SOME OBSERVATIONS ON THE ROLE OF LORD DENNING IN THE DEVELOPMENT OF INTERNATIONAL LAW

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1. INTRODUCTION

While it seems to be generally accepted that Lord Denning's influence on the development of English law cannot be dismissed, surprisingly, few authors have dealt with Lord Denning's quite substantial role in the development of international law.

This article will concentrate on analysing those of Lord Denning's judgments which have led to beneficial changes in certain major areas of international law.

2. THE EXTENT OF SOVEREIGN IMMUNITY IN INTERNATIONAL LAW

Lord Denning contributed greatly to the change from the 'absolute' doctrine of sovereign immunity to that of the new English 'restrictive' approach.

Formerly, a State could claim immunity from being impleaded before the courts of another State. This concept of sovereign immunity was justified in *The Schooner Exchange v. McFadden*[1] by Marshall C.J. on the grounds of the equality, independence and dignity of States. With the advent of increased trading activities in the nineteenth and twentieth centuries, it became clear that difficulties were beginning to occur and would undoubtedly continue to occur if immunity could be claimed for commercial transactions.

As early as 1958, in *Rahimtoola v. The Nizam of Hyderabad*[2], Lord Denning attempted to change the absolute doctrine of sovereign immunity into a restrictive doctrine whereby there would be immunity for governmental but not commercial transactions. The other Law Lords expressly dissociated themselves from this position.[3]

Lord Denning again pressed for this approach in *Thai-Europe Tapioca Service Ltd v. Government of Pakistan*[4], although the restrictive approach in the end had no bearing on the facts of this case.

In *The Philippine Admiral*[5], the Judicial Committee of the Privy Council showed their support for the restrictive doctrine by applying it to an action *in rem* against a State-owned trading vessel. *Trendtex Trading Corporation v. Central*

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[1] (1812) 7 Cranch. 116.
[2] [1958] A.C. 379.
[3] *Ibid.* 398, 404, 410.
[4] [1975] 1 W.L.R. 1485.
[5] [1976] 2 W.L.R. 214.

Bank of Nigeria[6] was decided soon after and Lord Denning, with Shaw L.J. concurring, held that the restrictive theory should be generally applied. Stephenson L.J. dissented and criticised the way in which the majority had gone about forming their decisions on this matter. But, for the first time, Lord Denning found himself one of the majority with regard to his view of sovereign immunity.

The restrictive approach has now been adopted by statute in the State Immunity Act 1978. The Courts have generally elected to follow Lord Denning's decision. The precedent established in *Trendtex* was repudiated by Donaldson J. in *Uganda Co. (Holdings) Ltd v. Government of Uganda*[7] on the ground of inconsistency with prior authority, but this decision in turn was repudiated by the Court of Appeal in *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*.[8] Lloyd J. also followed the majority view in *Trendtex* in *Planmount v. Republic of Zaire*.[9]

Goff J. used the same approach at first instance in *I Congreso del Partido*[10] and finally when this case went on appeal to the House of Lords,[11] the decision in *Trendex* was affirmed and the House referred to the 'admired judgment' of Lord Denning. It is thus clear that Lord Denning's view is now represented by English law.

Some problems have since occurred with the restrictive approach to sovereign immunity because of the difficulty in distinguishing between acts of state (*jure imperii*) and acts of commerce (*jure gestionis*).[12] However, in general, Lord Denning's approach is to be admired. As State trading has greatly increased in recent decades, it seems inappropriate that foreign governments should still be able to claim immunity for trading activities. It seems almost obligatory for municipal law to be flexible enough to adapt to changing circumstances in this area.

3. THE DOCTRINE OF INCORPORATION: CUSTOMARY INTERNATIONAL LAW IN MUNICIPAL LAW

Lord Denning was continually at the forefront of those advocating a new approach to the relationship between customary international law and municipal law.

International custom, the evidence of a general practice among States of what is accepted as obligatory, is one of the major sources of international law under Article 38.1 of the Statute of the International Court of Justice. In England, there was some authority for the view that customary international law could only be

[6] [1977] Q.B. 529.
[7] [1979] 1 Lloyds Rep. 481.
[8] [1979] 2 Lloyds Rep. 277.
[9] [1980] 2 Lloyds Rep. 393.
[10] [1978] Q.B. 500.
[11] [1981] 3 W.L.R. 328.
[12] For example, problems occurred in the two *I Congreso del Partido* cases where the major question was whether immunity should be accorded where the events which gave rise to the cause of action were acts of government, although the cause of action itself was apparently commercial. The Court of Appeal held that immunity did not apply, but the House of Lords upheld Goff J.'s decision at first instance, holding that the restrictive theory of immunity applies to claims with respect to State-owned trading vessels, whether the claims are *in rem* or *in personam*.

part of English law in so far as the rules had been adopted by legislation, judicial decision, or established usage.[13]

In *Trendtex Trading Corporation v. Central Bank of Nigeria*,[14] Lord Denning rejected this old doctrine of transformation of customary law in favour of the doctrine of incorporation. This latter doctrine is represented by statements affirming that rules of customary law automatically become part of municipal law.[15] Thus, Lord Denning was able to find that the customary rule of restrictive sovereign immunity was now part of municipal law in that case.

This approach has much to recommend it considering the problems associated with the doctrine of transformation where 'the assent of the nations who are to be bound'[16] and some overt action of adoption or acceptance of disputed rules[17] had to be shown. The doctrine of incorporation allows a greater degree of flexibility by the courts in determining international law in the municipal system and it has now been accepted by British courts.[18]

4. *RULES OF INTERNATIONAL LAW AND* STARE DECISIS

The doctrine of incorporation of customary law is not without its limits. It has been stated that customary law must yield to an Act of Parliament[19] and that it cannot be adopted if it is contrary to a common law rule.[20] Lord Denning, in his judgment in the *Trendtex* case attempted to avoid this second restriction by stating that international law knows no rule of *stare decisis*; that is to say that it is not subordinate to previous judicial decisions of final authority. He stated:

> If this court today is satisfied that the rule of international law on a subject has changed from what it was fifty or sixty years ago, it can give effect to that change — and apply the change in our English law — without waiting for the House of Lords to do it.[21]

Lord Denning cites little authority in support of this rather radical approach. He points to the rules concerning the extent of territorial waters and slavery as examples whereby the English courts have discarded contrary authority in favour of a more modern rule. As has been pointed out:

> These isolated examples do not seem a sound basis by which to override authority.[22]

There is also a problem with this approach in determining when international law has changed so as to override previous decisions. Stephenson L.J. for example, asked in *Trendtex:*

[13] *R. v. Keyn* (1876) 2 Ex. D. 63.
[14] [1977] Q.B. 529.
[15] It is interesting to note that Lord Denning did not always advocate this approach. In *R. v. Immigration Officer; ex parte Thakrar* [1974] Q.B. 684, 701, Lord Denning gave a restricted view of incorporation, stating: 'In my opinion, the rules of international law only become part of our law in so far as they are accepted and adopted by us.' This 'selective' approach to incorporation had obviously changed by the time *Trendtex* was decided, into an 'automatic' approach.
[16] *R. v. Keyn* (1876) 2 Ex. D. 63, 202-3 *per* Cockburn J.
[17] *Chung Chi Cheung v. R.* [1939] A.C. 160, 167-8 *per* Lord Atkin.
[18] Brownlie I., *Principles of Public International Law* (3rd ed. 1979) 45.
[19] *Mortensen v. Peters* (1906) 14 S.L.T. 227.
[20] Brownlie, *op. cit.* 45.
[21] [1977] Q.B. 529, 554.
[22] Triggs G., 'Restrictive Sovereign Immunity: The State as International Trader' Parts I and II (1979) 53 *Australian Law Journal* 244 and 296, 252.

> How do you prove that the gestation of a new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new form?[23]

Other judges such as Scarman L.J. in *Thai-Europe Tapioca Service v. Government of Pakistan*[24] and authors such as O'Connell[25] and Brownlie[26] have rejected Lord Denning's approach, preferring to follow the traditional line that customary international law 'will not be applied if it is contrary to a statute, and the courts will observe the principle of *stare decisis*'.[27]

However, there is much to recommend Lord Denning's approach, even though the weight of authority may be against it. It is clear that international law knows no rule of *stare decisis* in the sense that it can grow and change in itself and it seems sensible that municipal courts should be able to adapt the changed rules of international law without being bound by the difficulties of *stare decisis*. International law is flexible and it should follow that municipal law is flexible also in its ability to adopt customary international law.

It will be interesting to note how the English courts in the future deal with Lord Denning's approach. Duffy suggests that the exception to *stare decisis* will probably be given a narrow interpretation and confined to 'precedents whose *rationes* rest on now obsolete customary international law',[28] rather than being overtly used to override precedent.

Even if this is the case, Lord Denning's approach is still a step forward in adapting municipal law to changing customary international law. Lord Denning's view of incorporation in *Trendtex* displays the obvious need for judges to 'so handle precedent . . . as to do justice in a way fitted for the needs of the times in which we live'.[29]

5. *THE MAREVA INJUNCTION*

Lord Denning's advocation of the use of the Mareva injunction[30] has led to a great step forward in cases dealing with international law. This injunction means that prior to a plaintiff obtaining judgment, a municipal court may grant an order freezing the assets of a defendant where there is a real risk that these assets may be taken outside the jurisdiction. The use of the Mareva injunction encourages plaintiffs to take action because, if they are successful, they will be able to obtain measures of execution against the defendant's assets which are in the jurisdiction.

The Mareva injunction is intrinsically related to international law in that it may be ordered against banks and other bodies at an international level.

For example, in *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*,[31] the defendant bank did not honour its obligations under an irrevocable

[23] [1977] Q.B. 529, 570.
[24] [1975] 1 W.L.R. 1485, 1495.
[25] O'Connell D. P., *International Law* (2nd ed. 1971) vol. 1, 49-51.
[26] Brownlie, *op. cit.* 45-50.
[27] *Ibid.* 45-6.
[28] Duffy P. J., 'English Law and European Human Rights' (1980) 29 *International and Comparative Law Quarterly* 585, 601.
[29] Denning, Alfred Lord, *The Family Story* (1981) 177.
[30] So called because it was first developed by Lord Denning in *Mareva v. International Bulkcarriers* [1975] 2 Lloyds Rep. 509.
[31] [1979] 2 Lloyds Rep. 277.

letter of credit issued in respect of a contract for the purchase of cement for the Nigerian Ministry of Defence. In March 1976, a Mareva injunction was issued against the bank in order that its assets be frozen in the jurisdiction. It was affirmed by the Court of Appeal that a Mareva injunction may be executed in such circumstances against a bank. It is clear that the Mareva injunction is a welcome avenue of relief for the creditor at international law who wishes to prevent the debtor from parting with his assets pending trial.

In *The Due Process of Law*,[32] Lord Denning quotes from some of his judgments which show the development of the injunction and he stresses the need for such a method to favour plaintiffs in times of increasing commercial transactions between States. Since 1975, this injunction has been used widely in both England and Australia and, as Maher has pointed out:

> Lord Denning can be credited with widening the scope of the injunction, a useful process in these times when funds can be speedily transferred from one jurisdiction to another.[33]

6. *SUMMARY*

Lord Denning has clearly played an exceptionally important role in developing the now accepted doctrines of restrictive sovereign immunity and the incorporation of customary international law as well as the use of the Mareva injunction. Lord Denning's more recent advocation of international law knowing no rule of *stare decisis* has yet to be fully accepted in English law and it will be interesting to follow how the courts deal with his progressive approach in future decisions.

The judgments referred to in this article form only a small part of the many decisions which Lord Denning has handed down concerning the relationship between various areas of international law and its application to the common law.

Limitations of space prevent an analysis of Lord Denning's other interesting decisions such as those concerning the relationship between municipal law and the law of the European Economic Community; the legal effects of unrecognised governments in English law and state responsibility for expelled nationals.[34] Suffice it to say that it is hoped that in the future the attention of those authors seeking to assess Lord Denning's role in English law will also be drawn to his quite substantial contribution to the development of international law.

[32] (1980) 134-51.

[33] Maher F., 'Lord Denning Leaves the Scene' (1982) 56 *Law Institute Journal* 558, 561.

[34] The most interesting judgments in these respective areas include: *Bulmer v. Bollinger* [1974] 3 W.L.R. 202; *Hesperides Hotel v. Aegean Holidays Ltd* [1977] 3 W.L.R. 656 and *R. v. Immigration Officer; ex parte Thakrar* [1974] Q.B. 684.