De Facto Officials and "Usurpers"

In *Madzimbamuto* v. *Lardner-Burke*,[1] one of the several fundamental questions of law discussed was that of the relationship between an usurping government and a lawful government. The Privy Council adverted to the possibility that there might be a general principle, depending on implied mandate, recognising the need to preserve law and order in territory controlled by a usurper.[2] The dissenting view of Lord Pearce would have applied the principle of necessity or implied mandate.[3] The views of the majority were carried a step further in *Adams* v. *Adams*,[4] when recognition was refused to a divorce decree pronounced by a Judge appointed after the Unilateral Declaration of Independence. The particular question of present interest is the rejection of the argument that the divorce should be regarded as the valid act of a *de facto* judge.[5] From a practical point of view, these cases offer little assistance to loyal citizens in Southern Rhodesia carrying on their normal tasks. It has been suggested that the English action constitutes a 'legal blockade' in which 'innocent private individuals ... may be caused undeserved hardship',[6] remedial action being left to the executive or legislature.[7] It is therefore of interest to examine the judgment of Henry, J. in *Bilang* v. *Rigg*,[8] delivered on 23 March 1971, with regard to the question of the validity of acts done by *de facto* officials.

In *Bilang*, a writ of *mandamus* was issued to compel the Registrar of the Court to re-seal a grant of administration made in Southern Rhodesia. United States cases on the validity of acts of revolutionary State governments suggest that valid acts of such governments include 'acts necessary to peace and good order among citizens, such for example as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents ...'.[9] The grant of administration in *Bilang* would there-

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[1] [1968] 3 All E.R. 561.
[2] *Ibid.*, at p. 577.
[3] *Ibid.*, at p. 584.
[4] [1970] 3 All E.R. 572.
[5] *Ibid.*, at pp. 588-591.
[6] *Ibid.*, at p. 587.
[7] *Ibid.*, at p. 592.
[8] Supreme Court of New Zealand at Auckland, not yet reported.
[9] *Texas* v. *White*, 7 Wall. 700 (1868), at p. 733.

fore appear to be a similar type of act, from the point of view of validity, to the divorce decree in *Adams*. Why then should different decisions be reached in the two cases?

In *Bilang*, the Court stated that the sole question was whether or not the Court making the grant was at the time a 'competent Court in any Commonwealth country' within the meaning of the *Administration Act, 1952* [10] (replaced by the *Act* of 1969). In *Adams*, the question of competence of the court pronouncing the divorce decree, in municipal law, was raised under common law principles.[11] The grant in *Bilang* was made by Mr. Perry, an Additional Assistant Master of the High Court of Rhodesia, appointed on 13 September 1966, i.e., after the Unilateral Declaration of Independence, by the Minister of Justice, acting under the *Administration of Estates Act, 1907*.

In *Madzimbamuto*, it was accepted that the Minister (*inter alia*) had been lawfully dismissed before this date.[12] The Court in *Bilang* took the view that the Minister of Justice was not qualified to act as such. However, the Court did not hold that the Minister's acts were therefore totally invalid. In the Court's judgment, as the United Kingdom legislation did not expressly forbid the act of Perry, his grant was competent, following *In re Aldridge*,[13] and the opinion of Lord Pearce in *Madzimbamuto*. It is not proposed, in this discussion, to investigate the question as to the extent to which those portions of Lord Pearce's dissenting judgment cited in *Bilang* can be reconciled with the majority judgment.

In *Aldridge*, a motion for *habeas corpus* was considered by the Court of Appeal. A prisoner, who had been tried in 1890 by Edwards, J., alleged that Edwards, J. was not then a judge. In *Buckley* v. *Edwards*,[14] the Privy Council had previously ruled the appointment invalid. *Aldridge*, although reported in 1897, was decided in 1893, the question of Edwards, J.'s appointment having been the subject of a 'political party fight' in Parliament in 1890.[15] In *Aldridge*, the Court held that the prisoner had been lawfully convicted by a *de facto* judge. However, there are strong indications that this principle does not extend to wilful abuse of office, still less by 'mere usurpers'.[16] Other opinions in that case amplified the concept of

[10] 15 Geo. I, c. 52, (N.Z.).
[11] [1970] 3 All E.R. 572, at p. 584.
[12] [1968] 3 All E.R. 561, at p. 577.
[13] (1897), 15 N.Z.L.R. 361.
[14] [1892] A.C. 387.
[15] (1927), 3 Butterworth's Fortnightly Notes 97.
[16] (1897), 15 N.Z.L.R. 361, at p. 372 (*per* Richmond, J.).

a 'usurper' as meaning 'a person without a colourable title'[17] and emphasised that Edwards, J. had acted 'by colour of right'.[18]

An American decision apparently regards usurpers as persons not 'clothed with the evidence of such offices and in apparent possession of their powers and functions'.[19] The exclusion of usurpers from the *de facto* judge concept in *Aldridge* was endorsed by the New Zealand Court of Appeal in *Fitzgerald* v. *MacDonald.*[20] In *Adams,* the Court suggested that the *de facto* judge principle is inconsistent with *R.* v. *Cronin.*[21] *Cronin* has been described as 'somewhat unsatisfactory'.[22] But, whether or not this case is directly in point, no consideration appears to have been given to the *de facto* judge question, reference only being made to cases on *venire de novo.* For this reason, *inter alia, Cronin* can hardly be described as decisive on this point.

In *Bilang,* the Court considered that the only defect in the appointment of Perry was that the power was exercised by a *de facto* Minister. However, the Court repeatedly and specifically termed the Smith Government 'the usurping power'. It would, therefore, appear that the Minister of Justice could correctly be termed a 'usurper' within the meaning of the exception to the *Aldridge* rule.

Let us then return to the discussion in *Adams* of the validity of the acts of a *de facto* judge. In that case, the Court held that the doctrine has never been applied 'under a usurping power'.[23] Although this ground is only one of several relied upon in *Adams,* it would appear that *Aldridge* and *Adams* can be reconciled on this point. However, in *Bilang,* the Court relied upon *Aldridge* (*inter alia*) but found some difficulty in distinguishing *Adams.* The Court did not read *Adams* as relying upon the lack of qualification of the appointing authority, but as relying upon the failure of the judge to qualify under the only valid constitution. The Court considered it perhaps more correct to view the appointment as one under a statute (constitution) declared by the United Kingdom legislation invalid. Insofar as *Adams* and *Aldridge* may conflict, the Court proposed to follow the latter as binding on this question,

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[17] *Ibid.,* at p. 379 (*per* Denniston, J.).
[18] *Ibid.,* at p. 380 (*per* Conolly, J.).
[19] *Norton* v. *Shelby County,* 118 U.S. 425 (1886), at p. 441.
[20] (1918), 37 N.Z.L.R. 769, at p. 789 (*per* Chapman, J.), and at p. 804 (*per* Herdman, J.).
[21] [1940] 1 All E.R. 618.
[22] R.B. Cooke, *Venire de Novo,* (1955), 71 L.Q.R. 100, at p. 106.
[23] [1970] 3 All E.R. 572, at p. 590.

unless the United Kingdom legislation expressly declared the act of Perry void, which it was held, was not the case. If the argument previously advanced concerning the 'usurpers' exception to the *Aldridge* rule is correct, then there is no conflict between *Aldridge* and *Adams*. As the Court in *Bilang* regarded the Smith Government, including the Minister of Justice, as 'usurpers', it might be argued that this, of itself, rendered any actions of the Minister of Justice invalid.

This line or argument would, of course, totally avoid the question of the status of the Governor's statements, and the precise scope of the subsequent statement of the Secretary of State for Foreign and Commonwealth Affairs that '[t]he former Governor's injunction has lapsed'.[24] The Governor's directive to all citizens 'to carry on with their normal tasks' was given prominence in *Bilang*, but it is not clear that this directive, alone, was decisive.

However, it will be pointed out that the practical result of *Bilang* is unavoidable. As Lord Pearce emphasised in *Madzimbamuto*, the law should, even in the case of rebellion, have some regard to the preservation of the citizens from chaos and disorder.[25] It is therefore suggested that the same result could be achieved by another route. The Court in *Bilang* cited and discussed at some length both *Madzimbamuto* and *Adams*. It is submitted that the judgment in *Bilang* proceeds on lines very similar to those which an English court would have pursued, with some significant differences. But, for a New Zealand court, Southern Rhodesia is either a colony of a foreign state, the United Kingdom,[26] or an independent state. If the New Zealand court, with or without an executive certificate, reaches the conclusion that Southern Rhodesia is still a colony of the United Kingdom, the question would then arise of the attitude to be taken to the action of foreign 'usurpers'. In *Madzimbamuto* and *Adams*, the basic question was that of the validity of acts of what may be termed indigenous 'usurpers'. Recent *dicta* regarding the acts of non-recognised governments [27] may provide a solution to this problem.[28] This view may provide a more

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[24] Parliamentary Debates (Hansard), House of Commons, H.M.S.O., (London, 1969-70), 5th series, Vol. 797, at pp. 13 *et seq.*; quoted in *Adams* v. *Adams*, [1970] 3 All E.R. 572, at p. 583.

[25] [1968] 3 All E.R. 561, at p. 581.

[26] *Cf.* A. Quentin-Baxter, *Rhodesia and the Law*, (Wellington, 1970), at p. 39.

[27] *Carl Zeiss Stiftung* v. *Rayner & Keeler (No. 2)*, [1967] 1 A.C. 853, at pp. 903, 907-908.

[28] Quentin-Baxter, *op. cit.*, n. 26, at p. 43.

certain rule that that adopted in *Bilang*. If the court examines each case using the *Bilang* test, every situation will require consideration separately. Regarding the problem as one of the validity of acts of an unrecognised foreign government, a single test for validity may well prove sufficient.

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