recalled,[38] for the mere fact that the court has jurisdiction over the foreign sovereign for the purposes of the action before the court does not mean that it has jurisdiction to execute against the property of the foreign sovereign even though that property may be physically present within the country. This, it seems is a fundamental problem in considering whether the doctrine of sovereign immunity from suit should be abrogated; to allow a court jurisdiction when it is clear that no remedy in fact will result seems a somewhat futile exercise.

Nor, I suggest, is the argument met by the assertion that this view indicates a "lack of faith in law itself."[39] Faith in "law" should at least be tempered by reality, and a plaintiff who is unable to execute a judgment has hardly received a remedy. The view that the problem is not substantial has been advanced by Lauterpacht, who pointed out that there is no clear rule of international law sanctioning immunity from execution and in any event a foreign sovereign may in fact decide to comply with a judgment against it even though it has protested the jurisdiction and asserted its immunity.[40] This may be so but at least there must be some certainty of an ability to execute judgments before a decision is reached to allow jurisdiction over foreign states. If execution is not guaranteed then the proceedings can have little purpose other than to embarrass or harass a foreign sovereign, a purpose which the original development of sovereign immunity was designed to avoid and one which domestic courts should hardly facilitate or condone.

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[36] This seems to have been the position taken by Lord Atkin in the classic case of *Campania Naviera Vascongado* v. *S.S. Christina,* [1938] A.C. 485, when he said (at 490) that there were "two propositions of international law engrafted into our domestic law . . . The first is that the courts of a country will not implead a foreign sovereign, . . . The second is that they will not by their process, . . . seize or detain property which is his or of which he is in possession or control". See also Lord Wright, *id.* at 502. The classic denial of this view is found in Lauterpacht, *supra,* note 35.

[37] O'Connell, *supra,* note 32 at 841. Sucharitkul, *supra,* note 32 at 356.

[38] The two have always been treated separately in English law; hence waiver of immunity by a sovereign does not extend to immunity from execution, see O'Connell, *International Law, supra,* note 32 at 864-65.

[39] Hendry, *supra,* note 34 at 171.

[40] Lauterpacht, *supra,* note 35 at 222.

One argument adduced for the retention of the absolute doctrine of immunity is the lack of a workable distinction between those acts for which a foreign state should be entitled to immunity (public acts) and those for which no immunity should be allowed (private acts). Examples of difficult cases are numerous and well-known,[41] and a court adopting the restrictive approach eventually has to work out its own criteria, arbitrary though they may be.[42] However, the difficulty of reaching an acceptable division between different kinds of acts should not, as has been pointed out, necessarily lead to a rejection of restricted immunity.[43]

It seems that discussions of the desirability of limiting or abolishing sovereign immunity have generally omitted a central issue to the whole debate. The real question is not whether the courts should adopt the restrictive approach to immunity but rather *who should decide* which approach is to be taken. The answer to this depends upon whether the decision is one the elements of which properly can be considered and weighed by the courts. If it is not then some other body should be charged with the decision.

The traditional reasons for immunity mentioned above surely suggest the correct answer; the various merits or otherwise of the doctrine of sovereign immunity essentially involve matters of foreign policy concerning the relations of the alleged defendant state with the state whose courts are seeking to assert jurisdiction. This in itself indicates that the organs of government concerned with the making and implementation of foreign policy and the day to day relationship with foreign states ought to be involved in decisions relating to foreign state immunity.[44] One of the benefits of the absolute immunity doctrine, of course, was that it removed questions of an inter-governmental or foreign policy nature from the courts.

One of the advantages of leaving to the executive the decision whether or not to move from absolute to restrictive immunity is that a closer appreciation of the relevant interests involved can be made.[45] The executive should be aware of what will hinder its foreign policy activities whereas the courts

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41 *Id.*, 222-25.

42 This point was acknowledged by Laskin J. in *Venne*, [1971] S.C.R. 997 at 1021-22.

43 Hendry, *supra*, note 34 at 171.

44 This comment is limited to the question of who should decide whether there should be a change from absolute to restrictive immunity. Should the restrictive doctrine of immunity be adopted there remains the further question of the grounds upon which immunity should be granted in any individual case and though a discussion of this issue is beyond the scope of this comment it is suggested that such an issue similarly involves foreign policy considerations and should involve the executive. For the contrary view see e.g., Jessup, *Has the Supreme Court Abdicated One of its Functions* (1946), 40 Am. J. Int'l L. 168 who argues that the decision in each case is essentially judicial.

45 This view is reinforced by the argument that the issue at stake is not merely preventing the sacrifice of private interests; it is "a problem of totally revising our conception of the modern State and its activities, and re-thinking the purposes which sovereign jurisdictional immunities are intended to serve". Simmonds, *The Limits of Sovereign Jurisdictional Immunity: the Petrol Shipping Corporation and Victory Transport Cases* (1965), 11 McGill L.J. 291 at 308.

can never get beyond the realm of conjecture.[46] The executive, too, can evaluate alternatives to the assertion of jurisdiction which are not really open to the courts. It might be thought desirable, for example, to retain the doctrine of immunity but establish, through agreement with foreign states which engage in activities within the jurisdiction, a compensation fund for those suffering loss in commercial undertakings with such states. In any event a change in sovereign immunity practice may involve reciprocal consequences in a foreign state and these ought to be the subject of diplomatic discussion and negotiation.

The arguments in favour of leaving the courts to decide whether the immunity doctrine will be changed proceed from two sources. First, the courts sometimes are seen as the only realistic avenue in view of the probable delay if the matter is left for legislation.[47] Secondly, the argument has recently been made that in view of the lack of centralized institutions, including judicial institutions, in the international legal order domestic courts should play a greater role in submitting the activities of states to the governance of rules.[48]

The first view, I suggest, is hardly compelling. Although it may be preferable in the short term to get a decision without recourse to the executive and legislature, the long term result may not always be desirable. We must in each case find the most appropriate decision-maker: calling on the courts to make decisions for reasons of expedience ultimately may have a detrimental effect if those decisions have to be based on a lack of available background information or information on consequences, or are made by persons who lack expertise in the subject matter of the area in which the decision is to be made. There is a present tendency to assume that courts are equipped to make all kinds of policy decisions without a rational analysis of the process by which judicial decisions are reached. Before we accept that the courts are the proper organs for making a decision in the area of foreign policy, at least we must be sure that they have adequate procedures for obtaining all the relevant information and can rationally consider and weigh alternatives. Indeed, to continually foist upon the courts questions which require decisions that they are not equipped to make must lead eventually to a lack of confidence in the judicial process.

The view that municipal courts should take a more positive role in identifying rules of international law and applying them to defendant states is an appealing one in an international legal order which lacks a binding adjudicatory process. Yet there are difficulties in automatically assuming that the courts must therefore reject the doctrine of absolute immunity and subject foreign states to their jurisdiction at least in respect of non-public acts. Obviously it is not possible within the space of this comment to enter into a full analysis and critique of Professor Falk's thesis on the role of domestic

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[46] A classic example of the differing views of judges on the foreign policy implications of their decision is *Banco Nacional de Cuba* v. *Sabbatino* (1964), 376 US 398; c.f. Harlan J., for the Court, at 431-433 with White J., dissenting, at 463-69.

[47] Hendry, *supra,* note 34 at 173.

[48] Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse: Syracuse U.P., 1964).

courts in the international legal order. Yet clearly there are difficulties in assigning a greater role to domestic courts, some of which already have been mentioned. It is not clear that there is a positive rule of international law requiring municipal courts to grant immunity to foreign states; before the courts can be given a role there must be certainty that they are equipped to identify adequately rules of international law.[49]

Moreover, it must be clear that any action by municipal courts would in fact promote international legal standards. In this regard, it is hardly likely that states which have rejected, or adhered to only reluctantly, third party adjudication at the international level will accept passively third party adjudication introduced by an alternative means. It does not, therefore, seem unduly positivistic to suggest that at the present domestic courts should stay within the bounds of their own legal order until it is clear that their role in the international legal order would be a beneficial one and not conducive of discord and ill feeling between states.

The decision of the Supreme Court of Canada in *Democratic Republic of the Congo* v. *Venne,* serves as a reminder, then, that we should not expect the courts to take the initiative in areas which fall more appropriately to be dealt with by some other organ of government. The Supreme Court's reluctance to move to the restrictive doctrine of immunity can be justified not so much on the ground that a decision on that issue was strictly not required,[50] but rather that the issue really involved matters of foreign policy which should be solved at the diplomatic level. It is, however, probably too much to hope that some executive action will be taken, and followed by clarifying legislation, before the next case of sovereign immunity comes before the courts.[51]

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49 At least one of the arguments against this view is that domestic courts tend to be unduly nationally oriented in their determination of what amounts to a rule of international law.

50 This, of course depends upon the view taken of the adequacy of the evidence on which the Court in *Venne* decided that the act in question was a public act.

51 Since this comment was written a bill has been introduced into the United States Senate which will give to the courts the task of determining whether a foreign state is entitled to immunity and which particularises the grounds on which immunity will be granted. The bill also restricts immunity from execution. See (1973) 12 I.L.M. 118-162.