The Privy Council and the Gentle Revolution

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1.

Of the great cases decided since World War II, few can surpass the Rhodesian case of *Madzimbamuto* v. *Lardner-Burke and Another*[1] in interest. Part and symptom of that war's aftermath, *Madzimbamuto's* case raised basic issues of the nature of law and its creation by revolutionary process. Names seldom heard outside the lecture room flit through the arguments: Grotius and Pufendorf, Bynkershoek, Bacon and Hawkins, Kelsen and Olivecrona. Articles commenting on the case appeared before the ink on the judgments handed down in the Court of First Instance was dry, and by now the score is in the neighbourhood of a dozen.[2] The legal problems raised in argument will be discussed, with emotive heat or academic detachment, for years to come, until they will find permanent resting places in the standard works on constitutional law, public international law and jurisprudence.

The drama unfolded in three acts. Act One took place in the General Division of the High Court of Rhodesia,[3] Act Two in the Appellate Division.[4] For Act Three, the scene shifted to the Privy

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[1] As to the references, see n. 3, 4 and 5 *infra.*

[2] Mention may be made here to the following: A.M. Honoré, *Reflections on Revolutions,* (1967), 2 Irish Jurist 268; J.M. Eckelaar, *Splitting the Grundnorm,* (1967), 30 Mod. L.R. 156; Claire Palley, *The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary,* (1967), 30 Mod. L.R. 156; R.S. Welsh, *The Constitutional Case in Southern Rhodesia,* (1967), 83 L.Q.R. 65; Alan Wharam, *Treason in Rhodesia,* (1967), 25 Camb. L.J. 189; R.W.M. Dias, *The U.D.I. Case: The Grundnorm in Travail,* (1968), 26 Camb. L.J. 233; L.C. Green, *Rhodesian Independence-Legal or Illegal,* (1968), 6 Alberta L.R. 37; J.M. Eckelaar, *Rhodesia: The Abdication of Constitutionalism,* (1969), 32 Mod. L.R. 19; R.H. Christie, *Practical Jurisprudence in Rhodesia,* (1969), 2 Comp. & Intern. Law Journal of Southern Africa 3; F.M. Brookfield, *The Courts, Kelsen and the Rhodesian Revolution,* (1969), 19 U. of Tor. L.J. 326.

[3] Judgment GD/CIV/23/66, obtainable from the Government Printer, Salisbury, Rhodesia.

[4] (1968) 2 S.A. 284 (R.A.D.). Application for leave to Appeal to the Privy Council was refused by the Rhodesian court, (1968) 2 S.A. 457 (R.A.D.), but was subsequently granted by the Privy Council.

Council Chambers in London.[5] *R.* v. *Ndhlovu*[6] declaimed the Rhodesian Epilogue.

The facts in *Madzimbamuto* were simple. On November 11th, 1965, Mr. Smith and his Ministerial colleagues issued their *Unilateral Declaration of Independence (U.D.I.)* and created a new Constitution for Rhodesia. On November 16th, 1965, the Parliament of the United Kingdom passed the *Southern Rhodesia Act,*[7] which was immediately followed by the *Southern Rhodesia Constitution Order,* 1965,[8] declaring the new Rhodesian government illegal and all its acts, laws and decrees invalid. At the time of *U.D.I.*, Madzimbamuto was detained under emergency regulations, making provision for the summary arrest or detention of any person in the public interest. These regulations had been lawfully issued in terms of the *Emergency Powers Act,* 1960, which empowered the Governor to declare by proclamation a state of emergency, provided that no such proclamation was to remain in force for more than three months, unless it was renewed for further periods of three months at a time. The state of emergency under which Madzimbamuto was detained came to an end on February 4th, 1966. The Smith government prolonged it from time to time under the 1965 Constitution and issued new emergency regulations, under which Madzimbamuto's detention was continued.

The validity of Madzimbamuto's detention was challenged by his wife (not, be it noted, by Madzimbamuto himself) on the ground that the Rhodesian government was an illegal government and that, in consequence, the declaration of a state of emergency and the issue of a detention order were invalid.

The General Division of the Rhodesian Court (Lewis and Goldin, JJ.) held that the 1965 Constitution was not a lawful constitution and that Mr. Smith's government was not a lawful government, but upheld the validity of the emergency regulations and the detention order on grounds of state necessity. As Lewis, J. put it,

> The Government is the only effective Government of the Country, and therefore on the basis of necessity and in order to avoid chaos and a vacuum in the law, this Court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order.

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[5] (1968) 3 All E.R. 561.
[6] (1968) 4 S.A. 515 (R.A.D.).
[7] 13-14 Eliz. 2, c. 76.
[8] 1965 S.I. 1952.

The Appellate Division of the High Court, before which the matter came on appeal, concurred with the General Division in holding that the emergency regulations issued by the new Rhodesian government were valid, but it was along different routes that the five judges arrived at this result.

Beadle, C.J., held that the Smith government was a fully *de facto* government, though not yet 'quite' a government *de jure*, and that, having effectively usurped the governmental powers granted Rhodesia under the 1961 constitution, it could lawfully do anything which its predecessor could lawfully have done. He added the rider that 'until its new constitution is formally established and thus becomes the *de jure* constitution of the Territory, its administrative and legislative acts must conform to the 1961 constitution.' Jarvis, J.A., substantially concurred with him.

Quènet, J.P. and Macdonald, J.A. considered that for internal purposes the Smith government was a government *de jure* as well as *de facto* and that, consequently, all its acts and measures were valid.

Fieldsend, A.J.A., who subsequently resigned from the Rhodesian Bench on conscientious grounds, disagreed. In his view the Rhodesian court, having been created in terms of a written constitution, had 'no jurisdiction to recognize either as a *de jure* or *de facto* government any government other than that constitutionally appointed under that constitution'. He declared himself, however, prepared to uphold such measures as were justified by necessity.

Thus the Appellate Division, by a majority of four to one, decided the crucial issue, *viz.*, whether the Rhodesian government could effectively legislate, in favour of the Rhodesian government. On a technical point, however, the appeal of Madzimbamuto's wife succeeded. Unlike previous detention orders, the detention order under which Madzimbamuto was being detained had not been made under the pre-1965 section of the emergency regulations, but under a newly added, wider section. The Appeal Court held that this section was *ultra vires*.

The appellant's victory was but a short-lived one. The defect in the issue of the order was remedied and Madzimbamuto's detention continued.

Madzimbamuto's wife now appealed to the Privy Council.[9] The Rhodesian government, which no longer recognized the jurisdiction of the Board, was not represented, but the Privy Council appointed

[9] It will be remembered that the Rhodesian Court had refused her leave to appeal: *supra*, n. 4.

an *amicus curiae*. The judgment of the majority of the Board — Lords Reid, Morris of Borth-Y-Gest, Wilberforce and Pearson — was that by the *Southern Rhodesia Constitution Order*, 1965, and the *Southern Rhodesia Act*, 1965, Rhodesia had been effectively deprived of the power to legislate for itself, and that the Government in control was not a lawful government. It followed that both the emergency regulations and the detention order were invalid. Lord Pearce dissented.

Rhodesia had the last word in *R.* v. *Ndhlovu*,[10] where, in reliance on the Privy Council judgment, a number of accused persons protested the validity of a criminal indictment on the ground that all acts of the Rhodesian government and its agents were invalid. Confirming the judgment of the General Division, the Appellate Division of the Rhodesian High Court decided that the 1965 Constitution was now the only valid constitution of Rhodesia; that the present Rhodesian government was Rhodesia's only lawful government; and that the judgment of the Privy Council was not binding on Rhodesian courts. The transition from a *de facto* to a *de jure* government was thus, in the Court's view, complete.

To do justice to the arguments of learned counsel, the closely reasoned judgments, the erudite articles of a multitude of eminent writers, would require a book, not an article. In accordance with the logistics of the limited objective, this article will be confined to a critique of the Privy Council decision.

Compared with the Rhodesian judgments, the judgment that Lord Reid delivered on behalf of the majority in the Privy Council was short and simple. Put in a nutshell, it comes to this: undivided sovereignty over Rhodesia vests in the Crown. The *United Kingdom Act* and Order-in-Council of 1965 had full effect in the territory, depriving the Rhodesian Legislature of the power to make laws. In consequence, the usurping government in Rhodesia is not a lawful government, and all its acts and decrees are invalid. Assuming the principle stated by Grotius in *De Jure Belli et Pacis* [11] that the acts

[10] See *supra*, note 6.

[11] 1.4.15: 'We have spoken of him who possesses or has possessed the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, King, or senate, would prefer that measures promulgated by him should meanwhile have the Force of Law, in order to avoid the often confusion which would result from the subversion of Laws and suppression of the Courts'.

part of modern law, it cannot override the right of the Parliament of the United Kingdom to make binding laws for Rhodesia.

Quoting *Uganda* v. *Commissioner of Prisons*[12] and *The State* v. *Dosso*,[13] Lord Reid briefly referred to the possibility of a new legal order being established by revolution, but rejected it for Rhodesia on the ground that 'the British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed'.[14]

Lord Pearce in his dissenting judgment agreed with the majority that the United Kingdom could legislate for Rhodesia, and that 'the *de facto* status of sovereignty cannot be conceded to a rebel government as against the true Sovereign in the latter's courts of law.'[15] However, on the principle of 'state necessity' or 'implied mandate', he considered that acts done by those actually in control might be recognized as valid in so far as they were reasonably required for the orderly running of the State.

As to the effect of the United Kingdom legislation of 1965, Lord Pearce remarked:[16]

> ...for the present argument it makes no difference if an Order-in-Council expressly made acts illegal and void, so that instead of being plainly illegal and void as contrary to the lawful Constitution and lawful Government of Rhodesia they also become illegal and void as contrary to an Order-in-Council. They were still subject to the principle of necessity or implied mandate and still within the margin of tolerance laid down in the Governor's directive. There is no indication in the Order-in-Council that it intended to exclude the doctrine of necessity or implied mandate by enjoining (inconsistently with the Governor's directive) continuing disobedience to every act or command which had not the backing of lawful authority. Even had it done so, I feel some doubt as to how far this is a possible conception when over a prolonged period no steps are taken by the Sovereigu himself to do any acts of government and the result would produce a pure and continuous chaos or vacuum.

He concluded:[17]

> Perhaps one may emphasize, what should be obvious, that no question as to "the merits" of the main contest between the lawful ruler and the illegal government have any relevance whatever to the arguments in this case. Questions of martial law do not depend on the merits of an

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[12] [1966] E.A. 514.

of sovereignty exercised by a usurper have obligatory force, forms

[13] [1958] 2 P.S.C.R. 180; (1959), 1 Pak. L.R. 849.

[14] [1968], 3 All E.R. 561 at p. 575.

[15] *Ibid.*, at p. 579.

[16] *Ibid.*, at p. 587.

[17] *Ibid.*, at p. 587.

invasion. When a state of rebellion or invasion exists the law must do its best to cope with resulting problems that beset it.

2.

The key to an understanding of the problems raised by *Madzimbamuto's* case lies in the realization that in adjudicating upon the validity of the acts of a rebel government, different answers may have to be given by a court of the break-away country, a court of the country seceded from, and the court of a 'neutral', uninvolved country. This is implied in several of the judgments in *Madzimbamuto* and clearly set out in Noël-Henry's *Les Gouvernements de Fait devant le Juge.*[18]

The first point the judge in the country seceded from or a neutral country has to consider is whether his government has recognised the usurper as the sovereign of the break-away country. If the answer is in the affirmative, he has to accept him as such and treat his acts and decrees as valid. If it is in the negative, he is precluded from recognizing the new authorities as the legal government of the rebellious territory. On the question whether in the latter case all the acts and decrees of the usurper have to be treated as absolute nullities, American and English law differ.

In America, the problem cropped up after the Civil War, when the courts of the United States found themselves called upon to pronounce upon the validity of acts and decrees that had emanated from the secessionist governments during the war. In a long line of decisions, the Supreme Court held that, though the rebel governments had to be treated by the courts as unlawful, acts done by them had nevertheless to be recognized as valid in so far as they were reasonably required for the ordinary orderly running of the State and were not done with 'hostile intent', in promotion of the rebellion.

Expressive of the 'civil-war' line of cases are *Texas* v. *White,*[19] *Sprott* v. *U.S.,*[20] *Williams* v. *Bruffy*[21] and *Baldy* v. *Hunter.*[22]

In *Williams* v. *Bruffy,*[23] Mr. Justice Field put the matter thus:

> The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had

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[18] Doctoral Thesis, Paris, 1927. See also L.C. Green, (1958), 6 Alberta L.R. 37 at p. 54.

[19] (1868), 19 L. Ed. 227.

[20] (1874), 22 L. Ed. 371.

[21] (1877), 24 L. Ed. 716.

[22] 171 U.S. 388 (1897), 18 S. Ct. 89; 43 L. Ed. 208. See also *Horn* v. *Lockhart* (1873), 21 L. Ed. 657.

[23] (1877), 24 L. Ed. 716 at p. 720.

existed in the State [Virginia] prior to the rebellion, remained during its continuance and afterwards. As far as the Acts of the States do not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens under the Constitution, they are, in general, to be treated as valid and binding.

And in *Baldy* v. *Hunter*,[24] the law was summed up by Mr. Justice Harlan as follows:

From these cases it may be deduced...

That the transactions between persons actually residing within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so-called Confederate States;

That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience nor destroy the bonds of society nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame "except when proved to have been entered into *with actual intent* to further invasion or insurrection"; and

That judicial and legislative acts in the respective states comprising the so-called Confederate States should be respected by the courts if they were not "hostile *in their purpose*" or mode of enforcement to the authority of the national government and did not impair the rights of citizens under the Constitution.

(the italics are Mr. Justice Harlan's).

The same approach was adopted, in a somewhat different context, when in the 1920's, American courts had to pronounce upon the validity of acts of the Soviet Government, which at that time was not yet recognized by the State Department. In *Sokoloff* v. *National City Bank*,[25] the opinion of the Court was summarized in the headnote as follows:

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[24] 43 L. Ed. 208, at p. 213.

[25] 239 N.Y. 158 (1924); 145 N.E. 917.

> [w]hile unrecognized government may be viewed juridically as no government, if power withholding recognition so chooses, government *de facto*, though formally unrecognized because deemed unworthy of place in society of nations, may possibly gain quasi governmental validity for its acts or decrees, if violence to fundamental principles of justice or public policy might otherwise be done.

Elaborating on this theme, Cardozo, J. said:[26]

> Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War. In those litigations acts or decrees of the rebellious governments, which, of course, had not been recognized as governments *de facto*, were held to be nullities when they worked injustice to citizens of the Union, or were in conflict with its public policy. ... On the other hand, acts or decrees that were just in operation and consistent with public policy were sustained not infrequently to the same extent as if the governments were lawful. ... These analogies suggest the thought that, subject to like restrictions, effect may at times be due to the ordinances of foreign governments which, though formally unrecognized, have notoriously an existence as governments *de facto*.

Putting the same idea more briefly, Mr. Justitce Lehmann of the New York Court of Appeal said in *Russian Reinsurance Co.* v. *Stoddard*:[27]

> [The Soviet Government's] rule may be without lawful foundation; but, lawful or unlawful, its existence is a fact, and that fact cannot be destroyed by juridical concepts.

Again, in *Upright* v. *Mercury Business Machines Co.*,[28] Mr. Justice Breitel stated:

> ...only limited effect is given to the fact that the political arm has not recognized a foreign government. Realistically, the courts apprehend that political nonrecognition may serve only narrow purposes. While the judicial arm obligates itself to follow the suggestions of the political arm in effecting such narrow purposes, nevertheless, it will not exaggerate or compound the consequences required by such narrow purposes in construing rights and obligations affected by the acts of unrecognized governments....

He continued:

> It is a false notion, if it prevail anywhere, that an unrecognized government is always an evil thing and all that occurs within its governmental purview are always evil works. There are many things which may occur within the purview of an unrecognized government which are not evil and which will be given customary legal significance in the courts of nations which do not recognize the prevailing *de facto* government. In a time in which

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[26] 145 N.E. 917 at pp. 918-9.
[27] 240 N.Y. 149 (1925) at p. 158; 147 N.E. 703 at p. 705.
[28] 213 N.Y. Supp. 417 (1961) at p. 420, and p. 422.

> governments with established control over territories may be denied recognition for many reasons, it does not mean that the denizens of such territories or the corporate creatures of such powers do not have the juridical capacity to trade, transfer title, or collect the price for the merchandise they sell to outsiders, even in the courts of nonrecognizing nations....

The American approach is also that of the Continental courts. In two Dutch cases, decided by the *Hooge Raad* in 1840[29] and 1847,[30] the validity of measures of internal government enacted by those in *de facto* control of the Province of Limburg during the secession of that Province from the Kingdom of the Netherlands during the 1830-39 revolt came under review. The *Hooge Raad* held that in accordance with principles accepted by 'all civilized nations', the measures of the usurper, except those specially dealt with by the legal government after the restoration, should remain in force *'ex utilitate publica'*. The same attitude, it would seem, was taken by the Swiss *Bundesgericht* in 1905 in *Zieglersche Tonwarenfabrik ca. Kanton Schaffhausen.*[31]

In Western Germany, there have been numerous cases since the last war, in which effect was given to East German decrees and judgments, despite the fact that the German People's Republic remains unrecognized. And when in the Rhodesian banknote case the British Government applied to the German courts for the seizure of banknotes printed by a German firm for the 'illegal' Rhodesian Reserve bank in Salisbury, the *Oberlandesgericht* in Frankfurt apparently adopted the same approach as the High Court in Salisbury, holding, in the words of Professor L.C. Green,[32] that effect had to be given 'to those measures which could be construed as necessary for normal administration by the authority able to carry them out'.

In English law, the question is, according to an *obiter* statement of Lord Wilberforce in *Carl Zeiss Stiftung* v. *Rayner and Keeler (No. 2)*,[33] still an open one. After stating that:

> In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary

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[29] *Weekblad van het Recht*, 15th October, 1840.

[30] *Weekblad van het Recht*, 28th August, 1847.

[31] *Zeitschrift für Völkerrecht und Bunderstaatsrecht*, (1907) 1 at p. 728.

[32] (1968), 6 Alberta L.R. 37 at p. 65. As I was unable to procure a copy of the German judgment I relied here largely on Professor Green's article.

[33] [1967] A.C. 853 at p. 954.

> has to prevail, give recognition to the actual facts or realities found to exist in the territory in question,

he went on to say:

> No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total individuality of all laws and acts flowing from unrecognised governments.

However, what cases there are, from *Ogden* v. *Folliot*[34] to *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.*[35] (for obvious reasons generally referred to more briefly as *Luther* v. *Sagor*) and *Banco de Bilbao* v. *Sancha,*[36] though not conclusive, lean towards total non-recognition. The Privy Council decision in *Madzimbamuto* (in which, incidentally, Lord Wilberforce concurred with the majority) does not settle the issue, for in that case there was not only refusal of recognition, but legislation expressly annihilating the Rhodesian government and all its works. However, the impression one gains (perhaps wrongly) from reading Lord Reid's judgment is that even if there had been no such legislation, but mere non-recognition, the Privy Council would not have recognized the validity of acts of the Rhodesian government even on a selective basis.[37]

Though there is no basic difference betwcen the rules by which the judges in the country rebelled against and those in a neutral country guide themselves, there is an important practical difference: whereas government and courts in a neutral country are emotionally uninvolved, the government and courts in the country seceded from will tend to regard the very existence of the new government as an affront to their country and its legal order. In the result, the government of the mother country will be inclined to deny the existence of the rebel government long after other countries have recognized it, and her courts will be less generous in admitting the validity of its acts than those of a non-involved state.

3.

Entirely different considerations apply when a court within the break-away country is seized of the matter. Provided the revolutionary government is in fact in power, the judges, whether appointed by the old or the new government, have no choice but to apply its

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[34] (1790) 3 T.R. 725; 100 E.R. 825.
[35] (1921) 1 K.B. 456.
[36] (1938) 2 K.B. 176 (C.C.A.).
[37] See the statement by Lord Reid that is quoted *infra*, at p. 108 (note 61).

decrees, not because they favour the new order or are afraid for their jobs, but because as judges they have to apply the law that is, and not the law that was and, perhaps in their own view, ought to be restored. There is, of course, nothing to prevent a judge who is out of sympathy with the new regime to resign from office, as Mr. Justice Fieldsend in Rhodesia eventually did,[38] but as long as he carries on, it is no part of his task to assist in dislodging the revolutionary government from power, just as it is no part of his task to assist it in maintaining itself in power. His task as a judge is to decide cases, 'without fear, favour or affection', according to the law of the land.

By giving effect to the decrees of the new Rhodesian Government, the judges of Rhodesia did not, therefore, support an illegal regime or become false to their oath to the Queen. They merely, as they were in duty bound, applied 'the law'. If out of loyalty to Britain, they would have ignored the decrees of the new government, they would have based their decision on a legal order that no longer existed. Judicial discretion does not embrace the power to decide on facts known by the judge to be untrue.

The matter was clearly put by Beadle, C.J., when he said in his judgment in the Appellate Division:[39]

> ...Judges do not "enforce" the law; they merely "declare" it. Enforcement is a matter for the administration. In this regard the remarks of Chase, C.J., in *Shortridge* v. *Mason*[40] (U.S. Circuit Court, North Carolina, date not available) are in point. At p. 97 of this report he is reported as saying: "Courts have no policy. They can only declare the law." ... It is a wrong conception, therefore, to imagine that the judges, by "enforcing" or not "enforcing" a particular constitution, can play a part in the resolution of the struggle for political power which occurs in the time of revolution. "Law enforcement" is not a judicial function, and the courts should not involve themselves in the political struggle for power; much less should the political predilections of the individual judge be a decisive factor in determining the judgment of the court.

He continued:

> It seems to me that at any one time in any one place there can only be one correct law. That law cannot vary with the political views of the individual judge who "declares" it. This, of course, is by no means the same thing as saying that the judge, having declared the law as he finds it to be, or even before so declaring, must necessarily remain in office and apply that law. Here his personal views may play a part, because in certain circumstances the judge may decide that rather than continue as

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[38] Mr. Justice Young followed him in resigning, after the Appellate Division had refused to give effect to the decision of the Privy Council.

[39] (1968) 2 S.A. 284 at pp. 326-7.

[40] 1 Abb. U.S. 58; 5 Amer. Law Rev. 95; 1 Amer. Law T. Rep. U.S. Cts. 35.

> a judge and apply such law he will go. So long, however, as he continues to sit as a judge he must declare the law as it "is" and not as it "was", or as what he thinks it "ought" to be.

The point that, as far as the judge in the territory in secession is concerned, all acts of the revolutionary government are valid, is made with admirable clarity by Noël-Henry in his work on *'Les Gouvernements de Fait Devant le Juge'*. Before he deals with the approach of the *'Juge Interne'* (*i.e.* the judge of the country seceded from) and the *'Juge Tiers'* (*i.e.* the judge of a neutral country), he considers briefly the position in the territory controlled by the new government. Here, he sees no problem:

> Pendant que le gouvernement de fait est au pouvoir, aucune difficulté ne se présente. Il est généralement obéi par les organes de l'Etat: les fonctionnaires exécutent ses ordres, les tribunaux rendent la justice en son nom et appliquent les lois qu'il édicte...[41]

It is only after the *de jure* government has been restored to power (as was the case in the *Texas* v. *White* line of cases) that the validity of the legislative and administrative acts of the *de facto* government can be questioned by a domestic court.

While there is, for obvious reasons, not much case law on the point, such cases as there are — *The State* v. *Dosso*,[42] *Uganda* v. *Commissioner of Police*,[43] the two Dutch cases of 1840 and 1847[44] — support the view that as long as the usurper is in power his word is law. The American cases, from *Texas* v. *White*, are, strictly speaking, not in point, for they deal with the validity of acts of a secessionist government as seen through the eyes of the courts of the lawful sovereign, *post facto*, after the revolution has been put down. However, there are strong dicta supporting the view that courts functioning under a rebel government have no choice but to recognize its acts and decrees. Thus, Chief Justice Taney in *Luther* v. *Borden*[45] remarked that:

> The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted has been put aside and displaced by an opposing government, it would cease to be a court and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it

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[41] *Les Gouvernements de fait devant le juge*, Noël Henry, 1927, Paris, at p. 5.
[42] See *supra*, note 13.
[43] See *supra*, note 12.
[44] See *supra*, notes 29, 30.
[45] (1847-1850), 12 L. Ed. 581 at p. 598.

> decides at all as a Court, it necessarily affirms the existence and authority of the government under which it was exercising judicial power.

Again, in *Thorington* v. *Smith*,[46] Mr. Chief Justice Chase remarked:

> There are several *degrees* of what is called *de facto* government. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations, assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

No one seems to have been able to find a reported case in which a court of one of the rebellious Southern States pronounced upon the validity of governmental acts while the civil war was in progress, but the reason is not difficult to guess. A counsel who would have raised the point, a judge who would have considered it, would have taken their lives in their hands. The reason why the matter could be calmly debated in a Rhodesian court was that the Rhodesian revolution was, as revolutions go, a gentle one. Always the most loyal of British subjects, Rhodesians were half-hearted revolutionaries, who tried valiantly to achieve independence without severing their ties with Britain and its institutions.

If it be asked whence the new law derives its force, the answer lies in what Jellinek in his *Allgemeine Staatslehre*[47] called the *'normative Kraft des faktischen'* — the power of a factual situation to create new law.

> *In der überwiegend grossen Zahl der Fälle bernht die Bildung neuer Staatsgewalten auf Vorgängen, die jede Möglichkeit rechtlicher Qualifikation von vornherein ausschliessen.*[48]

And again:

> *Die Ausübung der Staatsgewalt durch den Usurpator shcafft sofort einen neuen Rechtszustand, weil hier Keine Instanz vorhanden ist, die die Tatsache der Usurpation rechtlich ungeschehen machen Könnte.*[49]

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[46] (1868), 19 L. Ed. 361 at p. 363.

[47] (1960) 3rd. ed., pp. 337 *et seq.*

[48] *Ibid.*, at p. 42. 'In the overwhelming number of cases the formation of new state powers depends upon events which from the beginning exclude any possibility of legal justification' (My translation).

[49] *Ibid.*, at p. 340. 'The exercise of the power of the State through the usurper creates at once a new legal order, since there is no court which could legally under the fact of usurpation' (My translation).

4.

Lord Reid in the majority judgment considered that the concepts of *de facto* and *de jure* governments, on which so much reliance was placed in the Rhodesian courts, 'are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control'.[50] He also said that 'their Lordships are satisfied that it [the Statute of 1495] cannot be held to enact a general rule that a usurping government in control must be regarded as a lawful Government'.[51]

With all respect to a great judge of one of the world's great courts, these statements obscure rather than enlighten. The terms *'de facto'* and *'de jure'* governments are employed in two different contexts. In international law, they denote stages in the recognition of a new government by the governments of other countries, and this may well be the meaning which comes first to the lawyer's mind today. But they also are employed in a second meaning, which is really the earlier and primary one, where they denote just what they say: a government that rules in fact and a government that is legally entitled to rule. When the term *'de facto* government' is used in this sense, it is purely a statement of fact, signifying that within the territory in question a particular person, body or party exercises, to borrow from Lord Atkin's statement in *The Arantzazu Mendi*,[52] 'all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government'. To speak of a government as one *de jure*, on the other hand, is to make a value judgment. It signifies that in the eyes of the person making this statement, the government is entitled to govern. The term *de jure* government is normally used of a government that governs in fact and is entitled to do so. Occasionally, the term is applied to a government that does not in fact rule but is in law entitled to do so, but this is a misuse of the term, for such a government is, at the moment, a non-government, though it may have been a government in the past and may become one again in the future. Conversely, an illegal government is not a non-government, but a government *de facto* which, though legally not entitled to do so, exercises for the time being executive power.

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[50] (1968) 3 All E.R. 561 at p. 573.
[51] *Ibid.*, at p. 575.
[52] [1939] A.C. 256 at pp. 264-5.

There is a large measure of agreement on this point. 'Any established government', says Austin,[53] 'be it deemed lawful or be it deemed unlawful, is a government *de facto*. ... In strictness, a so called government *de jure* but not *de facto* is not a government. It merely is that which was a government once, and which (according to the speaker) ought to be a government still'.

Austin adds that:

> In respect of *positive law*, a sovereign political government which is established or present, is neither lawful nor unlawful, neither rightful nor wrongful, neither just nor unjust. Or (changing the expression) a sovereign political government which is established or present, is neither *legal* nor *illegal*.

Similarly, Montague Bernard[54] remarks:

> A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A *de facto* Government is one which is really in possession of them, although the possession may be wrongful or precarious.

Paton, in commenting on Austin's definition of law, says:[55]

> [I]n emphasizing that positive law is such only if it is in effective operation in a particular community Austin makes an important point.

Earlier, he said:[56]

> The validity of a legal system as a whole depends on the fact that it is accepted by, and therefore capable of enforcement over, a given community.

Kelsen states[57] that:

> A legal order is regarded as valid, if its norms are by and large effective (that is, actually applied and obeyed).

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[53] *Jurisprudence*, Austin, 1911; Vol. I, p. 327.

[54] *Neutrality of Great Britain during the American Civil War*, London, 1870, p. 108. See also Hale, *Pleas of the Crown* (1682), pp. 58-61, 101, 103; further, Hawkins, *Pleas of the Crown* (1716-1720), Vol. 1, p. 10: 'As to the third point, *viz.*, who is a king within this act [*i.e.* the Treason Act]? It seems agreed, that every king for the time being in actual possession of the crown, is a king within the meaning of this statuto, for these is a necessity that the realm should have a King, by whom and in whose name the laws shall be administered; and the King in possession being the only person who either doth or can administer those laws, must be the only person who has a right to that obedience which is due to him who administers those laws; and since by virtue thereof he secures to us the safety of our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.'

[55] *Jurisprudence*, Paton, 1964, 3rd., p. 77.

[56] *Ibid.*, at p. 77.

[57] *Pure Theory of Law*, 1967, at p. 212. Similarly, Jellinck, *op. cit.*, at p. 360: '*Alles Recht ist peaktischer Natur und muss sich irgendwie im Leben bewähren und durchsezen Können*'.

It is clear that since *U.D.I.*, the present Rhodesian government has effectively exercised governmental powers in Rhodesia, without a rival making even a pretence of governing. Equally clearly, ever since *U.D.I.*, the British Government has been a 'non-government' in Rhodesia, incompetent 'to redress grievances, to afford protection, and, generally, to execute the laws'.[58] The shopkeeper in Salisbury who has a burglary, the farmer in the country districts who is attacked by robbers, receives protection from the Smith government — he would look in vain for it to Britain.

The mere fact that the British government is trying to regain control and continues to claim from a distance of 5,000 miles that sovereignty over Rhodesia vests in Great Britain, amounts to no more than an asseveration that Britain is *de jure* entitled to be restored as the ruler of Rhodesia. It cannot alter the fact that, whatever the future may hold, for the time being Britain's writ no longer runs in that country. Nor can the so-called 'sanctions-war' be equated to a struggle for power within the country. Economic sanctions (normally directed against a nation, *e.g.* Italy in the Abyssinian War) are intended to persuade a government to change voluntarily its course. They amount to an implied recognition that it is *de facto* in power.

Nor does it detract from the position of the Rhodesian government as a *de facto* government, that it is not recognized as such, either by Britain or any other country. Ideally, of course, recognition should follow fact. As Berber puts it in his work on *Public International Law*:[59]

> It is of the essence of the recognition of a government, which becomes acute only if power is illegally acquired, that it is not the question of legality, but of the effectiveness of the governmental power that must be tested as a prerequisite of recognition; *i.e.*, the (new) government, in order to qualify for recognition, must be able to undertake the factual control of the apparatus of government, and to exercise its activities without substantial resistance; the absence of resistance need not rest on free consent; it is sufficient in public international law, if the people submit *de facto* to the new government, whether happily, indifferently or grumblingly, voluntarily, or out of fear.

However, in modern practice recognition of a new foreign or rebel government even as a *de facto* government has become a political act, granted or refused on grounds that have nothing to do with its existence or stability. It may well happen, therefore,

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[58] *Respublica* v. *Chapman* (1781), 1 L. Ed., at p. 35, per Chief Justice M'Klean.
[59] Berger, *Public International Law*, (1960) Vol. 1, at p. 235.

as was the case in Rhodesia, that a government that *de facto* exists is yet not recognised as such by other nations.[60]

It follows that, whatever its position in international law may be, the present Rhodesian government is, for domestic purposes, the only government in Rhodesia whose commands bind citizens and courts alike. A non-recognised *de facto* government is not a non-government.

5.

The problems with which the Privy Council found itself faced in *Madzimbamuto's* case were largely caused by the gap between fact and fiction. Under the United Kingdom legislation of 1965, the British government was the ruler of Rhodesia, the Rhodesian government a non-entity. In fact, the Rhodesian government was the effective ruler in Rhodesia, while the British government was a 'non-government'. The way in which the British government blew hot and cold did not alleviate the difficulties. On one side, she promoted legislation which, by purporting to eliminate the only effective government in Rhodesia, was calculated to produce chaos and confusion. On the other side, she called upon the judiciary, armed services, police, public service and man-in-the-street to maintain law and order in the country and to carry on with their normal tasks, in order to avoid chaos and confusion.

The majority judges, while of course well aware of the dilemma, considered themselves bound by the letter of the law.

Said Lord Reid:[61]

> Her Majesty's Judges have been put in an extremely difficult position. But the fact that the judges among others have been put in a very difficult position cannot justify disregard of legislation passed or authorised by the United Kingdom Parliament, by the introduction of a doctrine of necessity which in their Lordships' judgment cannot be reconciled with the terms of the Order in Council. It is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to laws made by the usurping Government, to such extent as may be necessary for that purpose.

Lord Pearce agreed with the majority judges that the acts of a *de facto* government are not *per se* valid but accepted the principle laid down in the American cases that 'acts done by those

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[60] See the *Tinoco Arbitration*, where Chief Justice Chase remarked that non-recognition of a government does not mean that it cannot be a *de facto* government: Briggs, *Law of Nations*, 2nd. ed., at p. 202.

[61] (1968) 3 All E.R. 561 at p. 578.

actually in control without lawful validity may be recognised as valid or acted upon by the Courts, with certain limitation . . .'[62]

Lord Pearce found the basis for this doctrine in 'state necessity', as rationalized in Grotius' civilized fiction (which he calls 'sound common sense') that the humane ruler would rather have his erring children obey the usurper than expose them to anarchy.[63] That the British Government, while purporting to dismiss the Rhodesian ministers and legislature, had done nothing effective to fill the vacuum reinforced him in his views.

It is clear that from a strictly logical point of view, the majority judgment is unassailable. 'The Queen as the true sovereign of Rhodesia has dismissed the Smith government from office. The British legislature has passed legislation declaring any law made, business transacted, step taken or function exercised by any person not authorized by the Queen to be void and of no effect. *Ergo:* all decrees, laws and administrative acts issued or executed by the present Rhodesian government are invalid.' It is a perfect syllogism.

But logic, taken to extremes, is a dangerous guide. In practice, as Cardozo, J. pointed out in *Sokoloff's* case,[64] 'juridical conceptions are seldom, if ever, carried to the limits of their logic'. Assuming the 1965 legislation amounted to no more than non-recognition spelled out at length, this was surely an opportunity for accepting, as Lord Pearce did, the American (and Continental) doctrine that an unrecognized government may still be a *de facto* government, and that, if justice is to be done, some of its acts ought to be recognized even though the government is not. It is clear from Lord Reid's judgment that, somewhat inconsistently with their rigidly positivist approach to the 1965 legislation, the majority judges would have been prepared to recognize the Rhodesian government as a *de jure* government, had they been convinced of the efficacy of the change.[65] Why then boggle at the recognition of its necessary acts as a government *de facto*?

Conceded, it is an elementary principle of English law that there are no limits to the legislature's powers, and that, though it cannot change a man into a woman, it can provide that for all or specified purposes a man shall be treated in law as if he were a woman. Similarly, there can be no doubt that while the legislature cannot transform an existing government into a non-existing one, it can

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[62] *Ibid.*, at p. 579.
[63] See *supra*, note 11.
[64] 145 N.E. 917 at pp. 918-9. See *supra* at p. 98.
[65] [1968] 3 All E.R. 561 at pp. 574-5.

effectively provide that it shall be treated in law as if it did not exist. However, a legislative fiction has to be narrowly construed, and the more so the further it is removed from fact.[66] Even if one assumes that the U.K. legislation of 1965 amounted to more than an express assertion of non-recognition, there was, as Lord Pearce points out,[67] still no need to interpret it so widely as to exclude the operation of the principle of state necessity.

There is, however, an even more basic doubt about the approach of the Privy Council. The Board assumed, without querying it, that United Kingdom law had to be applied or, rather, that the law of the United Kingdom was also at all relevant times the law of Rhodesia, and did not distinguish between cases, such as *Texas* v. *White*,[68] in which a court of a *de jure* government pronounces upon the validity of acts of a rebel government after its defeat, and cases, such as *The State* v. *Dosso*,[69] in which a domestic court functioning within the territory in secession deals with the same issue. If it be true that as long as he is in power, the usurper's edicts are binding on the courts under his *de facto* control (and all the authorities point that way),[70] it may well be that a British court sitting in Britain would have to find acts of the present Rhodesian government invalid, while a Rhodesian court, sitting in Rhodesia, would have to find them valid. Surely, the question was not whether the judgment in *Madzimbamuto* would have been correct, had it been rendered by an English or Scottish court functioning under the umbrella of the Crown, but whether it was correct coming from a court in Rhodesia. It has always been considered that 'the Judicial Committee of the Privy Council, when deciding an appeal for an overseas territory, is technically hearing an appeal as a foreign court'.[71]

Assuming, however, it is not correct that the edicts of the usurper are law within the land under his control, can there be any doubt that the validity of his acts has generally to be upheld, if on no other ground, on the ground of state necessity or implied mandate? One could well imagine that a Rhodesian court might have declared one or other measure or decree of the present government (including

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[66] *Zur Lehne von den Filktionen* by Dr. Franz Bernhöft in *Aus Römischen und Berger Lichen Recht, festschrift für Ernst Immanuel Bekker*, 1907, 239 at pp. 242-6.

[67] [1968], 3 All E.R. 561, at p. 587. See *supra* at p. 96.

[68] See *supra*, note 19.

[69] See *supra*, note 13.

[70] See *supra*, at pp. 101-104.

[71] Schmitthoff, 'England' in *Die Anwendung Ausländischen Rechts im Internationalen Privatrecht*, 1968, at p. 90.

the one under review) invalid. No court in the world, in equal circumstances, has ever given, or will ever give, a ruling to the effect that each and every act of the usurper is a 'non-act', thus creating the conditions for legal chaos (in practice, of course, a ruling of this kind would simply be ignored by the usurper). Yet, this would be the result if the decision of the Privy Council were acted on in Rhodesia. How, then, can it be said that the Rhodesian courts erred in upholding the general validity of the acts of the Rhodesian government which however established, was still *the* government for the time being. And it is certainly significant that Mr. Justice Fieldsend, who dissented from his brother judges in the Rhodesian Appellate Division in finding the new government and constitution illegal, found himself nevertheless impelled to save the emergency regulations from drowning by placing them on the plank of state necessity. With all his obvious dislike for the new order, he found the 'normative force of the factual' clearly too strong for him.

'It is hardly intellectually satisfactory', says D.W. Greig, 'to reach a conclusion which amounts to a denial of the existence of a whole legal system.'[72] Right or wrong, the Privy Council handed down a judgment, which was meaningless in terms of realities. Even now, it is difficult to imagine that a court in the United Kingdom would refuse to recognise a Rhodesian divorce, because it was granted by a judge appointed by the Rhodesian government without the concurrence of the Crown; or to give effect to the liquidation of an estate in Rhodesia, because the Master of the High Court of Rhodesia, was invalidly appointed. The probabilities are that, should Britain be restored to power in Rhodesia, one of her first acts would be to pass a statute expressly validating almost all the laws and decrees of the Smith regime.

6.

In conclusion, two odd points about *Madzimbamuto's* case are worth mentioning. First, strictly speaking, the appellant had no *locus standi* in the matter. Madzimbamuto himself, who had ample opportunity of doing so, did not apply for his own release or even join in the proceedings. Seeing that he was neither minor nor lunatic, what title had his wife to bring the application on his behalf?

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[72] (1867) 83 L.Q.R. 96 at p. 145. Grieg suggests that 'the simplest solution would be for the English courts to allow the appropriate foreign law to be proved as a fact in the normal way.' R. Ritcher (1968), 6 Melbourne U.L.R. 448 at p. 450, too, is critical of the rule that all the acts of unrecognized governments are to be considered of no effect.

However, as Lord Reid said in his judgment,[73] no objection was taken at any stage by the respondents to the appellant's title to raise the proceedings.

Secondly, there was, strictly speaking, no appealable issue, for the Rhodesian Appeal Court upheld the appellant's appeal against the dismissal of her application and awarded her costs. True, the Rhodesian Appeal Court held that, though the detention order made in this case was invalid, the Rhodesian government could generally validly legislate, but since when is it possible for the winning party to appeal against a judgment because he is not satisfied with the reasons on which the court decides in his favour? The Privy Council had apparently no difficulty in getting over this point. Lord Reid said:[74]

> But the appellant's success was short lived. Immediately a new order was made under the former section and in fact the appellant's husband was never released from custody. In their Lordships' view it is implicit in the judgment of the Appellate Division in this case that the section of the emergency regulations under which the new Order for the detention of the appellant's husband was made is one which the Court must recognise as valid. Therefore that judgment is a determination of the validity of the regulations: on the authority of that judgment all Rhodesian Courts would so decide.

In this respect, at least, the Privy Council judgment was a triumph of substance over form, of realism over fiction.

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[73] [1968], 3 All E.R. 561, at p. 565.
[74] *Ibid.*, at p. 571.