THE ACT OF STATE DOCTRINE : A CONTINENTAL LAWYER LOOKS AT THE HOUSE OF LORDS RULING BUTTES GAS v. HAMMER

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1. Some time ago, the Courts in the United Kingdom have had to handle a litigation between two American oil companies about an oil location in the Persian Gulf. The procedural aspects of the dispute were involved and the substantive questions important. In its decision that put an end to the litigation (*Buttes Gas and Oil Company and Boreta* v. *Hammer and Occidental Petroleum Corporation* (1), the House of Lords gave a pronouncement on the « nature of the judicial process » about which an observer from over the Channel may be allowed to express some surprise.

2. Two Californian oil exploration corporations, Buttes Gas and Oil Company (hereafter Buttes) and Occidental Petroleum Corporation (hereafter Occidental) were granted oil concessions in the Persian Gulf. On November 10, 1969, Occidental obtained from the ruler of the Arab Emirate, Umm al Qaiwain (hereafter U.A.Q.), an exclusive concession to explore and exploit the territorial and offshore waters of U.A.Q. and the seabed and subsoil underlying such waters. For its part, on December 29, 1969, Buttes obtained from the ruler of another Arab Emirate, Sharjah, the exclusive right to explore and exploit the territorial waters of the main land of Sharjah, all islands within the jurisdiction of the ruler, the territorial waters of these islands and all the area of the seabed and subsoil lying beneath the waters of the Arabian Gulf contiguous to the said territorial waters over which the ruler exercises jurisdiction and control. The dispute between the two corporations resulted from the discovery of oil in a location in the seabed of the Arabian Gulf, at a distance of about nine miles from an island called Abu Musa, recognized by both Emirates and the U.K. Government to belong to Sharjah.

(1) *W.L.R.*, 1981, p. 787.

In his statement of the facts Lord Wilberforce continued as follows : « As the result of various events occurring in 1969-1973 Buttes emerged as concessionaire entitled to exploit the location, to the exclusion of Occidental : out of this situation, which was unwelcome to Occidental, the present litigation arose » (2).

On October 5, 1970, Dr. A. Hammer, Chairman of Occidental, gave a press conference in London, at which he accused Buttes (*inter alia*) of using improper methods and colluding with the then ruler of Sharjah to backdate a decree by the ruler extending the territorial waters of Sharjah, in respect of Abu Musa, from three miles from the coast of the island to 12 miles so as to obtain for themselves the benefit of the oil-bearing deposit at the location which he claimed was discovered by and belonging to Occidental. Thereupon, on October 18, 1970, Buttes issued a writ against Dr. A. Hammer and Occidental claiming damages for slander. The defendants offered a full and elaborate justification of the slander, alleging the backdating (from March or April 1970 to September 1969) of the decree of the ruler of Sharjah at the request or on the advice of Buttes. Occidental then counterclaimed against Buttes for damages for conspiring to defraud, and against Buttes and Mr. J. Boreta, president and chief executive of Buttes, for damages for libel. The counterclaim, which in fact was the kernel of the litigation, alleged that in December 1969 and onwards, Buttes, the then ruler of Sjarjah and others « wrongfully and fraudulently conspired ... to cheat and defraud Occidental, and further or alternatively to cause and procure Her Majesty's Government and others to act unlawfully to the injury of Occidental » (3).

Buttes then sought an order that the court should not exercise jurisdiction in respect of certain specified acts being acts of state of the governments of Sharjah, U.A.Q., Iran (which since the 19th century claimed sovereignty over the island Abu Musa) and the United Kingdom, or alternatively, that certain specified parts of the defence and counterclaim should be struck out or all proceedings stayed as to any issue arising therefrom on the ground that they raised matters which are acts of state. This request finally reached the Court of Appeal, which refused to strike out the conspiracy counterclaim and parts of the plea of justification. However, as proceedings went on, the same Court of Appeal refrained from acceding to Occidental's request for discovery of documents being in Buttes's possession on the ground that the case was one for the exercise of judicial restraint since it would be contrary to the comity of nations to order discovery without the consent of the foreign sovereign concerned, *in casu* the ruler of Sharjah. Occidental objected it was illogical and unfair

(2) *W.L.R.*, 1981, p. 793.
(3) *W.L.R.*, 1981, p. 794.

that while the counterclaim was permitted to go on, this further decision denied the means necessary for its prosecution.

On November 11, 1980, an Appeal Committee of the House of Lords gave leave to Occidental to appeal against the decision on the discovery of documents and to Buttes and Mr. J. Boreta to appeal out of time against the Court of Appeal's previous decision. At the same time it ordered that a fresh summons issued by Buttes and Mr. J. Boreta on July 11, 1980, should be dealt with on the hearing of the conjoined appeals. This summons sought an order that on Buttes undertaking to consent upon application by Occidental and Dr. A. Hammer to a stay of the slander claim, the counterclaims of Occidental and Dr. A. Hammer be stayed on the grounds (*inter alia*) that the said counterclaims raised issues which are non-justiciable by the court and/or which it is contrary to the public interest for the court to adjudicate upon. So, the stage was set for the House of Lords « to form an opinion as to the *justiciability* of the claims of either side » (4), and to make the decision whether the proceedings should be allowed to continue to trial with appropriate discovery or should be terminated by stay or striking out.

3. In November 1971, shortly before the intended British withdrawal from the Arabian Gulf, an understanding was reached between Sharjah and Iran, whereby, *inter alia*, all parties accepted the existence of a 12-mile territorial sea round Abu Musa, with Buttes as the concessionaire for the area on the terms of its agreement with Sharjah, while the revenues resulting from such exploitation were to be shared between Sharjah and Iran (Sharjah in turn agreed to share its royalties with U.A.Q.). This global understanding was approved by the U.K. Government. Thereafter, in June 1973, Occidental's concession was terminated by the ruler of U.A.Q. acting under a clause in the concession agreement.

Buttes and Mr. J. Boreta argued that the English courts will not entertain actions questioning the validity or effectiveness of foreign legislation, *i.e.* the decree of the ruler of Sharjah dated September 10, 1969, extending the territorial sea of his Emirate to a width of 12 miles from the baselines around its coasts and islands, *or* actions examining the validity of, or motives for, acts of foreign sovereign states in their international relations, *or* finally actions challenging the legality of acts of the U.K. Government outside the U.K. and not relating to British subjects. To this, Occidental replied that there is no absolute or general rule forbidding English courts from « sitting in judgment » upon or « inquiring into » the validity or nature of a foreign law. The courts would be entitled to do so when either that law is not confined in operation to the territory of the enacting state, or is contrary to public policy, or to international law. Moreover, in English

(4) *W.L.R.*, 1981, p. 796, emphasis added.

law no general doctrine of « act of state « could be found, nor any rule of judicial restraint such as is applied in some U.S. cases.

For Lord Wilberforce the question of title to the location did not arise incidentally or collaterally; it was at the heart of the case; it called for adjudication upon the validity, meaning and effect of transactions of sovereign states. He then stated that the main issue was « whether ... there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states »; he immediately went on in the affirmative : « This principle (which it seems desirable to regard not as a variety of « act of state » but as one for judicial restraint or abstention) is not one of discretion, but is *inherent in the very nature of the judicial process* » (5). Thus, he transcended the limits of the traditional « act of state » doctrine in order to state a more general theory on judicial self-restraint, based both on the views a judge holds of his own task and the means he considers to possess for its accomplishment. In Wilberforce's words it sounded as follows : « Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ... the court would be in a judicial no-man's land : the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law » (6).

These considerations led the House of Lords to allow Buttes's appeal against the order of the Court of Appeal which had refused to strike out the conspiracy counterclaim and parts of the plea of justification, and to hold Buttes to the offer made in its summons of July 11, 1980.

4. *Comments.* According to Lord Wilberforce the principle accepted here is not a variety of the « act of state » doctrine, but rather an exercise of « judicial restraint » deemed to be « inherent in the very nature of the judicial process ». This raises the questions whether there is a difference between these two qualifications, and possibly, what is the admissible scope, if any, of that more general judicial restraint reaching beyond the limits of a traditional attitude of abstention based on « act of state » grounds.

5. The original authoritative statement of the « act of state » doctrine was framed in terms relating to the requirements of international law. Thus, Chief Justice Fuller stated in his opinion for the U.S. Supreme Court

(5) *W.L.R.*, 1981, p. 804, emphasis added.
(6) *W.L.R.*, 1981, p. 810.

in *Underhill* v. *Hernandez* (7) : « Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves ».

In that perspective, the judiciary's abstention merely amounted to respecting one of the state's international legal obligations. As its source appeared to be rather uncertain, Justice Clarke took a more pragmatic stance on the matter in his opinion for the U.S. Supreme Court of 21 years later, in *Oetjen* v. *Central Leather Co.* (8) : « The principle that the conduct of one independent government cannot be successfully questioned in the courts of another ... rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations ».

It was this latter opinion which three years later sounded through in the United Kingdom, when the case of *Luther* v. *Sagor* had to be decided (9). There, Lord Justice Scrutton upheld the « act of state » doctrine under explicit reference to « the comity of nations as between independent sovereign states », resolving their disputes « by diplomatic means between states, not by legal proceedings against an independent sovereign ». He even stressed that denying the « act of state » principle might well « with a susceptible foreign government » lead to « a casus belli ».

6. A different strand in the « act of state » doctrine surfaced in the *Bernstein* litigation (1946-1954), which was dealt with by the U.S. Court of Appeals for the Second Circuit. This Court, in an opinion delivered by Judge Learned Hand, first stated that in accordance with the « act of state » doctrine it could not pass upon the validity of a coerced transfer of property operated in 1937 by Bernstein, a Jew, to one Boeger, a Nazi agent (*Bernstein* v. *Van Heyghen Frères S.A.* (10)

However, in a later stage of the proceedings, pursued against a different defendant, but involving the exact same issue, the Court of Appeals decided *per curiam* to amend its previous mandate, « by striking out all restraints based on the inability of the Court to pass on acts of officials in Germany during the period in question » (11). This amendment was accepted « in view of (the) supervening expression of Executive Policy ». The latter was

(7) 168 U.S. 250, 252 (1897).
(8) 246 U.S. 297, 304 (1918).
(9) 3 K.B. 532 (1921).
(10) 163 F. 2d 246, 2d Cir. 1947.
(11) 210 F. 2d 375, 2d Cir. 1954.

declared in a letter of April 13, 1949, from Jack B. Tate, Acting Legal Adviser of the Department of State, affirming *inter alia* that « the policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials » (12). In this case the impression is given that a judge should apply the « act of state » doctrine only in order not to frustrate the foreign policy goals of the Executive. If, however, this risk is not likely to materialize (which it definitely is not when the Executive itself so indicates) the judiciary won't be bound by any other restraint put on the normal exercise of its jurisdiction.

The final justification of the « act of state » doctrine then rests upon considerations relating to the constitutional principle of separation of powers within the state which the judges belong to. The doctrine becomes an exception to the general jurisdiction of the judiciary, flowing from the constitutional commitment to a « coordinate branch », *i.e.* the Executive, of the conduct of foreign affairs. Once the Executive, as a matter of policy, lifts the exception, the plenitude of the judiciary's jurisdiction is reinstated, without any further limitation of international or constitutional law weighing on it.

7. Unfortunately, this rather straightforward rationalization of the operation of the « act of state » doctrine did not as such make its way through the U.S. Supreme Court. Indeed, in the very famous case *Banco Nacional de Cuba* v. *Sabbatino* (13), the Court accepted the « act of state » doctrine as proscribing a challenge to the validity of the Cuban expropriation decree of August 6, 1960, issued pursuant to Cuban Law No. 851 of July 6, 1960, while admitting *per* Justice Harlan that this doctrine wasn't compelled by any principle of international law, nor required by the text of the Constitution. In Harlan's opinion the « act of state » doctrine did, however, have *constitutional underpinnings* : « It arises out of the basic relationships between branches of government in a system of separation of powers » (14).

As to this case the Department of State refused to give any comment on the need of application of the « act of state » doctrine, leaving it as a matter « for the courts to determine ». So, technically speaking, the Court didn't know whether the Executive would be embarrassed by an exercise of full jurisdiction. In the absence of any indication by the Executive,

(12) State Department Press Release, April 27, 1949, *Dept. State Bulletin*, 1949, p. 592.
(13) 376 U.S. 398 (1964).
(14) 376 U.S. 398, (1964).

the Courts were in a situation where a decision not to exercise full jurisdiction was wholly their own.

In spite of this the opinion of Justice Harlan went on to link the lack of « relevant international law standards » needed to judge the validity of the Cuban expropriation decree, to « the possibility of conflict between the Judicial and Executive Branches ». He stated (15) : (The) continuing vitality (of the « act of state » doctrine) depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. (...) When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns ». Harlan phrased the central question of the case in terms of a search for « judicially discoverable and manageable standards » (16), thus plainly reasoning along the lines of that other doctrine leading to judicial self-restraint, *i.e.* the « political questions » doctrine. To the extent then that a court is unable to formulate standards of (international) law appropriate for judicial application, it should leave the matter for resolution to the Executive, even without any « textually demonstrable constitutional commitment (of the matter under consideration) to a coordinate political department », *Baker* v. *Carr*, *ibidem*. It is in that sense that Harlan could affirm that the « act of state » doctrine was compelled by « neither international law nor the Constitution », yet that it did have *constitutional underpinnings* flowing from the basic relationships between branches of government in a system of separation of powers.

8. By so reasoning, Justice Harlan in fact widened the scope of the « act of state » doctrine to something which Lord Wilberforce in his *Buttes* opinion would later call that restraint or abstention « inherent in the very nature of the judicial process ». Indeed, in both the opinions of Harlan and Wilberforce, the proper limits of the « act of state » doctrine *sensu stricto* became rather unclear, as it seemed to be more the lack of judicially manageable standards needed in order to adjudicate the merits of the case at hand, than the risk of friction between the executive and judicial branches of the Government leading to the refusal to exercise jurisdiction (17).

(15) 376 U.S. 398, 427-428, 432-433.

(16) *Baker v. Carr*, 369 U.S. 186, 217 (1962).

(17) See on this point the contribution by P. Herzog, « La théorie de l'Act of State dans le droit des Etats-Unis », *Revue critique de droit international privé*, 1982, pp. 617 *et seq.* especially at p. 633 and note 32.

If after the 1964 *Sabbatino* ruling of the U.S. Supreme Court the lines between « act of state » and « political questions » varieties of judicial restraint appeared to be as blurred as they certainly were in 1981 by the decision of the House of Lords in the *Buttes* case, in 1972 a plurality of the U.S. Supreme Court tried to delimit with more precision the allowable scope of the « act of state » doctrine. In *First National City Bank* v. *Banco Nacional de Cuba*, in which the main issue was again the validity of Cuban expropriations, a plurality of the Court acceded to the Executive's request that the « act of state » doctrine should not be applied : « We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts » (18). This statement reminds directly of the straightforward rationalization of the « act of state » doctrine, as it came out of the *Bernstein* litigation. Justice Douglas, however, in his separate opinion, criticized the judiciary's *a priori* deferential posture vis-à-vis the Executive concerning the application of the « act of state » doctrine : « The Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others » (19).

Constitutionalist L. Tribe commented very accurately : « The plurality opinion in *First National City Bank* would have replaced the *Sabbatino* principle, which had limited the judiciary to areas resolvable by accepted standards of decision, with a crude, prudential rule to avoid conflict between the federal judiciary and executive departments by having the former simply defer to the judgment of the latter in a pending case » (20).

9. This statement leads at once to the focal point of Lord Wilberforce's opinion in *Buttes*, *i.e.* the difference — as Wilberforce saw it — between the « act of state » doctrine and that restraint or abstention which is inherent in the very nature of the judicial process. The first of his categories leans towards the *Bernstein* and *First National City Bank* interpretations of the « act of state » doctrine as an exception (which can be lifted by the Executive in the absence of a risk of friction) to the general jurisdiction of the courts; the second draws upon *Sabbatino*-like considerations about the functional limitations inherent in the judiciary's task to discover judicially manageable standards of adjudication. This latter tendency, to which Lord Wilberforce claimed to adhere, always suffered numerous criticisms, since it sounds like an abdication by the judges, when faced with their normal responsibilities of adjudicating admissible claims, based on the difficulties proper to the process of adjudication rather than

(18) 406 U.S. 759, 768 (1972) *per* Justice Rehnquist.
(19) 406 U.S. 759, 773 (1972).
(20) *American Constitutional Law*, New York, Foundation Press, 1978, pp. 77-78, note 35.

on any danger of collision with a coordinate branch of government (this is, in the sphere of foreign and international relations, the Executive).

10. In the United States, the same dispute between Buttes and Occidental also gave rise to court proceedings. Before the Court of Appeals for the Fifth Circuit, the U.S. filed an *amicus curiae* brief, to which was attached a letter from the Legal Adviser to the Department of State to the Attorney General. There, it was stated « that it would be contrary to the foreign relations interests of the United States if our domestic courts were to adjudicate boundary controversies between third countries and in particular that controversy involved here (...); that it would be potentially harmful to the conduct of our foreign relations were a United States court to rule on the territorial issue involved in this case (...); that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties ». The Court of Appeals then dismissed the case and the U.S. Supreme Court denied a further petition for *certiorari* (21).

In the U.K. proceedings, however, Occidental's counsel stressed that, at a difference with the situation in the U.S., no indication had been given « that Her Majesty's Government would be embarrassed by the court entering upon these issues ». Lord Wilberforce replied that he appreciated this argument, but that the ultimate question what issues are capable and what are incapable of judicial determination had to be answered depending upon an appreciation of the nature and limits of the judicial function itself. He concluded that there were no judicial or manageable standards by which to judge these issues, even leaving aside all possibility of embarrassment in the U.K.'s foreign relations (which it could be said not to have been drawn to the attention of the court by the Executive).

11. Here, we definitely touch upon the most sensitive point in the opinion by Lord Wilberforce : is it indeed acceptable that a law court invokes the lack of judicially manageable standards needed to adjudicate an action brought by a private plaintiff, thereby forfeiting — without any compelling request emanating from the Executive — its mission of protecting rights and enforcing duties? Moreover, the feeling of dissatisfaction with the outcome of the opinion is strengthened by the fact that the alleged lack of judicially manageable standards hinges precisely on the highly political colouration of the issues to be adjudicated. In such a situation the protection by the judiciary of the rights of private parties would seem to be all the more indispensable.

When judicial abstention is not asked for by the Executive (as was the case in both *Sabbatino* and *Buttes*) the judiciary should be entitled to reach the merits of the case. If it still feels there is a risk of conflict between the

(21) See *W.L.R.*, 1981, p. 808.

foreign policy interests of the Nation defended by the Executive and the necessary judicial determination of the validity of foreign governmental acts or « international » acts, consultation with the Executive could be indicated. The practice of French courts to refer systematically all issues concerning the interpretation of treaties to the Foreign Ministry might serve as a precedent (22). The courts then would be ready to ask and to follow the advice of the Executive on the merits of the « act of state » involved in the case to be decided. If the Executive refuses to express an opinion, the courts should decide for themselves, thereby exercising the plenitude of their jurisdiction. In such a case the Executive is deemed to lift the « act of state » exception to the courts' normal jurisdiction by simply remaining silent.

In fact, this position tends to equating the Executive's silence in the *Sabbatino* and *Buttes* (U.K.) cases with its letters in the *Bernstein* and *First National City Bank* litigations. That, of course, leaves the courts with the rather difficult task of adjudicating issues of international law without any help from outside, *i.e.* from the Executive. The judges should cope with it « as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions, and above all, defining the rule in terms which are consonant with justice rather than adverse to it » (23). For his part, Justice Brennan had stated already in *Baker* v. *Carr* (24) : « It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action ».

12. Technically speaking, the House of Lords did not commit what would amount on the European Continent to a *déni de justice;* the House took indeed a « decision » allowing Buttes's appeal and making an order on Buttes's summons of July 11, 1980. In all probability Article 6 of the European Convention on Human Rights has not been violated either, as the parties concerned enjoyed full access to the courts in order to see their rights and duties determined by them. Because of the House's hands-off policy towards the « acts of state » involved in the case, that determination took place in a formal strictly sense only.

13. The desire of Courts not to embarrass the executive by deciding

(22) See M. WAELBROECK, *Traités internationaux et juridictions internes dans les pays du Marché Commun*, Paris, Pédone, 1969, pp. 204 *et seq.*

(23) *Per* Lord DENNING, M. R., *Trendtex Trading Corporation v. Central Bank of Nigeria*, January 13, 1977, I Q.B. 529 *et seq.*

(24) 369 U.S. 186, 211 (1962).

independently sensitive international issues raises the question of the relationship between judiciary and executive in foreign affairs. On this important subject (25), which is constitutional in nature, attitudes can differ from country to country. The opinion that the « nature of the judicial process » leads to the result that the judge can rely on the absence of « judicial or manageable standards » to refuse to decide an international issue is, however, of more than local significance.

The absence of compulsory judicial settlement has as a consequence that much of international law could be said to be deprived of « judicial or manageable standards ». Yet if international law is to remain « part of the law of the land » (26), municipal Courts should discharge their responsibilities in this matter. It is therefore suggested, with due deference, that the example given by the House of Lords in the *Buttes Gas* v. *Hammer case* should not be followed on the Continent.

(25) Discussed by F. A. MANN in Grot. Soc. 1945, reprinted in *Studies in International Law*.

(26) BLACKSTONE, *Commentaries*, Bk. 4, see p. 67.