RHODESIAN INDEPENDENCE—LEGAL OR ILLEGAL?

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Mr. Green's analysis of this perplexing question illustrates the conflict between the Rhodesian judges' respect for their oaths as Her Majesty's Justices and the necessity of preserving the rule of law as far as possible together with an effective administration. Mr. Green examines the bank-notes dispute and concludes that third states may gradually accept the situation as a matter of necessity.

Colonialism and Self-Determination

The history of the British Empire between the passing of the New Zealand Constitution Act, 1852,[1] and the South Africa Act, 1909,[2] had been one of evolution. Gradually, colonial territories in which there was an established English community were given increasing competences in self-government until they were considered able to govern themselves in every way, culminating in the grant of dominion status.

During this period, the generally recognized rules of international law provided that a colonial territory belonged to the mother country, that all the inhabitants of the colony, regardless of racial origin or individual desire, enjoyed the nationality of the mother country, subject to any limitations in the latter's legislation and that the mother country was entitled to administer the territory as it pleased. In those days it was accepted that the manner in which a state treated its nationals was purely an issue of domestic jurisdiction. This being so, save in those rare circumstances in which the great powers claimed a right of humanitarian intervention—usually on Christian grounds[3] — no state had the right to comment or criticise, and certainly not to intervene in the name of democracy in another country's internal affairs. England had, therefore, every right to confer self-government or independence on any of her oversea territories and to lay down the terms on which such independence was to be exercised. If the imperial government wished to confer governmental authority or some measure of statehood upon a minority group of English settlers—or upon them and a defeated group of European settlers jointly, as in the case of South Africa—this could be done, and no other state would have considered that anything morally or legally reprehensible was involved in ignoring the position or rights of the aboriginal indigenous majority. After all, the general view among states at that time was that Native communities had no status in international law and as such could not possess any rights of statehood,[4] although some municipal judges refused to deny that they might enjoy protection against complete discretionary treatment by those who came into contact with them.[5]

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1 15 & 16 Vict., c. 72.

2 9 Edw. 7, c. 9.

3 See Green, *General Principles of Law and Human Rights*, (1955) 8 Current Legal Problems, 162, 167.

4 See, e.g., *Island of Palmas Case* (P.C.A., 1928), 2 *Reports of Int. Arb. Awards*, 829, 888; *Status of Eastern Greenland* (P.C.I.J., 1933), Series A/B, No. 53, 3 Hudson, *World Court Reports*, 151, 171.

5 *The Hurtige Hane* (1801), 3 C. Rob. 324, 326, and *The Madonna Del Burso* (1802), 4 C. Rob. 169, 172 (per Sir Wm. Scott, Lord Stowell, in both cases).

The establishment of the Irish Free State in 1922[6] was a deviation from the norm and was completely *sui generis*. In this instance, independence was granted to part of the mother country's own territory in response to civil war organized by the local population. There was, in this case, no question of an English minority ruling an indigenous aboriginal population, with the latter's rights being ignored. The civil war was more religious than racial in background, and was settled by dividing that part of the imperial territory involved into two, in accordance with a line drawn at the point at which the rival religions each enjoyed a majority population. The area which was inhabited by a majority that rejected the Established Church became a self-governing dominion; the other part remained within the United Kingdom, although it was granted certain internal powers of self-rule.[7]

In the years following the First World War, the evolutionary process continued. By the Statute of Westminster, 1931,[8] the self-governing dominions and the mother country were placed virtually in the same position and the dominions were given authority to sever legislative and judicial links. In fact, by the combined operation of the Act and the acceptance by third states of the new constitutional position, the dominions were, to all intents and purposes, elevated into self-governing independent states enjoying international personality. As between them and the mother country the situation was, for all practical purposes, *par in parem imperium non habet*. This new status came fully into its own with the outbreak of the Second World War. The United Kingdom declared war against Germany on September 3, 1939, for itself and its non-self-governing territories. After a Cabinet meeting in Australia, the Prime Minister announced on the same day, "Great Britain has declared war, and, as a result, Australia is also at war".[9] While a similar position operated in New Zealand, the Union of South Africa issued its own declaration on September 6th after there had been a change of government—and after some people had feared that that dominion might become an ally of Germany—and Canada's declaration was issued on September 10. The latter's tardiness was remedied in 1941, when Canada declared war on Italy and on Japan before the United Kingdom.[10] The Irish Free State remained neutral throughout the war. The world recognized the independent sovereign status of the dominions when all, with the exception of the Irish Free State, became foundation members of the United Nations.

The constitutional position in some of the non-self-governing territories was also changing during this period. Perhaps the best example is that of India. Here there was no intention to give independence or home rule to an English minority, and by the Government of India Act, 1935,[11] an extensive measure of self-rule with an elected government was granted. While there was no separate declaration of war in respect of that territory, India attended the San Francisco Conference and was a foundation member of the United Nations. By the end of the Second

6 Irish Free State (Agreement) Act, 12 & 13 Geo. 5, c. 4, Irish Free State Constitution Act, 13 Geo. 5, Sess. 2, c. 1.
7 Government of Ireland Act, 1920, 10 & 11 Geo. 5, c. 67.
8 22 & 23 Geo. 5, c. 4.
9 O'Connell, *International Law in Australia*, 20 (1965).
10 Read, *Problems of an External Affairs Legal Adviser*, (1967) 22 International Journal, 376, 392-3.
11 26 Geo. 5 & 1 Edw. 8, c. 2.

World War it was clear that full self-government would have to be conferred upon India if a civil war—or perhaps the correct jargon would be 'war of independence'—was to be avoided. The Indian Independence Act, 1947,[12] marked a new stage in the evolution of the Empire into Commonwealth. From then, it became clear that independence was no longer tied to the existence of an English governing minority, but would now be conferred upon a Native majority provided the home government considered that the population had 'progressed' sufficiently to enjoy and exercise this 'privilege'.

After the creation of India and Pakistan the speed towards self-government increased and the number of Commonwealth countries rapidly multiplied, while some former colonial territories, for example Burma, preferred to seek their destiny outside the Commonwealth. This increase in numbers was intensified by the whirlwind of change in Africa, and the whole complexion of the Commonwealth relationship changed. In the new world of independent states created after 1945, independence was not considered enough. The acme of status was membership of the United Nations, and the nature of that organization also changed. What had been an institution consisting of some fifty or so states, practically all of which were European and 'white' in origin, has become an entity of some 120 members, about half of which come from newly-independent territories which may broadly be described as 'coloured'. Moreover, the present position is such that, save for countries like Switzerland and the two Germanies, there is little prospect of any new 'white' member coming in, while as further colonial territories, however small and indefensible, become independent the number of 'coloured' members is likely to increase still more.

This change in the balance of United Nations membership has had its effect upon state attitudes towards what were formerly regarded as established rules of international law. Many of the new members, moved by repulsion at the treatment of their fellow Africans in South Africa, have re-interpreted the domestic jurisdiction clause of the Charter[13] to an extent that makes it virtually non-existent. Their own pride in their new independence has led to the adoption of resolutions by the General Assembly condemning colonialism and calling for the independence of all peoples subject to alien rule,[14] although the attitude towards 'peoples' is somewhat selective. For the main part, imperial settlers in Africa and Asia, at least those who came from England, regarded themselves as transients in the territory in which they resided. This was true in, for example, Ghana, India, Malaya or Singapore. In some territories, however, the settlers made the territory their home and in no way regarded themselves as visitors who would return to the mother country to retire or die. This had been the case in South Africa, and was true in, for example, Kenya and Rhodesia. The new states are not prepared, however, to concede this fact. For them, all who have come into their territories, regardless of the *animus* or of the length of time they have been established there, are regarded as alien influences who

12 10 & 11 Geo. 6, c. 30.
13 Art. 2 (7).
14 See Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, (1966) Part IV, ss. 1, 3; Brownlie, *Principles of Public International Law* (1966) 25, 482; Green, *New States, Regionalism and International Law*, (1967) 5 Canadian Yearbook of International Law.

enjoy only such rights as a Native majority government may in its discretion grant them. This is carried to such an extent that the Charter of the Organization of African Unity, 1963,[15] indirectly excludes any white state in Africa from being regarded as an African State. Among the Organization's Purposes is the eradication of all forms of colonialism from Africa, and among its Principles is "absolute dedication to the total emancipation of the African territories which are still dependent". To these ends, membership is confined to "each independent African State". The Heads of State at the founding conference adopted a resolution in which they outlined their proposals concerning the relations between themselves and non-African States in so far as Africa is concerned. In addition to calling for a complete boycott of South Africa and Portugal, and subsequently securing their exclusion from certain international institutions, they called for:

> . . . unification of the different liberation movements; creation of liberation armies and volunteer corps on the territories of different independent African states; and establishment of a coordinating committee to organize direct action with a view to liberating dependent African territories.[16]

This view of independence and towards colonialism is not confined to the members of the Organization of African Unity. At their Cairo Conference, 1964,[17] the Heads of State or Government of Non-Aligned Countries also pledged themselves to the termination of imperialism, colonialism and neo-colonialism, proclaimed their intention "to work unremittingly to eradicate all vestiges of colonialism, and to combine all their efforts to render all necessary aid and support, whether moral, political or material, to the peoples struggling against colonialism and neo-colonialism". These states also ensured the passage of a General Assembly resolution on the Principles of Friendly Relations and Co-operation among States[18] in which was included recognition of equal rights and self-determination of peoples. On the face of it this merely confirms the text of the United Nations Charter.[19] When it came to spelling out what this principle meant, it became clear that there were wide divergencies of opinion. Thus, as to "the use of force in the exercise of the right of self-determination [,] some representatives said that right included the right of peoples under colonial domination to use force in self-defence. Some added that States were prohibited from taking measures against peoples struggling for their freedom and independence".[20]

It might have been thought that, in view of these condemnations of colonialism and exhortations on behalf of self-determination and independence, any move towards securing local rule would have been welcomed. In fact, this has by no means been the case. Perhaps the most famous case of all was the opposition of Indonesia to the formation of Malaysia, whereby Singapore ceased to be a British colony and joined with the independent Federation of Malaya to form a new Federation. Indonesia carried her opposition to such extremes that she withdrew from the United Nations in opposition to this exercise in 'imperialism'.[21]

15 (1963) 2 *International Legal Materials*, 766.
16 Boutros-Ghali, *The Addis Ababa Charter*, 1964 (*International Conciliation*, No. 546), 32.
17 11 Oct., 1964, Press Release, U.A.R. Consulate-General, Singapore.
18 12 Dec., 1966, Res. 2181 (XXI).
19 Art. 1 (2).
20 Report of the 6th Committee of the Gen. Ass., UN Doc. A/6547, 7 Dec., 1966.
21 Green, *Indonesia, the UN and Malaysia*, (1965) 6 Journal of SE Asian History, 71.

Similarly, when Gibraltar and the United Kingdom agreed on further progress towards internal self-government for the colony, Spain objected and received strong support from the United Nations Committee of 24 on Colonialism.[22] In neither of these cases could those States which opposed the proposed constitutional developments honestly maintain that they would involve the preservation or consolidation of an imperialist power or grant authority to an alien group contrary to the wishes of the local majority.

This would of course not be true in connection with any European colony in which it was proposed to transfer power to the white minority, or where the white minority already enjoying *de facto* administrative authority attempted to assert sovereign independence with itself as the *de jure* government. It matters little that before 1945 everybody, regardless of ideology, would have praised the wisdom and farsightedness of the imperial power which recognized its responsibilities sufficiently to concede home rule. Even after the establishment of the United Nations, but before the change in the balance of voting power in the General Assembly, such a proposal would have been considered as consistent with Chapter XI of the Charter,[23] and, had the territory involved been a British colony, the United Kingdom supported by the other members of the Commonwealth would have welcomed a new member of their 'club' and joined together in proposing it for admission to United Nations membership. Attitudes have now changed, and with the assertion that self-determination constitutes a principle of international law—at least when it is being claimed against a European ruler, for Indonesia has shown in connection with West Irian, as Nigeria has portrayed *vis-à-vis* Biafra, that the same principles do not apply when it is a question of coloured subject people against coloured ruler—to grant home rule to a minority group, and it would seem even if the majority agrees, is regarded as the negation of independence.

Rhodesia's Unilateral Declaration of Independence

The colonial territory in which these issues came to the fore was Southern Rhodesia. Whatever might have been the views of the Afro-Asian group in the United Nations, it was still open to the United Kingdom as the imperial power to grant home rule, self-government or independence to whatever group of the territory's inhabitants it chose. The other members of the Commonwealth could have refused to agree to the new state becoming a member,[24] and any existing state could have refused to recognize the entity so created as possessing international personality, for recognition and not mere existence is the basis of statehood in so far as already existing states are concerned. The existing states, too, might have been able by virtue of the majority they can control in the General Assembly to condemn the United Kingdom for 'breach' of one or other of the Resolutions relating to self-determination. In view of the fact that, in accordance with the Charter, only the Security Council can decide upon enforcement measures relating to

[22] *The Times* (London), 2, 6, 17 Oct., 1964, 11 Apr., 1965, 14, 15 Jun., 1967, H.M.S.O., *Report on Gibraltar: Recent Differences with Spain*, Cmnd. 2632 (1965); *Gibraltar: Talks with Spain*, Cmnd. 3131 (1966); Sp. Min. For. Aff., *Documents on Gibraltar*, 1965; Gen. Ass., Res. 2231 (XXI) and Res. of 17 Dec. (*The Times*, 18 Dec. 1967).
[23] Declaration regarding Non-Self-Governing Territories.
[24] Fawcett, *The British Commonwealth in International Law*, 85-7 (1953).

threats to the peace, and that the United Kingdom enjoys a veto in that body, it is most unlikely that they would have been able to secure such a decision against her. Further, it is a little difficult, on the surface at least, to agree that independence granted to a ruling caucus which is able to maintain peace and good order within the territory, and which has no intention and gives no indication of moving against its neighbours, amounts to a threat to the maintenance of peace or an act of aggression. On the other hand, in the light of the new temper which exists in the world, and the determination of so many states not to tolerate the creation of another minority government which, in their view at least, negates the human rights of the majority whose pigmentation—for it is dangerous to talk of race in the light of the tribal rivalries which exist among, for example, the Ibos, the Yorubas and the Hausa—happens to coincide with that of the critical states, to an extent that they maintain is contrary to the new international law, and whose very exisence is such anathema as to constitute a running sore which incites them to destructive action. It is always difficult in such circumstances to be certain whether the threat to the peace comes from those who refuse to tolerate the continuance of a situation which runs so counter to the current trend in modern life, or whether it comes from those who, despite their professions of peace and tolerance, create such conditions.

The Government of the United Kingdom was fully aware of the temper of its fellow states and made it clear that, whatever might have been the practice with regard to white settlers during the nineteenth and early twentieth centuries, they would not confer independence upon any such group whose policy indicated that it was wedded to its vested interests and was not committed to the self-abnegation involved in working towards majority rule. On the other hand, one can sympathise with a group of settlers who have established their homes in a territory, have been responsible for whatever economic advancement there has been, and have brought about a state of order and the rule of law, opposing a transfer of power from themselves, and being bitter about not receiving self-government and seeing it offered or promised instead to those of their fellow nationals who, perhaps because of neglect by the ruling group, have not as yet the know-how to maintain what the group regards as the blessing of civilization, especially when they see in neighbouring territories where like majorities have secured power a displacement of white settlers and the apparent breakdown of law and order and its replacement by anarchy. But, today, self-government has become more important than good government, and the democratic principle of one man one vote has become all pervasive, at least for those territories where it has not yet been introduced.

This has meant that, in so far as Southern Rhodesia is concerned, there has been what might appear to some as a retreat from a consistent British policy of dissolution of Empire. The denial of independence to the white settlers is a complete breach with the practice that applied in so far as the older dominions are concerned. But, since the white settlers were there and were exercising political power, it has not been possible to treat the territory as if it were just another African colony. In those colonies which have achieved their independence, government was in the hands of a small articulate group drawn from the local inhabitants. Even

when difficulties or disturbances of the Mau Mau type have existed, there has been a local body to whom power could be transferred, even though this has often meant that the first Prime Minister had only recently been inhabiting the local gaol as a security prisoner.

At the beginning of November, 1965 the white settlers' government in Southern Rhodesia gave every indication that they intended declaring their independence, regardless of the views of the United Kingdom Government or of the world at large. In the past, when leaders of Native administrations have made similar gestures they have been arrested. In this case, however, nothing was done. To some extent this could not be helped. In Southern Rhodesia there was no Colonial Office administration, nor was there any detachment of the British armed forces that could be called upon to take action. Moreover, it was those who possessed local executive power who were threatening action, as distinct from the normal situation in which action was threatened against them. However, there was some evidence to suggest that large portions of the white population, because of their loyalty to the Crown, were unhappy with the decision to 'go it alone'. When Mr. Smith, the territory's Prime Minister, visited London, it would not have been impossible for the British authorities to take action against this British subject who had placed himself within the jurisdiction and was threatening action which might disrupt peace and good order in Rhodesia. Even if no criminal charge had been brought against him, it would not have been completely impractical for the Governor of the colony or for the Minister to have declared him a forbidden immigrant and kept him from returning. At that time, it is even possible that the landing of a token force might have been all that was necessary to rally the dissidents. But nothing was done and on November 11, 1965, the Smith government issued its unilateral declaration of independence.

As has already been pointed out, an assertion of independence as such has no effect on the international scene. For the entity concerned to enjoy its independence, recognition must be extended by third states. So far, no state has granted such recognition, and from the legal point of view the problem remains one between the *de facto* administration in Salisbury and the British Government—and this is not substantially affected by the latter's invocation of United Nations support. It matters little that the Southern Rhodesian authorities and their people maintain that they remain loyal to the Queen, for the ultimate authority for conferring independence is the British Parliament, who retained the power of amendment of the 1961 Constitution.[25] The Constitution came into effect by Statutory Instrument[26] by which internal self-government was virtually complete:

> . . . except for the fact that certain powers of constitutional amendment are in the hands of the Crown, while a residual power of disallowance and reserve powers in respect of Royal Instructions, suspension, and revocation of the Constitution remain,[27]

and, since the Statute of Westminster has no application to the territory, "Parliament at Westminster has unfettered legal power to legislate for Southern Rhodesia,"[28] although by convention this power is limited by

[25] Southern Rhodesia (Constitution) Act, 1961, 10 & 11 Eliz. 2, c. 2, s. 1.
[26] S.I. 1961, No. 2314.
[27] Palley, *The Constitutional History and Law of Southern Rhodesia*, 413 (1966).
[28] *Id.*, at 702, 703.

the need for agreement with the local government. However, "emergencies may cause rules to be broken. Improper action by the colonists might compel Parliament to legislate in disregard of the ordinary maxims of policy".[29] Presumably, therefore, unconstitutional action by the local administration would immediately restore the British Parliament's discretion to legislate for Southern Rhodesia without any need for consultation, even though the British and Southern Rhodesian Governments had agreed that the latter would have sole power to amend its Constitution.[30] In any case, such ministerial agreements could not affect a statute nor extend the power of the local legislature beyond the competence contained in the Constitution, so that the Crown by Order in Council remains the amending authority for the composition of the legislature and the definition of the authority in whom executive power for Southern Rhodesia is vested and how such power is to be exercised. Furthermore, this fact was acknowledged by the Southern Rhodesian Legislature and Government in March, 1964.[31] To some extent it may be contended that the United Kingdom Government acting alone and without Parliament has the supreme power, for, after all, the reserved powers of the Queen and her Instructions to the Governor, who is appointed on the advice of the home Government, are only exercised or issued on the advice of her British Ministers. Even apart from any Instructions that the Governor may receive from the Queen, since he "is guardian of the Constitution, it would be his duty to exercise Crown reserve power where the preservation of the Constitution is at stake. Thus a Governor faced with 'a coup d'état under the forms of law' should refuse assent".[32] In Southern Rhodesia the new administration, since the Governor remained loyal to the Queen and London, appointed its own 'Officer Administering the Government', so that the issue of disallowance did not arise in connection with the new 'Constitution' of 1965 and the administration's subsequent emergency legislation. To some extent the issue had also been avoided by the fact that the Governor, believing there would be no unilateral declaration, had given his assent under the 1961 Constitution to emergency legislation before November 11, and much of the action that followed stemmed from this legal exercise of power.

The general effect of the new 'Constitution' was to purport to sever all links with Britain which might in any way limit Rhodesia's independence.[33] It denied further validity to imperial legislation or the Colonial Laws Validity Act, and proclaimed that Her Majesty's prerogatives would be exercised only on the advice of Ministers of the Government of Rhodesia. As if to reaffirm 'loyalty', Her Majesty was to be requested to appoint a Governor General, and if this were not done within fourteen days the Rhodesian Ministers would appoint a Regent. In fact Mr. Smith's 'advice' that Mr. Dupont, the former External Affairs Minister, be appointed Governor was rejected as Her Majesty could not accept such purported advice.[34] Actions which could only be taken in the name of and on behalf of Her Majesty would in future be taken by the

[29] Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, 12 (1902) (c. Palley, 703).
[30] Palley, *op. cit. supra* at 708.
[31] *Legislative Assembly Debates*, vol. 56, cols. 640, 665 (*id.*, 709).
[32] Palley, *op. cit supra* at 721 (c. Evatt, *The King and His Dominion Governors*, 200 (1936).
[33] Summary based on Addendum to Palley, 747 *et seqq.*
[34] *The Times*, Dec. 4, 1965.

Officer Administering the Government, and reference to Her Majesty was omitted.

The British Government's reply to the Unilateral Declaration of Independence and the new 'Constitution' was almost immediate. By the Southern Rhodesia Act, 1965,[35] the status of Southern Rhodesia as a colony within Her Majesty's dominions was reaffirmed, as was the fact that the Government and Parliament of the United Kingdom had 'responsibility and jurisdiction as before', while Her Majesty was enabled to issue such Orders in Council as might appear necessary or expedient, including the power to amend or revoke any provision of the 1961 Constitution and to impose restrictions on transactions with the Colony. In the meantime, the 1961 Constitution remained valid as amended. By Order in Council[36] all actions under the 1965 'Constitution' were declared invalid, while the local Legislative Assembly was forbidden to indulge in any further activity. Southern Rhodesia was removed from the Commonwealth Preference Area,[37] with the result that Gallaher's, the tobacco importers, have found themselves liable for heavy customs duties on Rhodesian tobacco consigned before the promulgation of the Order, but subsequently removed from bond.[38] The United Kingdom Government also suspended Southern Rhodesia from the sterling area, froze its accounts in the United Kingdom, and assumed control over the Reserve Bank, appointing its own nominees to control the Bank's assets wherever they might be found[39]—an action which later resulted in legal proceedings in Germany.[40]

Despite the English reaction to events in Rhodesia and the attempt there to set up a new legal order, it was realized in Salisbury that the new régime could not dispense completely with all vestiges of what went before. The new 'Constitution' provided for continuance in office of civil servants, judges, and the like, while provision was made for their offices to be vacated if they refused ot accept the new 'Constitution'. What still existed of the right of appeal to the Privy Council, primarily only by special leave, was abolished, and it was stipulated that no Court could inquire into the validity of the 'Constitution', while all restrictions stemming from the United Kingdom Parliament were abrogated. At the same time, it was provided that an Act of Indemnity could be passed 'in connection with the attainment by Rhodesia of sovereign independent status', while in the future no foreign judgment, opinion or order was to be binding on any court or person in Rhodesia.

Far from taking any oath to the new 'Constitution', the Governor of Rhodesia dismissed the Prime Minister, who retaliated by appointing his own Officer Administering the Government and by instituting various sanctions against the Governor and Government House. As for the judges, they too refused to take any oath and in accordance with instructions from the Governor decided to remain in office and fulfil their judicial functions.[41] By contrast, when, in 1967, the National Reformation

35 13 & 14 Eliz. 2, c. 76.
36 S.I. 1965, No. 1952.
37 S.I. 1965, No. 1954 (see definition in Imports Duties Act, 1958, 6 & 7 Eliz. 2, c. 6).
38 *Gallaher Ltd. v. Commissioners of Customs and Excise*, *The Times*, June 1, 1967.
39 S.I. 1965, No. 2049.
40 *Reserve Bank of Rhodesia* v. *B.E.A., South African Airways and Giesecke Devrient GmbH.* (1967) Land Court, Frankfurt/Main—2/12Q30/66 (my thanks are due to the Minister of Justice, Hesse, for supplying a copy of the judgment).
41 Mr. Wilson, Prime Minister, in House of Commons, *The Times*, Nov. 13, 1965.

Council took over Sierra Leone, removing the Governor General, Prime Minister and Cabinet, and dissolved the House of Representatives, the judges swore to uphold the new administration. Sir Samuel Bankole-Jones, President of the Court of Appeal, stated:

> I am not quite certain whether I am doing the right thing, and whether suspension of the Constitution is the right thing. However, these are not normal times, and I am ready to subject myself and give my utmost support to the Council.[42]

The situation in Sierra Leone was not on all fours with that in Rhodesia. In the first place, the former was already completely independent and the United Kingdom enjoyed no reserve powers. Secondly, there was no revolution to seek freedom, merely a change in government. In fact, the Attorney General declared:

> Executive authority remains vested in Her Majesty under the 1961 Constitution, although now exercised on her behalf by the Council, instead of the Governor-General.[43]

The loyalty of the judges in Rhodesia was emphasised in November, 1967. Judge Edwards, presiding judge in the Rhodesian Court of Appeal for African Civil Cases, had originally been appointed on a two year contract. When his contract expired, he refused to be reappointed by the Officer Administering the Government and submitted his resignation to the Governor-General. It is understood that his pension has been withheld.[43a]

Revolutions, Independence and Criminal Law

In countries which abide by the rule of law and where the English concept of judicial interpretation of statutes prevails, it may well be true that the legality of a revolution—entailing legislative activity by what was formerly regarded as the proper process—will depend upon the extent of co-operation by the judiciary. As has been pointed out, in Southern Rhodesia the judges remained in office but refused to declare their allegiance to the new authority, while in Sierra Leone they found it possible to do so. The problem has, of course, arisen before, and it might be worth considering what happened in England in 1688, in North America at the time of independence, and in the United States during and after the Civil War.

According to Blackstone, 1688 was a breach with the proper procedure, in that "it was the act of the nation alone, upon a conviction that there was no king in being", for the Joint Resolution of the two Houses of Parliament stated that 'the king has abdicated the government, and the throne is thereby vacant', the King having broken the original contract between himself and the people. It is on the basis of this breach of contract that Blackstone rests his case, and

> Whereas, our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie . . . to maintain it.[44]

He acknowledges that "it might in some respects go beyond the letter

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42 *The Times*, Mar. 27, 1967.
43 *The Times*, Mar. 28, 1967.
43a *The Times*, Nov. 30, 1967. See, however, id., Jan. 1, 1968, for Judge Knight's appointment as successor.
44 1 *Commentaries*, (1787), 211, 212-3.

of our ancient laws, . . . [nevertheless] it was agreeable to the spirit of our constitution, and the rights of human nature." He points out, with what can only be described as consummate casuistry, that Parliament did not declare the King guilty of subverting the Constitution, but only attempting so to do, and

> they therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though the executive magnificence was gone, and the kingly office to remain, though king James was no longer king. And thus the constitution was kept entire; which upon every sound principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.[45]

For Blackstone, once the vacancy arose, ultimate power rested with the two Houses and therefore everything followed as a matter of course, as it would have done if there had been a total failure in the succession. In the parliamentary debate, Holt, later Chief Justice, said:

> The government and magistracy are all under a trust, and any acting contrary to that trust is a renouncing of the trust, though it be not a renouncing by formal deed. For it is a plain declaration by act and deed, though not in writing, that he who hath the trust, acting contrary, is a disclaimer of the trust.[46]

Some twelve years later, he commented that "an Act of Parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from an allegiance to the Government he lives under, and restore him to the state of nature".[47] Story's comment on the situation is interesting:

> . . . the great men who accomplished the glorious Revolution of 1688 . . . supposed that from the moment it became a Constitution it ceased to be a compact, and became a fundamental law of absolute paramount obligation, until changed by the whole people in the manner prescribed by its own rules, or by the implied resulting power belonging to the people in all cases of necessity to provide for their own safety. Their reasoning was addressed, not to the Constitution, but to the functionaries who were called to administer it. They deemed that the Constitution was immortal, and could not be forfeited; for it was prescribed by and for the benefit of the people. But they deemed, and wisely deemed, that the magistracy is a trust, a solemn public trust; and he who violates his duties forfeits his own right to office, but cannot forfeit the rights of the people.[48]

If the legal profession had refused to recognise the legislation that removed James II or followed the accession of William and Mary, it could have done so—at the cost of a real Revolution.

More recently, a similarly 'glorious' revolution took place in Pakistan, when in 1958 the President suspended the 1956 Constitution and changed the name of the State from Islamic Republic of Pakistan to Pakistan. In *The State* v. *Dosso*,[48a] Muhammad Munir, C.J. stated:

> . . . It sometimes happens that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. . . . The change may be attended by violence or it may be perfectly peaceful. It may take the form of a *coup d'état* by a political adventurer or it may be effected by persons already in public positions. . . . [A] change is, in law, a revolution if it amends the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or

45 *Id.*, at 213-4.
46 *Parliamentary Debates*, 1688, ed. 1742, 213.
47 *City of London* v. *Wood* (1701), 12 Mod. Rep. 669, 687.
48 1 *Commentaries on the Constitution of the United States* 250-251 (1891).
48a (1959) 1 Pak. Law Rep. 849, 27 Int. Law Rep. 22, 24-5 (italics added).

> organize it are judged by the existing Constitution as guilty of the crime of treason. But *if the revolution is victorious* in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new régime, then the revolution itself becomes a law-creating fact because thereafter *its own legality is judged* not by reference to the annulled Constitution but *by reference to its own success.* On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus *the essential condition* to determine whether a Constitution has been annulled is *the efficacy of the change.* . . . After [such] a change . . . , the national legal order must for its validity depend upon the new law-creating organ. Even courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution.

The 'revolution' had taken place while the appeal was pending and, despite the last-quoted phrase of the Chief Justice, the Supreme Court continued to function as did its members.

At the time of the American War of Independence—which could more correctly be described, at least from the standpoint of the United Kingdom, as a Revolution—the Conference of Delegates of 1774, appointed to represent the various colonies, "was wholly conducted upon revolutionary principles. The Congress thus assembled exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of the original powers derived from the people", and it operated until replaced by the confederated government in 1781.[49] Story's language on the 1775/1776 Revolution is similar to that he used about 1688:

> It was emphatically the act of the whole *people* of the united colonies, by the instrumentality of their representatives, chosen for that among other purposes. . . . It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new one, whenever necessary for their safety and happiness. . . . It was . . . the achievement of the whole for the benefit of the whole. The people of the united colonies made the united colonies free and independent States, and absolved them from all allegiance to the British crown. The Declaration of Independence has accordingly always been treated as an act of paramount and sovereign authority, complete and perfect *per se*, and *ipso facto* working an entire dissolution of all political connection with, and allegiance to, Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.[50]

These views of sovereignty passing to the people and from them to the states are confirmed in such cases as *Penhallow* v. *Doane*,[51] *Ware* v. *Hylton*[52] and *Chisholm's Executors* v. *Georgia*[53]—but then it must be remembered that the judges who heard these cases were themselves revolutionary statesmen.

Some of the incidents of the American Civil War are similar to what happened in Rhodesia in 1965. The insurgent legislature of Texas, for example, repealed the statute requiring endorsement of legislation by the Governor[54] and set up a Military Board. The acts of the Rebel Convention were subsequently sanctioned by the legislature which had been regularly elected. Texas then broke away from the Union and this act was ratified by the majority of the State. On its accession to the 'Confederated States', the Governor and Secretary of State refused to take an oath of allegiance and they were expelled from office. The elected

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49 1 *Story*, *id.*, at 145.
50 *Id.*, 154-5.
51 (1795), 3 Dall. 53 (per Patterson and Iredell JJ.).
52 (1796), 3 Dall. 199 (*per* Chase J.).
53 (1793), 2 Dall. 419 (*per* Jay C.J.)
54 Acts of Texas 1862, 45.

members of the legislature took the oath and provided for the election of a President. "During the whole of [the civil] war there was no governor or judge in Texas who recognised the national authority".[55] After the War, the attitude of the Supreme Court was simple. Whatever may have been the position at the time of independence, the Union was regarded, on the basis of the Articles of Confederation, as perpetual and the act of incorporation as final: "There was no place for reconsideration, or revocation, except through revolution, or through consent of the States".[56] As a result, all of the above-mentioned Texan acts were null and void.

The difference between Texas and Rhodesia lies in the fact that in the latter neither the judges nor the Governor have taken any oath of allegiance, and the judges continue to function as the Queen's judges, while there is apparently no judicial authority superior to that in Rhodesia which could hold the actions taken in the Territory as invalid—or, if it did so hold, would be able to make its judgments effective. While this may be true, it is necessary to examine to what extent the acts of the Rhodesian authorities might constitute treason, how far English judgments might still be relevant, and what the attitude of he Rhodesian courts to the act of revolution has been.

By the combined operation of the British Nationality Acts, 1948 and 1958,[57] citizens of Southern Rhodesia have the status of British subjects, and in many cases will enjoy dual nationality. The consequence of this is that what is lawful in the State of one of the nationalities may well be criminal in that of the other, and this places such persons as civil servants in an invidious position. This was clearly recognized by the British Government, and on the day of the Declaration of Unilateral Independence the Prime Minister stated in the House of Commons:

> It is our view that the Governor will have made statements in Rhodesia that it is the duty of public servants to carry on with their jobs. Judges and police should help to maintain law and order in Rhodesia. But they must be the judges of any possible action which they might be asked to take which would be illegal in itself or illegal in helping what has happened. . . . Where any public servant feels he has been asked to take action which affronts his conscience, or which in his view is contrary to his allegiance to the Queen, and where that public servant suffers financially from the exercise of that discretion or conscience, I am certain the whole House will feel we have a responsibility to him.[58]

It was also pointed out, at the time that threats were being made to expel the Governor from Government House, that

> anyone who orders or carries out the forcible expulsion of the Governor or lays hands on him or otherwise assaults him commits an act of treason. If any person were to usurp, or seek to usurp, the authority of the Governor by purporting to act as 'regent' or otherwise, this also would constitute an act of treason.[59]

A problem arises, however, in view of the fact that by s. 3 of the 1948 Act British subjects who are not citizens of the United Kingdom are not liable for offences against the laws of the United Kingdom in respect of actions done in any territory named in s.1 (3), of which Rhodesia is one. On the other hand, there is little doubt that acts of the Rhodesian representative in London in aid of the rebel authority constitute treason, as

[55] *Texas* v. *White* (1868), 7 Wall. 700, 19 L.Ed. 227, 237 (per Chase, C. J.).
[56] *ibid.*
[57] 11 & 12 Geo. 6, c. 56, 6 & 7 Eliz. 2, c. 10, s. 1.
[58] *The Times*, Nov. 12, 1965.
[59] Statement from 10 Downing Street, *id.*, Nov. 15, 1965.

do those in Rhodesia by anybody holding a British passport or maintaining property in the United Kingdom,[60] as well as by any Rhodesian who happens to be a United Kingdom citizen regardless of where the act is committed. Two further comments by members of the British Government may be of interest. The Prime Minister commented, in the course of a radio interview in which he repeated his former references to loyalty to the Queen and his advice that public servants should stay at their posts: ". . . It could be that loyal servants of the Queen, those who are most tormented by what they are asked to do, by staying at their posts—provided they are not asked to further the purposes of the rebellion—may be in a position to frustrate the purposes of the rebellion, and so speed the day when Rhodesia returns to the rule of law and the original allegiance. . . . There is talk of administering an oath. This oath is illegal—totally illegal. And anyone who seeks to administer it is committing a further act of illegality".[61]

Further problems under the law of treason arose in connection with those persons in the United Kingdom who sympathised with the rebel administration. This sympathy had various bases. Some were relatives of Rhodesian settlers; others felt it was time that white settlers who had enjoyed internal self-government for some forty years should be entitled to full independence, preferably within the Commonwealth; while others, seeing the situation that prevailed in some independent African States, were opposed to majority rule or African independence. It is true that the Attorney General had stated in the House of Commons that there was no censorship in the United Kingdom and that any views concerning Rhodesia could therefore be expressed,[62] but there were in fact limits to this freedom. Within a week the Solicitor General pointed out that

> . . . it was well established that incitement to treason was itself treason and if anyone in this country were to incite the rebels to persist in their rebellion, or gave them aid and comfort in any way, they might well be exposed to prosecution. If persons broke the law they must be prepared to take the conquences.[63]

It should be remembered, however, that the British Government was faced with somewhat similar activities when, during the Korean war, British subjects and the *Daily Worker* were indulging in 'undesirable' activities on behalf of North Korea while British troops were engaged in military operations against it. On that occasion the [Labour] Minister of Defence informed the Press Association that

> . . . it seems likely that from a legal point of view the state of hostilities between China [which was supporting North Korea] and ourselves is sufficient to bring the act of 'giving aid and comfort' to the Chinese within the definition of treason. The difficulty about instituting a prosecution, however, is that no other charge than that of treason would be possible, and that the only penalty for treason is death.[64]

It seems that Labour Governments are as unwilling to institute prosecutions against a Marquis of Salisbury as against a Dean of Canterbury.

Hesitancy about prosecuting residents of the United Kingdom for treason because of their attitude towards the Rhodesian rebellion does

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[60] *Joyce* v. *D.P.P.*, [1946] A.C. 347.
[61] *The Times*, Nov. 18, 1965.
[62] *Id.*, Nov. 12, 1965.
[63] *Id.*, Nov. 17, 1965. Problems have arisen re the proposed export of television films from Britain (id., Sept. 5, 8, 1967), and a projected visit by the Yorkshire cricket team (id., Sept. 11, 15, 19, 1967).
[64] *Id.*, April 13, 1951.

not necessarily mean that there would be any hesitancy about instituting proceedings against the Rhodesian Ministers themselves. Complications, however, arise. In the first place, there is little point in proclaiming the liability of individuals to stand trial for treason if they are not in the United Kingdom. Trials *in absentia* are unknown in English criminal jurisprudence, and it would therefore be necessary for an alleged traitor to submit to the jurisdiction either voluntarily or because he had been forcibly brought within it.[65] There is little likelihood that Mr. Smith or one of his colleagues would visit Britain or come within the jurisdiction of the English courts unless assured of immunity from arrest, as was understood to have been the case when he met the Prime Minister on *H.M.S. Tiger*. Any promise that he may have received, however, would have been of little more than moral worth, for according to Brett, M.R. "it is clear that there is no privilege from arrest upon a criminal charge".[66]

Rhodesian rebels may also find themselves liable to trial for treason in Rhodesia, where, as has been seen, the judges are continuing to uphold the Queen's peace and refusing allegiance to the new Constitution. This point was emphasized in the House of Commons by the Solicitor General:

> There was a difference between the law of treason in Britain and the law of treason in Rhodesia. The law in Rhodesia was based on the Roman-Dutch law, but although the terms were different the effect was much the same,[67] and it remained in Rhodesia as it did here that anyone who usurped the authority of the Government, or who incited to rebellion, or anyone who gave aid and comfort to the rebel régime, was guilty of treason.[68] Mr. Smith and certain members of his Cabinet were still citizens of the United Kingdom and colonies, whereas there were other persons there who were Rhodesian citizens. They were all subject to Rhodesian law while they were still in Rhodesia. The difference was that those who were citizens of the United Kingdom and colonies were also subject to the English law of treason, and if they committed an act of treason were liable to be tried in this country.[69]

What Sir Dingle Foot seems to have overlooked is the Treason Act of 1495,[70] which provided that it would not be treason to serve a *de facto* king. At the Restoration this was held not to protect those who had participated in any way in the execution of the King, on the basis that it was not available to anyone serving a *de facto* government which was not monarchical.[71] In Rhodesia, the administration has so far, despite murmurs from some of its supporters in favour of a republic, been insistent upon its continued loyalty to the Queen. This might not, however, protect them, for the Act continues "no person or persons shall take any benefit or advantage by this Act which shall hereafter decline from his or her allegiance."

One last thing might be mentioned in this connection. If the rebel administration were to amend or repeal the local Southern Rhodesia and British Nationality Act, 1963, passed in consequence of the dissolution of the Federation of Rhodesia and Nyasaland, this would have no effect on the status of British nationals in Rhodesia for this status stems from the British Nationality Act, 1948. If such an amending statute purported to rescind that status it would be invalid under the Colonial Laws

[65] See, e.g., *R. v. O.C., Depot. Battalion R.A.S.C., Colchester, ex p. Elliott*, [1949] 1 All E.R. 373.
[66] *Re Friston* (1883), 11 Q.B.D. 545, 552.
[67] *The Times*, Nov. 17, 1965.
[68] See, e.g., *R. v. Gomas* (1936), S.A.L.R., C.P.D., 225; *R. v. Neumann* (1948), (3) S.A.L.R. 1238 (T).
[69] *The Times*, Nov. 17, 1965.
[70] 11 Hen. 7, c. 1.
[71] *Axtell*, Kelyng 13.

Validity Act,[72] which still operates despite Rhodesian 'law' to the contrary.

For those who are inclined to maintain that treason involves some direct act against the sovereign, it may be as well to repeat the comment of the London *Times*—although it is conceded that the language is hardly that of the lawyer—

> Put simply, the law says it is treasonable to wish the Sovereign's death, and to wish the Sovereign's political death is to wish her real death. Hence Mr. Smith and his lieutenants have committed treason.[73]

Apart from the law of treason, the English courts may become involved with the situation in Southern Rhodesia by way of applications for *habeas corpus*. By the Habeas Corpus Act, 1862,[74] the writ will not issue out of England to any colony which has a court with authority to issue such writ. The writ does not exist in Southern Rhodesia, which has instead the *interdictum de homine libere exhibendo*, so presumably the exception in the Act would not apply.[75] On the other hand, in *Re Mwenya*,[76] in which it was held that the writ would issue from London to any British subject resident in a colony, Sellers, L.J. said:

> There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive the subject of a right which an English court could give *and enforce*. . . .

In view of the final words, perhaps one may ask whether the position is the same when it is clear that the Courts will be unable to enforce their order.

Another field in which a clash of legal competences may easily arise relates to the prerogative of mercy in capital cases. By s. 49 of the 1961 Constitution the Governor, on the advice of his council to which any Royal Instructions have to be imparted, exercised this prerogative, as well as being required to confirm the sentence. Under the 1965 'Constitution', however, all prerogative powers are to be exercised by the Officer Administering the Government who is not recognized by the Queen, the Governor or the United Kingdom Parliament. Presumably, therefore, if the Governor exercised his prerogative in a capital case, while the administration preferred to accept the purported advice of the Officer Administering that mercy be not extended, the latter Officer, the executioner, the governor of the jail and all others participating in the execution would be liable to prosecution for murder—perhaps this explains why the queue of those awaiting execution continues to grow.[77] On August 31, 1967, however, the Minister of Justice announced that three executions were to be carried out. The Commonwealth Relations Office immediately warned that any executions, unless confirmed by the Governor, "could be murder", while the Salisbury court issued an interim injunction in an uncontested suit.[78]

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72 Palley, op. cit. *supra*, at 736.
73 *The Times*, Nov. 12, 1965.
74 25 & 26 Vict. c. 20.
75 Palley, op. cit. *supra*, at 733.
76 [1960] 1 Q.B. 241, 308 (italics added).
77 See letters to *The Times* by Mr. P. Calvocoressi, Lord Campbell, Mr. R. T. Paget, Mr. Nigel Fisher and Mr. N. Shamuyarira (July 3, 5, 8, Aug. 22, 1967).
78 *Id.*, Sept. 1, 4, 1967. See also, id., Sept. 22 and 23, for statement by Lewis, J. that continuance of judges in office implied their recognition of the power of the executive to carry sentences into effect.

The Attitude of the Judiciary

It was not long after the unilateral declaration of independence that the Rhodesian judges were put to the test in the course of proceedings regarding Mr. Smith's Ministers and the new régime's legislation.[79]

One of the earliest cases was *Central African Examiner (Pvt.) Ltd.* v. *Howman*.[80] A left-wing monthly magazine asked Lewis, J. to declare that régime's censorship regulations and orders to be revoked and of no effect as a result of an Order issued by the British Government under the Southern Rhodesia Act, 1965. This request was opposed by the Southern Rhodesian Ministers of Information and of Law and Order, as well as by the Attorney General. The contentions of the two parties were based on the validity of the revolution and of the new régime, with the Ministers contending that:

> . . .the 1965 Constitution now prevailed in the country, and a United Kingdom Act of Parliament and orders made under it were of no force or effect in Rhodesia, [and that] it was beyond the jurisdiction of the High Court to entertain a challenge to the authority of the 1965 Constitution and the present Government which was constituted and appointed under it.

The *Examiner* contended that "the present Rhodesian Government, even if in fact in control of Rhodesia, 'is not the lawful Government thereof', [but that] if it was the lawful Government, it was so by virtue of the 1961 Constitution.

> Replying, the Ministers stated that the present Rhodesian Government, constituted and appointed in terms of the 1965 Constitution, 'was fully established as the lawful and effective Government of Rhodesia'."

The magazine sought a declaratory judgment, since they feared prosecution if the censorship regulations were not invalidated, but the Attorney General indicated that he would not agree to having his discretion regarding a prosecution fettered by any general declaration of rights. Counsel for the Government agreed that "the fundamental issue in this case is whether this country is independent. If this country is independent, then the United Kingdom Acts would have no application here", but he suggested that this issue could be avoided if a decision were rendered on the technical point. He was of opinion that the judge should decline "to be drawn into a political and constitutional battle on the side of the erstwhile parent country. If this happens, then disastrous consequences might ensue. Public confidence in the courts might be undermined. A resulting clash between Government and the courts might ensue. The Government controls the means of giving effect or otherwise to the court's orders and serious confusion could result. Say the order was granted. Then the officials would be forced into the predicament of either obeying the court's orders or the Government's." Lewis J. reminded counsel of the nature of the judicial function:

> The courts still have the duty to apply the law, and the problem does inevitably arise—what is the law? The law under the 1961 Constitution or the 1965 Constitution? How does one avoid making the decision if the problem fairly and squarely arises?

Counsel suggested that:

> . . . one can only deal with it by declining a jurisdiction that puts in issue the validity of the *de facto* régime. It may not appear to be a noble concept, but

[79] An account of some of these instances is to bt found in Palley, *The Judicial Process: U.D.I. and the Southern Rhodesian Judiciary*, (1967) 30 Mod. L. Rev. 263.
[80] (1966) (2) S.A. 1 (R).

> in a delicate situation of this sort one has to act with extreme delicacy. . . . I would save the courts here from having their position imperilled in the ways already indicated.

The judge, however, was not to be browbeaten:

> No one is more conscious of the delicacy of the situation than myself, but is it the proper approach to decline jurisdiction every time the question of the new or old Constitution being applicable arises? Doesn't it amount to closing the courts to the public and denying them justice?

Counsel agreed, and went further. He stated that "in certain circumstances it might have that effect, but is that not the lesser evil than perhaps a total closure of the courts? Or the substitution of something that one shudders to think of?" When challenged, he agreed that this might be 'a revolutionary tribunal' or the conferment of jurisdiction upon magistrates.[81] Although Lewis, J. refused to grant the order because there was merely fear of a prosecution, while the Attorney General had indicated, by refusing to agree that his discretion could be limited, he would not abide by the decision, he did proclaim that so far as he (the judge) was concerned and at that date the Rhodesian judiciary remained independent:

> The court's duty in every case [is] to endeavour to decide what the law is and to apply that law, irrespective of the circumstances and regardless of any such consequences, provided only that the court is satisfied that the issue which it is asked to decide has been raised in appropriate proceedings and the court has the necessary jurisdiction to decide it. No question of 'taking sides' arises. The judge is merely performing the duty which he swore to carry out when appointed as a judge: 'to do right to all manner of people, after the laws and usages of this country without fear, favour, affection or ill will.'[82]

In March 1966 an application was brought for the release of an African detainee on the ground of the illegality of the 1965 Constitution. In granting the State's application for a postponement, Lewis, J. indicated that even if the judges concluded that the Constitution was illegal this might not conclude the matter:

> Whatever the legal position may be as to the validity or otherwise of the Constitution and the Government set up thereunder in circumstances where a unilateral declaration of independence has taken place, there are some measures by the Government in effective control which must of necessity receive recognition from the courts, on the simple basis that we cannot have a complete vacuum in the law, and there is a *prima facie* authority to indicate that all such measures as are necessary for the purposes of good government to take an example at random, taxation law—should receive recognition from the courts.[83] I make it clear that this is merely a tentative view and by no means represents my final view on the matter.[84]

Some three months later Davies, J. showed that this attitude to the legislation of an effective administration was of much wider application than such matters as taxation. In *R.* v *Mudukuti*[85] the accused were charged with possessing offensive weapons 'without lawful authority or reasonable excuse', an offence punishable by death. The defence contended that, aware of their "duty as citizens to protect the country and its Constitution which had fallen into the hands of an illegal régime", they had sought military training and returned armed to fight "to bring about good government and the Constitution back into operation". The

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[81] *The Times*, Jan. 14, 15, 1966.
[82] Palley, *loc. cit. supra*, n. 79, at 269-70.
[83] This is true even for a belligerent occupant of enemy territory.
[84] *The Times*, Mar. 15, 1966.
[85] Jun. 23, 1966 (Palley, *loc. cit. supra*, n. 79 at 272-4).

judge rejected the contention that citizens were under a legal duty to take all steps necessary to quash rebellion, and held that there was therefore no 'lawful authority' for possessing weapons for this purpose. He also stated that it was only when law and order had broken down that citizens might have 'reasonable excuse' for such possession. "Since the 'Government' did not constitute a threat to the lives of citizens, nor was there any disorder, 'far from it being the duty of citizens to break the law, it can be said that their duty is to maintain and to assist in the maintenance of law and order.' Nor would the court treat as mitigating the accused's belief that they were struggling against an illegal government." However, since he conceded that the accused might have been misled by their leaders and since he regarded the case as borderline, Davies, J. sentenced them to twenty years. When the sentence was confirmed on appeal, Macdonald, J.A. said:

> It is the duty of this court, and, indeed, of all courts, to make clear beyond any possibility of misunderstanding that the events of November 11, 1965, may not be used as an excuse for the taking of human life or for acts of violence against persons or property.

The "Constitution" Case

The judges could not permanently evade the issue of constitutionality, and this fell for decision in *Madzimbamuto* v. *Lardner-Burke and Another; Baron* v. *Ayre and Others*, 1966.[86] The first plaintiff was applying on behalf of her husband, and the second on his own account, for freedom from detention under orders issued before the unilateral declaration of independence, contending that extensions of the state of emergency enacted thereafter and any other regulations were invalid. Although, as has been pointed out, the writ of *habeas corpus* does not exist in Southern Rhodesia, Lewis, J. described the applications as being "upon notice of motion for an order of *habeas corpus*".[87] It can only be assumed that the learned judge, who had been born in England and educated in South Africa and at Balliol College, Oxford,[88] was confusing the English concept with that of Roman-Dutch law, not an uncommon mistake for 'English' judges to make,[89] and one which was partly responsible for South Africa's decision to abolish appeals to the Privy Council.[90]

It is perhaps not to be wondered at that counsel for the applicants presented the court with an executive statement as to the status of Southern Rhodesia, which, in the normal way, could be considered as binding on Her Majesty's judges.[91] In this the Secretary of State for Commonwealth Relations stated:

> (a) Southern Rhodesia has since 1923 been and continues to be a Colony within Her Majesty's dominions and the Government and Parliament of the United Kingdom have responsibility for and jurisdiction over it.
> (b) Her Majesty's Government in the United Kingdom does not recognize Southern Rhodesia or Rhodesia [the name used by the Smith administration] as a State either de facto or de jure.

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86 High Court of Rhodesia, General Div., Salisbury, No. GD/CIV/66 (I must thank Sir Hugh Beadle, C. J., for supplying a copy of this Judgment).
87 *Id.*, at 2.
88 Palley, *loc. cit. supra*, 79 n. 9 at 265.
89 See, in the case of Ceylon, Jennings and Tambiah, *The Dominion of Ceylon*, 198 (1952). For South Africa see *Preller* v. *Jordaan* (1956), (1) S.A. 483 (A.D.) (*per* van den Heever, J. A. at 504).
90 *Pearl Assurance Co.* v. *Union Government*, [1934] A.C. 570; and comment by Aquilius, *Immorality and Illegality in Contract*, (1943) 60 S.A. Law, J., 468, 476.
91 See, e.g., *Sayce* v. *Bahawalpur*, [1952] 1 All E.R. 326, 2 All E.R. 64, in which K.B. and C.A. accepted as binding a certificate from the Commonwealth Relations Office transmitting information from the Government of Pakistan.

> (c) Her Majesty's Government in the United Kingdom does not recognize any persons whomsoever as Ministers of the Government of Southern Rhodesia and does not recognize any persons purporting to be such Ministers as constituting a Government either de facto or de jure.

Lewis, J. agreed that such a certificate "in regard to the status of a foreign country" binds all courts within British sovereignty, but he was of opinion that "the rule as to the conclusive nature of such certificates seems to be restricted to the realm of foreign affairs", and he cited both writers and decisions to this effect.[92] It is submitted, however, that he tended to overlook the fact that the situation with which he was concerned had not previously arisen and the English courts had not had any opportunity to consider the problem of a revolutionary régime in British territory, nor had this been in the minds of doctrinal authorities. The cases which came nearest were those relating to the Boer War and the attitude of the Transvaal Supreme Court, a British court, to the acts of the formerly recognized South African Republic.[93] He conceded that if the certificate had been placed before a court in the United Kingdom it would have been conclusive.

> No doubt, too, if there were a similar revolution in any other part of Her Majesty's dominions, this court would be bound by the certificate of Her Majesty's Secretary of State for Commonwealth Relations as to both *de jure* and *de facto* non-recognition of the revolutionary government in that territory if the question of the status of that revolutionary government became an issue in any proceedings before this court.[94]

The learned judge pointed out that he was not sitting in a United Kingdom court, and that:

> . . . a Rhodesian court, sitting here *in medias res*, is being asked to decide whether or not a revolutionary government in this country in revolt against the legal sovereignty of the United Kingdom, but otherwise purporting to carry out the ordinary functions of the former legal government in this self-governing territory, is the government in effective control. . . . Where . . . the conflict as to the status of this territory is one between the United Kingdom Government and the Government of this territory, the court of this territory in which the revolutionary Government is operating can and must take judicial notice of what is going on around it. It would be ludicrous if this court were obliged to take judicial notice of what the Secretary of State for Commonwealth Relations, six thousand miles away, said was the factual position in this country and to regard that as conclusive, if in reality it was the exact opposite of what the court itself noticed to be the true factual position.[95]

While this may sound eminently reasonable, the question arises why it is any more 'ludicrous' for the court to accept such a statement which it knows to be factually wrong, than to accept a statement that China and Japan were not at war at the time of the *Kawasaki* charterparty,[96] or that the Baltic States do not belong to the Soviet Union,[97] or the assertion that the Nationalist authorities in Taiwan constitute the Government of China[98].

In so far as facts were concerned, the learned judge pointed out:

> . . . that the Prime Minister and the members of his Cabinet, although dismissed by the Governor in the name of and by direction of Her Majesty the Queen, have continued on in office and have continued to exercise the powers which

92 *Madzimbamuto* v. *Lardiner-Burke*, *supra*, n. 86, at 26, 27, 28.
93 *Van Deventer* v. *Hancke & Mossop*, [1903] T.S. 401; *Lemkuhl* v. *Kock*, [1903] T.S. 451; *Oliver* v. *Wessels*, [1904] T.S. 235.
94 *Madzimbamuto* v. *Lardiner-Burke*, *supra*, n. 86, at 31.
95 *Id.*, at 30, 31.
96 *Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co.*, [1939] 2 K.B. 41.
97 *Latvian State Cargo and Passenger SS Line* v. *McGrath* (1951), 188 F.2d 1000; *Zalcmanis* v. *U.S.* (1959), 173 F. Supp. 355, 362 U.S. 917.
98 2 Whiteman, *Digest of International Law*, 90-110, 450-61.

> they formerly exercised prior to the Declaration of Independence, nothwithstanding their dismissal. Again, as a matter of fact, it is clear that the Governor, though still resident in this country, has not exercised his powers as such and that the . . . respondent [Dupont] . . . has purported to exercise the Governor's powers as 'the Officer Administering the Government' in terms of the 1965 Constitution. Finally, the members of the Legislative Assembly elected under the terms of the 1961 Constitution, have continued to function under the style of the Parliament of Rhodesia in terms of the 1965 Constitution, and such Parliament has, since the Declaration of Independence, purported to enact laws in respect of this country, and has purported to ratify the 1965 Constitution.[99]

The combined effect of these statements by Lewis, J., together with the indications already given in the earlier cases, suggested that the Rhodesian court was likely to adopt a policy based on effectiveness rather than lawfulness, and one may well question whether it is the true function of the judge to 'play ducks and drakes' in this way with the rule of law. It is doubtful, however, whether the multitude of cases that were cited to and by the Court arising from the Russian Revolution, the Spanish Civil war, and the like, relating to the distinctions between *de facto* and *de jure* governments were really relevant, for these had nothing to do with the effectiveness of a 'home' treasonable authority, but related to foreign affairs and other countries. Nor was it really necessary to go into long consideration of Kelsen's views on the effectiveness and basic norms of a legal order—in some ways, Lewis, J.'s judgment almost reads like a bibliography in jurisprudence, with its citations from Paton, Friedmann, Lloyd, Olivecrona, Allen, Salmond, Bryce and the rest.

On the other hand, Lewis, J. was fully aware of the revolutionary situation with which he was confronted, and:

> . . . the unilateral repudiation of the 1961 Constitution by the Declaration of Independence and the purported substitution of the 1965 Constitution . . . was such a 'fundamental change of circumstances'[100] entitling Britain, legally, to reassert its sovereignty over this country in regard to its internal affairs. . . . It cannot be suggested that there was also an *onus* upon Great Britain to assert its sovereignty by means of armed force directed against this country, and it cannot be said that the failure to do so amounts to a tacit recognition of the success of the revolution and the abandonment of its sovereignty over the country. That there has been such a reassertion of Britain's sovereignty over this country is clearly shown by the passing of the British Act of Parliament, the Southern Rhodesia Act. . . . It is also clear that the British Government has taken measures to endeavour to put an end to the revolution. Sanctions have been imposed . . . and the success or failure of these measures is still in doubt. . . . The court cannot decide as a fact that the revolution has succeeded or that it must succeed on that evidence.

In view of this it was possible not to accept the reasoning of the United States courts at the time of independence, for then the revolution was clearly successful.

> In the present situation, however, it could not be doubted that Britain would have the potential ability to put an end to the revolution; even if she had to resort to invoking the assistance of the United Nations for that purpose. In my opinion, it cannot be said that the 1965 Constitution is the lawful Constitution or that the present Government is a lawful government until such time as the tie of sovereignty vested in Britain has been finally and successfully severed.[101]

For the respondents an attempt was made ot suggest that continuance of the judges in office meant *ipso facto* the validation of the Constitution by the Court. The Court pointed out, however, that:

> . . . the judges hold office under the 1961 Constitution and derive their functions

99 *Madzimbamuto* v. *Lardiner-Burke*, *supra*, n. 86, at 4.
100 De Smith, *The New Commonwealth and its Constitution*, 42-3 (1964).
101 *Madzimbamuto* v. *Lardiner-Burke*, *supra*, n. 86, at 21, 22.

> from that Constitution. This is not a United Kingdom court. It is a court which was set up under the 1961 Constitution in a country possessing internal self-government under that Constitution. Although the judges are Her Majesty's judges, appointed by the Governor on Her Majesty's behalf, the Governor has no discretion as to their appointment under that Constitution. . . . The Chief Justice . . . is appointed on the advice of the Prime Minister, and the Governor cannot disregard that advice. . . . The other judges are also appointed on the advice of the Prime Minister and with the agreement of the Chief Justice. . . . The judges swore an oath of allegiance to Her Majesty the Queen, that is to say, Her Majesty in right of Rhodesia under the 1961 Constitution, and the judges owe no allegiance to the British Government as such. The judges also swore an oath to apply the law without fear, favour or affection. . . . At the time of the Declaration of Independence . . . , the judges were personally directed by the Governor, as Her Majesty's personal representative in this country, to continue on in office and not to resign. Accordingly, the judges do not have a choice of resigning or 'joining the revolution'. . . . If I were to hold [that the 1965 Constitution is the legal one], I would be false to my judicial oath to apply the law; I would also be false to my oath of allegiance to Her Majesty the Queen. It necessarily follows from this that I could not recognize as legal the right which s.128 (4) of the 1965 Constitution purports to confer on the Government to declare vacant the office of a judge of this court, appointed under the 1961 Constitution, who refuses to accept that Constitution. The judicial oath requires a judge of this court to uphold the law. If the 1965 Constitution is not the law, a judge of this Court cannot accept it or uphold it; if it ever became the law, . . . it would be upheld on that ground alone and not because of the threat contained in the subsection. . . . Once a judge appointed under the 1961 Constitution were to yield to this threat and to swear an oath to uphold the 1965 Constitution, knowing full well it was not the law, he would no longer remain an independent judge; he would become a craven hireling of the Executive.[102]

The court also referred to the fact that under the 1965 Constitution the Queen was given the title of Queen of Rhodesia which she had refused to accept, so that "anyone who took up office as a judge of this court in terms of the 1965 Constitution would be called upon to take an oath of allegiance to 'the Queen of Rhodesia', whereas there is in fact no such person holding that title." Counsel for the respondents suggested that this part of the Constitution might not be binding on the judges, but:

> . . . it does not seem possible to hold that a constitution can be legal in parts and illegal in others. A constitution, being the *fons et origo* of the law, cannot be severable in that way. Either it is in its entirety and beyond any impeachment the *Grundnorm* of the country, or it is no 'norm' at all. . . . Any judge who took up office under the 1965 Constitution would not and could not conscientiously be affirming its legal validity. He would be taking up such office purely through political expediency, and in so doing he would preclude himself from denying its legal validity. . . . His decisions upholding without question everything done under the 1965 Constitution would have no value as a legal decision in the eyes of the outside world, and they could not confer *de jure* status on the Constitution or on the present Government from the point of view of either the municipal law of this country or of international law, until the tie of sovereignty had been broken.[103]

Having thus nailed his flag to the mast of constitutional legality, Lewis, J., recognizing that ordered life in society must continue, turned his mind to problems of effectiveness and enforceability, starting from the premise that the British Government's certificate merely told the Court what it already knew about British non-recognition, but that it left the court to decide for itself what was the effective Government of the country. He pointed out—rightly—that to deny all validity to anything done since the Declaration by the purported legislature or executive would be tantamount to creating an anarchic hiatus, especially as the powers relating to the preservation of peace and good government

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102 *Id.*, at 22-24. See text to n. 43a above.
103 *Id.*, at 25.

under the 1961 Constitution were still being exercised exclusively by the revolutionary administration. Furthermore, any measures enacted by the United Kingdom were incapable of promulgation within Southern Rhodesia as required by Roman-Dutch common law. In any case, "any such British laws . . . would lack efficacy within the territory because the factual situation is that no one in this country, in the present state of affairs, could be prosecuted and punished for disobeying them",[104] a matter which had already been considered important in the case concerning the *Examiner* when the Attorney General made it clear that he would not accept a judgment limiting his discretion to prosecute for breach of censorship.

It is difficult to argue with Lewis, J. in his attitude towards the need for law to continue. Whenever a new State is created, one of its first measures is to pass a laws continuance enactment. Even when this is not done, however, the tendency is to treat the former law, with regard to such matters as marriage, post, registration of births, murder, and the like, as continuing.[105] Similarly, in accordance with the laws of war, even an unlawful aggressor is entitled to demand obedience from the population of occupied territory for such acts as fall into the concept of routine administration, and the normal practice is for the government of liberated territory to continue to recognize such acts.[106] In this case, moreover, the Governor had instructed the civil service as well as the judiciary to carry on, while the British Government had accepted that no offence would be committed by such action, at least so long as it fell short of active co-operation with the revolutionaries. Further, neither the Governor nor the home Government had called upon the local inhabitants to do anything which would actively contribute to overthrowing the Smith régime. "It is fanciful to suppose that the judges of this court, by refusing to recognize anything done by the present *de facto* Legislature and Executive could force the Government to abandon the revolution". This may be perfectly true, but there may be differences of opinion as to whether Lewis, J. was right in his next statement:

> . . . nor would it be an appropriate function of this court to attempt to influence the political scene in this way, even supposing that it could do so as a matter of reality.[107]

It may well be considered that this hardly accords with his earlier views of the judge's duty to maintain the proper law. His reason was fear of the dismissal of the judges and their replacement by 'revolutionary judges' who would be prepared unquestioningly to accept the legality of the 1965 Constitution. To this he coupled the principle *salus populi suprema lex*, but this should be tempered by the equally important maxim that *ex injuria jus non oritur*. It would be necessary, if these two maxims are to enjoy equal validity, that the judge should watch with care that when upholding order and good government he does not at the same time confer any rights upon the illegal administration. Lewis, J., in fact, viewed the obligation of the usurper to govern as deriving from

104 *Id.*, at 34.
105 *Hopkins Claim* (1926) U.S./Mexico, 4 *Reports Int. Arb. Awards*, 41 (postal orders); *Forer* v. *Guterman* (1948), Israel, 15 *Ann. Digest*, 58 (Order of Judicial Comm. P.C.); *Katz-Cohen* v. *Att. Gen.* (1949), Israel, 16 id., 70 (homicide).
106 *Chop Sun Cheong Loong* v. *Lian Teck Trading Co.* (1947), Malaya, 15 id., 583 (tenancy), *De Alwis (or Jayatilika)* v. *De Alwis and Yeo Giak Choo* (1947) Malaya, id., 589 (marriage); *Cheang Sunny* v. *Ramanathan Chettiar* (1948), Singapore, id., 587 (judicial decree).
107 *Madzimbamuto* v. *Lardiner-Burke*, *supra*, n. 86, at 36.

the *jus gentium* in the sense of natural law, especially in so far as the preservation of the State is concerned, and he accepted Grotius as his authority, using him as a Roman-Dutch commentator rather than an international lawyer, and he knew

> . . . of no authority which says that the *jus gentium* as propounded by Grotius is no longer a part of our law, and that the courts may not resort to its application in an unprecedented situation where the law is otherwise silent on the problem, and where the failure to apply it would result in chaos and disaster to the State and a failure of the machinery of justice within the State.[108]

In support of this view, the learned judge accepted two Dutch decisions of 1840 and 1847. He also used Grotius and other seventeenth century writers to illustrate that there was a duty to obey the 'usurper', but he made no reference to the 1495 Treason Act which was surely at least as relevant.

To say that the usurper is to be obeyed or that he is entitled to continue to govern is not the same as saying that everything he does enjoys legal validity.

> From the point of view of practical reality, therefore, the continued making of laws by the present *de facto* Government for this essential purpose [- preservation of peace and good government within the territory -] does not involve a usurpation of powers which the lawful government did not possess prior to the 11th November, 1965, and provided they are the type of laws which could validly have been made under the 1961 Constitution and provided they are not directly aimed at aiding the revolution, I see no grounds of public policy which would preclude the court from giving effect to them as a matter of necessity in this unprecedented situation.[109]

Clearly, at times the borderline will be very narrow, as Lewis, J. himself recognized, particularly in so far as the Smith régime might be constrained to legislate in order to overcome economic difficulties resulting from British sanctions. He cited legislative action to improve the quantity of wheat available for internal consumption, and said that:

> . . . *prima facie* these would be measures of ordinary good government validly taken to preserve the country, and the fact that they indirectly aided the revolution by providing necessary food for the people of this country, African and European alike, would not preclude the court from giving recognition to them. On the other hand, if, for example, measures were taken to restrict the existing franchise, thus interfering with the fundamental rights of citizens under the 1961 Constitution, it would be the duty of this court to declare such measures invalid[110]

but to what purpose or effect?

While the court may not wish to see itself in the position of legislator, this dichotomy between what a revolutionary régime may do and what is beyond its competence does impose upon it an obligation to set itself up as examiner of the government's conscience and purpose, and requires it to seek to decide why a measure was brought in. Thus:

> . . . if *ex facie* the measure, its purpose and mode of enforcement are predominantly innocent, the *onus* will be on an applicant seeking to set it aside to establish the contrary by means of evidence; if *ex facie* the measure, its purpose and/or mode of enforcement are predominantly unlawful and appear to be designed, as Grotius says, solely to establish the Government in its unlawful possession, for example, by stifling free and honest criticism of itself, then the court will refuse to recognize it unless satisfied by evidence that it has a legitimate purpose and/or mode of enforcement. Then there is yet a third type of measure where, *ex facie* the measure, the purpose or mode of enforcement is

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108 *Id.*, at 44.
109 *Id.*, at 59-60.
110 *Id.*, at 67.

> ambiguous; it could be either unlawful or innocent. In those circumstances, it is for the applicant seeking to set it aside to allege the unlawful purpose and/or mode of enforcement, together with sufficient facts from which a *prima facie* inference in his favour may be drawn. In the absence of rebutting evidence, he must succeed.[111]

In the instant case it is the third type of measure which is involved. In examining these measures, Lewis, J. investigated previous declarations of emergency in order to ascertain how far they might be construed as necessary for the preservation of peace and good government, and held this to be the case.

> The fact that there was [an] additional and suboridnate motive [- 'to fight the war on the economic and propaganda fronts' -] only means that the court has to scrutinize with particular care any emergency powers regulations made under it to ensure that such regulations, both in their purpose and in their mode of enforcement, conform to that dominant motive[112]

—and it is submitted that it would be extremely hard for any judge, given the premises on which Lewis, J. was acting, to conclude otherwise.

The applicants contended that their detention was ordered *mala fides* with a view to assist the forthcoming rebellion, but both had been subjected to prior restrictive orders and the court refused to accept the contention, although Lewis, J. indicated he might be prepared to insist, in camera if necessary, on disclosure by the Minister of his reasons in the event of a detention for the first time after November 11th. He finally dismissed the applications, reiterating that the 1965 Constitution was not lawful and nor was the government set up under it—"it will not become the lawful government unless and until the ties of sovereignty are severed either by express consent, or by acquiescence of Her Majesty's Government in abandoning the attempt to end the revolution." It is, however, "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", and extension of the state of emergency and of orders made thereunder fall within this category.[113]

In view of the length of Lewis, J.'s judgment, Goldin, J. who sat with him only required 30 pages for his concurrence. Perhaps one of the most important factors in his opinion was recognition of the fact that the presence or absence of recognition *de facto* or *de jure* by third States

> . . . is not crucial or even relevant to the discussion whether the present Government has effective control within Rhodesia, which is a question of fact to be determined by this court, or whether the 1965 Constitution has lawfully replaced the 1961 Constitution, which is a question of law. If thirty countries had accorded Rhodesia *de jure* recognition, it would not prove that the 1965 Constitution was created legally.[114]

He also pointed out that questions of recognition did not arise when a Southern Rhodesia court was called upon to decide on the validity of what purported to be the Constitution of Southern Rhodesia or of its laws, and from this point of view the significance of the attitude and

111 *Id.*, at 68-69.
112 *Id.*, at 71.
113 *Id.*, at 76,77.
114 *Id.*, at 85.

certificate of the British Government become less significant, particularly in so far as laws other than a so-called Constitution are concerned. At the same time:

> . . . it is neither the function of a court nor within its competence to accord recognition to the government or the international status of the government of its own country. Courts, Legislatures and the law derive their origin from the constitution and therefore the constitution cannot derive its origin from them.[115]

In so far as the world is concerned, Goldin, J. reminded the respondents that although their

> government has effective control within Rhodesia, it only claims to be or declares that Rhodesia is an independent State, but outside its borders it is neither accepted nor treated as such. On the contrary, in the sphere of international relations Rhodesia retains the status and powers conferred upon it by the 1961 Constitution. . . . The latter aspect is of particular relevance in deciding whether the 1961 Constitution has ceased to exist. . . . Rhodesia could only be considered to have become a sovereign independent state when the 1965 Constitution has replaced the 1961 Constitution, which involves holding that the latter ceased to exist. . . . The 1965 Constitution has not lawfully replaced the 1961 Constitution and the 1961 Constitution has not been annulled or ceased to be the lawful constitution of this country in any other manner or for any other reason.[116]

The judges were placed in an invidious position. On the one hand, they sought to maintain their independence from the Government and to respect their oaths as Her Majesty's judges. On the other, they were faced with the necessity of sustaining as much of the rule of law as was possible, while at the same time preserving as much of lawful administration as they were able. One must have some sympathy with Goldin, J. when he remarks that:

> . . . . when absolute necessity requires the court to function, and it can only function by giving effect to [some] legislative and administrative acts . . . then this doctrine [of public policy] can and should be invoked. The courts have not hesitated to apply the doctrine of public policy wherever the facts justified its application, because public policy does vary with situations and demands of public interest. It fluctuates with the circumstances of the time and it depends on the welfare of the community at any given time.[117]

The Legal Effect of UDI

In the light of this judgment it becomes clear that the nature of the Southern Rhodesian revolution has to be examined from different angles. There is no doubt that from the standpoint of the United Kingdom everything that has happened is illegal, that everything done by the administration since the Declaration of Independence is invalid and probably treasonable, and that those who participate therein, other than by continuing to function under their old oaths and in accordance with their rights and obligations under the 1961 Constitution, are conniving at the continuance of the revolution. From the point of view of the territory itself, however, it is equally clear that, while the administration regards the revolution as complete and successful thus giving legality to their actions, the judiciary, which has not yet been interfered with, refuses to accept this view. The judges consider a revolution to have taken place and an illegal Constitution and consequential legislation to have been enacted, recognizing a continued duty to enforce the law without assisting the purposes of the revolution, but at the same time

115 *Id.*, at 88.
116 *Id.*, at 91, 92.
117 *Id.*, at 95.

giving effect to existing order and accepting as valid such actions as would have been valid if performed today under the 1961 Constitution, or merely intended to continue administration in peace. A number of problems remain, not the least being how long the judges can continue to live in this schizophrenic fashion. Already there has been evidence that the situation may be changing and the appeals in connection with this case have been repeatedly adjourned, most recently so that full argument may be given as to the nature of allegiance in both English and Roman-Dutch law.

Both judges referred to the British sanctions and to the fact that the world was supporting Britain through the medium of United Nations resolutions.[118] This is not the place to consider the nature of United Nations action,[119] although it seems difficult to understand why Britain should not refer one of its colonial problems to the world body for the latter's assistance in dealing with it, particularly when her own inability may result in a threat to the peace either from the rebels seeking to maintain themselves, or from third States seeking either to restore British rule or replace the rebels by another group of nationals who, from the British point of view, would in the first instance at least be no less rebels—or perhaps to prevent a third State from sending police or armed forces into Rhodesia to assist in repressing Native guerrillas, even on the plea, specious or otherwise, that the latter were seeking to infiltrate into South Africa.[120]

Among the British sanctions applied against Southern Rhodesia were the freezing of assets and the taking over by named Governors of the Reserve Bank. This led to international complications when it was ascertained that the authorities in Salisbury were seeking to issue banknotes and had placed an order for these with a German printing house. The matter first came to notice when, at the request of the British Embassy in Bonn, the German police seized twenty-eight tons of Rhodesian banknotes printed in Munich. The British view was that the notes, which bore the Queen's portrait, were forged, although the Munich public prosecutor said that they were "not forged in the accepted sense of the word." Sir Sydney Caine, the British appointed Governor of the Reserve Bank of Rhodesia, instituted civil actions to prevent further printings or the dispatch of the notes to Salisbury. The German courts were at odds in the matter. The Frankfurt lower criminal court ruled that the impounding of the notes was illegal, since they had been properly printed by the Reserve Bank operating in Salisbury and carried the signature of Mr. Bruce, the Governor of the Bank there. Since they could not therefore be counterfeit, the magistrate ordered their release, but his ruling was immediately challenged by the public prosecutor. The civil court's injunction was considered to be unaffected by this ruling and was based on the illegality of the Smith régime and its lack of right to have banknotes pirnted. The Munich firm which printed the notes, however, together with South African Airways as carrier, lodged an appeal. The matter was further complicated when the Frankfurt High Court ordered suspension of any

[118] Gen. Ass. Res. 2012, 2022, 2024 (XX), Sec. Council Res. 216, 217, 221 (5 *Int. Legal Materials*, 1966, 161-8, 534).
[119] See Higgins, *International Law, Rhodesia and the U.N.* (1967), 22 *World Today* 94; Fenwick, *When Is There A Threat to the Peace?—Rhodesia* (1967), 61 A.J.I.L. 753.
[120] *The Times*, Sept. 11, 15, 18, 23, 26, 1967.

action on the lower court's order that the seizure was invalid. A few days later it found that there was no ground to hold the notes forgeries. The chairman of the Court ruled that:

> . . . it was not absolutely clear whether the Bank of Rhodesia in Salisbury had or had not the legal right to print money. The fact that Rhodesia was not internationally recognized as a republic had not played a decisive part in his decision.

This ruling was made despite the presence of a certificate from the Secretary of State for Commonwealth Relations that the Governor of Rhodesia had not authorized the German printers to print the notes, nor did it affect the validity of the injunction that had already been obtained.[121] This injunction, however, was rescinded by the Land Court in Frankfurt at the end of January, 1967.[122] The Court pointed out that the effect of the British Order was not to create a new Bank, but only to dismiss the then management and appoint a new one situated in London, and "the management in London is the sole organ entitled to represent the Reserve Bank of Rhodesia". This finding was in accord with the statement made to the Secretary General of the United Nations by the Government of the German Federal Republic, which was binding upon the Court since "in its declaration the Federal Government has not visibly violated any principles of international law". It should be remembered that the position of a German court towards international law is governed by Article 25 of the Federal Constitution whereby "the general rules of international law shall form part of federal law. They shall also take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory".

The reason for lifting the injunction lay in the inability of the London management to carry out its orders effectively. It "is not able to have its way in Salisbury. Should it send instructions, the Bank will not heed them, and the management will not force it to do so, and even judicial proceedings would be futile. The management has no recourse but to look helplessly on as another 'management' controls the Bank and attends to all the business which it should really be doing and wants to do. Both in point of fact and in law, its position is thus considerably weakened. The management does not appear to be the unlimited holder of the powers of the Bank or the managerial authority, but rather a management to whose already existing formal legitimacy must yet be added the possibility of actual business management and the exercise of all powers —when political conditions permit. Its position is comparable only to that of an aspirant to these powers. The intention was to grant full legal power immediately, but this has only happened formally—'on paper' as it were. To assume anything else would be to misunderstand the reality of law." The court emphasized Great Britain's own inability to make the London management effective, but indicated that German law will on occasion give effect to those possessing rights *in futuro*. While the law was not completely clear on the extent to which such a possessor is entitled to an order in restraint, he "will at least have to be granted such claims to the extent that he is able to forbid the actions of third parties which encroach upon his reversionary right or on his future authority". In the instant case, the Court did not regard the

[121] *The Times*, Dec. 22, 23, 24, 28, 1966.
[122] *Supra*, n. 40 (Eng. tr. by Mr. J. Gardiner, Dept. of Pol. Sc., Univ. of Alta.); *The Times*, Jan. 28, 1967.

Salisbury actions regarding notes as infringing the true management's future exercise of its full rights, especially as the Court found as a fact that the contract was not for a new issue but part of the normal functioning of the Bank and merely intended to replace notes which had become 'damaged and unsightly', while those printed in Great Britain before the Unilateral Declaration of Independence had been held up by the ban on exports. The Court declined to do anything on behalf of British imperial policy *vis-à-vis* Southern Rhodesia, and held that the case had nothing whatever to do with recognition of the régime or its local manager, being confined solely to questions of working management.

It is clear, therefore, that the attitude of the Court was to a great extent similar to that of the High Court in Salisbury. It sought to give effect to those measures which could be construed as necessary for normal administration by the authority able to carry them out. But the case did not rest there. The prosecution was dropped for lack of evidence and it was indicated that a settlement might be expected. This was in fact what happened. By agreement between London and the printers all procedings were dropped, and the notes remained in Germany 'for the time being'. It was also announced that Salisbury was releasing the Munich printers from their contract, provided none of the notes fell into the hands of the British.[123] Four months later it was announced in Salisbury that a new issue of banknotes had been made locally. This meant that the British blockade had been effctively broken in so far as paper, ink, plates, equipment and expertise were concerned. At the same time it was pointed out that, to avoid charges of forgery, the notes differed in details from the earlier ones. It could hardly be said, therefore, that this was, as had been the view of the Frankfurt court, purely in the course of normal business. In fact, Sir Sydney Caine announced from London that "if these purported banknotes are a new issue they will be invalid, and will not be legal tender, either in Southern Rhodesia or elsewhere".[124] This may be true in so far as London is concerned, but it is hardly operable for Southern Rhodesia itself. Further, even in time of occupation the occupant frequently issues his own banknotes and after liberation they, or at least contracts arising under them, receive recognition from the returned legitimate government.[125]

The settlement of the banknotes dispute indicates what may well be the outcome of Southern Rhodesia's unilateral declaration of independence. From the British point of view this is clearly illegal and remains so, although later legislation or acquiescence by the Crown may make it valid even retroactively. In the same way, at present the courts as the highest interpreters of law in Southern Rhodesia concur in this view. The latter recognize that some measures of the illegal authority have to be made effective and given full legal status. The agreement concerning the banknotes suggests that a somewhat similar view may exist in Britain regardless of public statements. With the present membership of the United Nations there is little likelihood of the condemnatory Resolutions being rescinded, but no State, with the power to be effective, has indicated any willingness to resort to armed force. The

123 *The Times*, Mar. 9, 11, 1967.
124 *Id.*, July 19, 1967.
125 See, e.g., Das, *Japanese Occupation and Ex Post Facto, Legislation in Malaya*, (1959) ch. XI, and cases there cited.

African States, too, are aware of their inherent weakness against the Rhodesian forces. It may well be that, while nothing obvious is done to make the situation respectable, it may over the course of time become accepted and, in accordance with the maxim *quieta non movere,* third States may gradually come to live with the situation as a matter of sheer necessity. The history of the inter-war years after 1933 shows numerous instances of States, which had asserted their determination to live in accordance with the law and to refuse recognition to illegal situations, accepting time as a healer—especially when their vital interests demanded a retreat from moralistic postures.