JUDGMENT

delivered in the General Division of the High Court of Rhodesia at Salisbury on Friday, 9th September, 1966,
in the matters between:

(1)

STELLA MADZIMBAMUTO,
Applicant,

and

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and of Law and Order, First Respondent,

and

FREDERICK PHILLIP GEORGE,
in his capacity as Superintendent of Gwelo Prison, Second Respondent,

(2)

LEO SOLOMON BARON,
Applicant,

and

NORMAN AYRE,
in his capacity as the Officer in Charge of Que Que Prison, First Respondent,

and

HENDRIK STEPHANUS BEZUIDENHOUT,
in his capacity as Director of Prisons,
Second Respondent,

and

CLIFFORD WALTER DUPONT,
Third Respondent,

and

DESMOND WILLIAM LARDNER-BURKE,
Fourth Respondent,

alternatively

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and of Law and Order, Fifth Respondent.

Reportable *Judgment No. GD/CIV/23/66.*

1. STELLA MADZIMBAMUTO,

Applicant,

versus

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and
of Law and Order, First Respondent,

and

FREDERICK PHILLIP GEORGE,
in his capacity as Superintendent of
Gwelo Prison, Second Respondent,

and

2. LEO SOLOMON BARON,

Applicant,

versus

NORMAN AYRE,
in his capacity as the Officer in Charge of
Que Que Prison, First Respondent,

and

HENDRIK STEPHANUS BEZUIDENHOUT,
in his capacity as
Director of Prisons, Second Respondent,

and

CLIFFORD WALTER DUPONT,

Third Respondent,

and

DESMOND WILLIAM LARDNER-BURKE,

Fourth Respondent,

alternatively

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and
Law and Order, Fifth Respondent,

(General Division, High Court, Rhodesia)

Salisbury. June 28, 29, 30, July 1, 4, 5, 6, September 9, 1966. Lewis and Goldin, JJ.

S. W. Kentridge, S.C., with him *H. T. Wheeldon*, for the first applicant.

M. A. A. May, Q. C., with him *P. McNally*, for the second applicant.

O. Rathouse, Q.C., with him *the Solicitor General, E. A. T. Smith, Q.C.*, and *B. C. Brown*, for the respondents in both cases.

LEWIS, J.: The first applicant, Stella Madzimbamuto, has applied upon notice of motion for an order of *habeas corpus* in respect of her husband, Daniel Nyamayaro Madzimbamuto. The second applicant, Leo Solomon Baron, has made a similar application on his own behalf. Since both applications involve the same legal issues, it was agreed by counsel on both sides and in both cases that they be heard together.

It is not disputed on the affidavits before the court that the background of events leading up to the present applications is as follows:

As far as Mr. Madzimbamuto is concerned, he was detained on or about the 26th February, 1959, until the 14th May, 1959, in terms of the Emergency (Temporary Detention) Regulations, 1959. From the 15th May, 1959, he was detained under the Preventive Detention (Temporary Provisions) Act of 1959. His case was reviewed by the tribunal set up under that Act, and the tribunal, over which a judge of this court presided, recommended that his detention be continued, which recommendation was accepted by the Governor. Thereafter, on the 8th June, 1961, he was released to a restriction area at Mafumgabusi, and finally released altogether on the 15th January, 1963.

Then, on the 28th April, 1964, he was served with an order issued by the Minister of Law and Order in terms of the Law and Order (Maintenance) Act of 1960 (now Chapter 39), restricting him to the area known as Gonakudzingwa, and on the 13th August, 1964, he was served with a similar order restricting him to the Sengwe Tribal Trust Area. That order expired on the 13th April, 1965, and he was released from restriction.

On the 19th June, 1965, Mr. Madzimbamuto was served with an order issued by the first respondent, in his capacity as the Minister of Justice and of Law and Order, in terms of the Law and Order (Maintenance) Act, restricting him to the Wha-Wha restriction area for a period of five years. By a variation of that order he was transferred to restriction in the Gonakudzingwa area, otherwise known as the Sengwe Restriction Area. On the 6th November, 1965, the first respondent, in his capacity as Minister of Justice and of Law and Order, issued a detention order against Mr. Madzimbamuto in terms of section 21 of the Emergency (Maintenance of Law and Order) Regulations of 1965, published in Rhodesia Government Notice No. 736 of 1965. The effect of the order was to detain Mr. Madzimbamuto in the Gwelo Prison, and the order was stated to be based on the belief that Mr. Madzimbamuto was "likely to commit acts in Rhodesia which are likely to endanger the public safety, disturb or interfere with public order, or interfere with the maintenance of any essential service".

As far as the second applicant, Mr. Leo Baron, is concerned, he was issued with a restriction order on the 28th May, 1965, by the same Minister (cited as the fifth respondent in the second application). The

order was issued in terms of section 50 of the Law and Order (Maintenance) Act, and it restricted Mr. Baron's movements to a radius of 15 miles of the main Post Office at Bulawayo for a period of one year. This order was said to have been made by the Minister in the belief that Mr. Baron had actively associated himself with activities prejudicial to the maintenance of law and order in Rhodesia, such belief being founded on information which the Minister was unable to divulge because of the confidential nature of the complaint and sources of such information. Mr. Baron, in correspondence between himself and the Minister, which is annexed to the affidavits before the court, denied the allegations on which the restriction order was based, and invited the Minister to state his reasons for the order and to substantiate those reasons before a judicial tribunal sitting *in camera*. The Minister declined to amplify his reasons, declined to agree to this proposal, and declined to revoke the order in question, which has now in any event expired by effluxion of time.

Thereafter, at about noon on the 11th November, 1965, the Minister issued a detention order against Mr. Baron, confining him to the Que Que Prison, in terms similar to those of the order against Mr. Madzimbamuto.

For the purposes of this case, it is accepted that the original detention orders in November, 1965, both in respect of the first applicant's husband and of the second applicant, were valid orders. On the 5th November, 1965, and by Rhodesia Proclamation No. 51 of 1965, published in Rhodesia Government Notice No. 735 of 1965, the Governor had proclaimed a state of emergency in this country, in terms of section 3 of the Emergency Powers Act [*Chapter 33*], and had made regulations in terms of section 4 of the Act which were contained in Rhodesia Government Notice No. 735 of 1965. Section 4, subsection (2) of the Act empowered the Governor to make regulations, *inter alia:*

> "4. (2) Such regulations may—
>
> (a) make provision for the removal from one part of Southern Rhodesia to some other part of Southern Rhodesia of any person whose removal appears to the Minister to be expedient in the public interest;
>
> (b) make provision for the summary arrest or detention of any person whose arrest or detention appears to the Minister to be expedient in the public interest.".

"The Governor", however, in terms of section 45 (1) of the 1961 Constitution, meant the Governor acting "in accordance with the advice of the Governor's Council or the appropriate Minister, as the case may require . . .", and it was laid down by the Appellate Division of this court in *African Newspapers (Pvt.) Ltd. v. Lardner-Burke, N.O.* 1964 (4) S.A.L.R. 486, that the Governor has no discretion to refuse to act

on such advice. At p. 488 C to D, BEADLE, C.J., after quoting the terms of section 45 (1) of the 1961 Constitution, said:

> "Since the appointed day, therefore, the Governor no longer has any discretion in this matter but is obliged to act on the advice of the 'Government' . .".

The detention orders in November, 1965, were made by the Minister under the powers conferred on him by the Act as read with the Regulations made by the Governor.

Thereafter, the Declaration of Independence occurred on the 11th November, 1965, in terms of which the Prime Minister and the members of his Cabinet purported to declare this country an independent sovereign State and to give to the country what I shall call "the 1965 Constitution" in place of the existing 1961 Constitution. Since then, there can be no doubt that the factual position is 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 they formerly exercised prior to the Declaration of Independence, notwithstanding their dismissal. Again, as a matter of fact, it is clear that the Governor, although still resident in this country, has not exercised his powers as such and that the third respondent in the application of Leo Baron 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.

In terms of section 3 (2) of the Emergency Powers Act no proclamation of a state of emergency could remain in force for more than three months, without prejudice to the issue of another proclamation at or before the end of that period if the Legislative Assembly by resolution so determined. On the 3rd February, 1966, the Rhodesian Parliament purported to pass a resolution in terms of that section determining that another proclamation of emergency be issued at or before the end of the period during which Rhodesia Proclamation No. 51 of 1965, referred to above, was in force. On the 4th February, 1966, by Rhodesia Proclamation No. 3 of 1966, published in Rhodesia Government Notice 57 of 1966, the Officer Administering the Government purported to declare a further state of emergency. The reason for this Proclamation is set out in his affidavit in these proceedings, as follows:

> "Because it appeared to me that action had been taken and was immediately threatened by certain persons of such a nature and on so extensive

a scale as to be likely to endanger the public safety or to disturb or interfere with public order or to interfere with the maintenance of certain essential services in Rhodesia.".

Pursuant to this Proclamation, the Officer Administering the Government purported to make regulations in terms of the Act entitled "The Emergency Powers (Maintenance of Law and Order) Regulations, 1966", published in Rhodesia Government Notice 71 of 1966. Before the expiration of that state of emergency, a further proclamation was issued by the Officer Administering the Government, contained in Rhodesia Government Notice 313 of 1966, dated the 3rd May, 1966, in pursuance of a resolution passed by Parliament on the 21st April, 1966, the effect of which was to purport to extend the state of emergency for a further three months.

In the meantime, by the Emergency Powers Amendment Act No. 14 of 1966 promulgated on the 11th March, 1966, the Officer Administering the Government, by and with the advice and consent of the Parliament of Rhodesia, purported to amend the principal Act, *inter alia*, by substituting "the Officer Administering the Government" for "the Governor" and "Parliament" for "the Legislative Assembly" wherever these words are used in the original Act. In terms of section 50 (1) of the 1965 Constitution, the same limitation as to his discretion in the exercise of his function is placed on the Officer Administering the Government as was formerly placed upon the Governor under section 45 (1) of the 1961 Constitution.

With the consent of the Minister, and pending the outcome of these two cases, this court, on the 14th March, 1966, ordered the temporary release of Mr. Madzimbamuto from the Gwelo Prison and his return to restriction at Gonakudzingwa, and on the 7th April, 1966, ordered the temporary release of Mr. Baron from the Que Que Prison and his return to his home in Bulawayo under certain conditions as to supervision.

As far as Mr. Madzimbamuto is concerned, it is not disputed for the purposes of these proceedings that the restriction order against him, dated the 19th June, 1965, restricting him to the Gonakudzingwa area for a period of five years, is a valid order, and that the first applicant is accordingly not entitled to an order of *habeas corpus* in respect of her husband, since, even if the subsequent detention order were held to be invalid, he would not be entitled to be set at liberty, but would have to return to the Gonakudzingwa Restriction Area until June of 1970. Mr. *Kentridge*, for the first applicant, accordingly sought and obtained an amendment to the draft order annexed to the notice of motion, so as to claim an order simply setting aside the order for the detention of Mr. Madzimbamuto in the Gwelo Prison.

That, briefly, is the background of events on which the hearing of these two applications is based. The contentions of the applicants and of the respondents respectively may be summarized as follows:

The applicants submit that the Declaration of Independence and the purported introduction of the 1965 Constitution in place of the 1961 Constitution were illegal, *ab initio*, and have remained illegal ever since. The only Constitution which is of legal force and effect is the 1961 Constitution, and since this court was constituted under and derives its powers solely from the 1961 Constitution, the only laws which the court can apply are those set out in section 56D of that Constitution, as amended, which reads as follows:

> "56D. Subject to the provisions of any law for the time being in force in Southern Rhodesia relating to the application of customary law, the law to be administered by the High Court and by any courts in Southern Rhodesia subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the tenth day of June, 1891, as modified by subsequent legislation having in Southern Rhodesia the force of law.".

The submission is that the only Rhodesian legislation which the court can recognize and enforce is that enacted in accordance with the 1961 Constitution prior to the 11th November, 1965; the Parliament of Rhodesia has no legal existence and everything done by it is invalid, and any administrative functions whatsoever of the present Executive set up under the 1965 Constitution, whether performed under such legislation enacted prior to the 11th November, 1965, or under legislation purporting to have been enacted since the 11th November, 1965, must be regarded as illegal by the court and of no force and effect. Since detention without trial is unlawful at common law, and is only permitted in terms of the 1961 Constitution, in exceptional circumstances where a state of emergency has been lawfully declared, the detention orders must be set aside.

The respondents' main contention is that the present Government is a valid *de jure* Government and the 1965 Constitution is now the only lawful Constitution, so that all laws made under it, or acts done pursuant to it, are equally valid. In the alternative, it is submitted that even if the present Government is not the *de jure* Government it is the "*de facto* Government" in that it is the only effective Government in this country, and the present Parliament is the only effective Parliament; therefore, at least some of the laws of this Parliament and administrative functions of the present Government are legal and must be recognized by the court. Those laws and administrative acts include, *inter alia*, such as are made or done for the preservation of peace or for the maintenance of law and order or for the general good government of the country.

The distinction between the terms "*de jure* Government" and "*de facto* Government" is well illustrated in the judgment of BANKES, L.J., in the case of *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva (1) A. M. Luther v. James Sagor and Company* (1921) 3 K.B.532 at p. 543, where the learned judge says:

> "Wheaton quoting from Mountague Bernard states the distinction between a de jure and a de facto government thus (1): 'A de jure government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time it may be deprived of them. A de facto government is one which is really in possession of them, although the possession may be wrongful or precarious'.".

Furthermore, it seems clear that the terms "*de facto* Government" and "effective Government" amount to one and the same thing. See the case of *The Arantzazu Mendi* (1939) A.C. at p. 264, where LORD ATKIN said:

> "By 'exercising de facto administrative control' or 'exercising effective administrative control', I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government.".

I turn then to consider the first point, which is whether this court should regard the present Government as legal in all respects, that is to say, whether it is the *de jure* Government of this country. Now, there can be no doubt that the means by which the Declaration of Independence and the introduction of the 1965 Constitution were brought about on the 11th November, 1965, were illegal, and Mr. *Rathouse*, for the respondents, as I understood his argument, did not attempt to contend otherwise. He based his argument on the submission, with which I shall deal later, that the Government has since become the *de jure* Government through its effective control of the country and the complete overthrow of the old order, and that its *de jure* status must date back retrospectively to the 11th November, 1965.

It is necessary at the outset to consider the constitutional position of this country prior to the seizure of independence. From the date of its occupation until the year 1923, this country was administered by the British South Africa Company under a Royal Charter and under the protection of the Crown. In 1923, pursuant to the holding of a referendum, it was annexed to and became part of His Majesty's Dominions as a Crown Colony with responsible government by virtue of the Southern Rhodesia (Annexation) Order in Council of 1923, as read with Letters Patent dated the 1st September, 1923, which provided for the 1923 Constitution. That Constitution persisted, with certain amendments, until 1961, when it was replaced by the 1961 Constitution granted by Her Majesty in terms of the Southern Rhodesia (Constitution) Order in Council, 1961. A prior referendum had shown a majority vote in

favour of the new constitution, and the 1961 Constitution gave the country a greater measure of autonomy.

The constitutional status of this country under the 1961 Constitution immediately prior to the 11th November, 1965, is, in my view, correctly set out by Professor de Smith, Professor of Public Law at the University of London, in his book entitled *The New Commonwealth and Its Constitutions*, published in 1964. At pp. 42–43 of that book, Professor de Smith says:

> "Southern Rhodesia, one of the constituent territories of the moribund Federation, enjoys an extraordinary degree of autonomy *vis-à-vis* the United Kingdom in respect of its domestic affairs. The United Kingdom Government has publicly recognized the existence of a convention that Parliament cannot properly legislate on any matter within the competence of the Southern Rhodesia Legislature, including the amendment of the Constitution, without the consent of the Southern Rhodesian Government. The majority of members of the United Nations have found it impossible to appreciate the force of the distinction between the sovereign legal powers of the United Kingdom Parliament over Southern Rhodesia and the conventional restrictions on their exercise, especially as for international purposes the United Kingdom Government has insisted on treating the internal affairs of Southern Rhodesia as matters of domestic jurisdiction within the meaning of the Charter; but there is no doubt that the United Kingdom is constitutionally bound (in the absence of a fundamental change of circumstances) by the limitations that it has expressly accepted. The amplitude of Southern Rhodesia's autonomy is also reflected by the 1961 Constitution. Discretionary reservation of Bills is abolished, and compulsory reservation is confined to one of the two alternative procedures prescribed for constitutional amendment. Disallowance of Acts on the advice of the United Kingdom Government is limited to measures injurious to government stockholders and measures inconsistent with the Crown's international obligations. Of the few constitutional provisions alterable by the Crown in Council none is of first-rate practical importance, and there is no general power to legislate for Southern Rhodesia except by Act of Parliament and in conformity with the agreed convention. The Southern Rhodesian Legislature, moreover, is unique among the legislative bodies of 'dependent' territories in having full power to make laws with extraterritorial effect."

> "The practical effect of the redistribution of federal powers upon the dissolution of the Federation might well be to leave Southern Rhodesia in a constitutional position not significantly different from that of a Dominion in, say, 1918. In purely constitutional terms a grant of independence at that point would not greatly enhance the control exercisable by Southern Rhodesia over its domestic affairs. However, the political implications of such a change of status would be far-reaching, not only for Southern Rhodesia but for Britain and the Commonwealth. In April, 1963, the British Government committed itself to the principle that Southern Rhodesia, like Nyasaland and Northern Rhodesia, would 'proceed through the normal processes to independence'; but it made no commitment as to the timing of independence, and left itself room for manoeuvre."

Thus, legal sovereignty over this country was still vested in the United Kingdom Parliament and the acquisition of sovereign indepen-

dence by this country, as at the 11th November, 1965, could only have come about legally and constitutionally by the grant of such independence by Her Majesty the Queen through an Act of the United Kingdom Parliament. As I have pointed out earlier, Mr. *Rathouse* did not contend otherwise, nor, quite rightly in my view, did he attempt to address any argument in support of the popular misconception that the purported ratification of the 1965 Constitution by the present Parliament and by the Officer Administering the Government could purge the original illegality and clothe the 1965 Constitution and the Government set up thereunder with *de jure* validity. It is therefore unnecessary to dwell further on that aspect. The whole basis of Mr. *Rathouse's* argument for the respondents on the question of *de jure* validity was the contention that such has been acquired retrospectively through the complete replacement of the old order by the new. It was submitted that a legal order ceases to have validity when it loses efficacy and no longer coincides with reality, and that this applies whether the new order which replaces it came about in a legitimate way or not, provided only that the prior efficacy of the old order has passed to the new one. This is the essence of what I may call the "Kelsen doctrine" propounded by Professor Kelsen in his well-known work on the *General Theory of Law and State,* upon which Mr. *Rathouse* placed great reliance, at p. 115:

> "C. THE BASIC NORM OF A LEGAL ORDER
>
> *a. The Basic Norm and the Constitution*
>
> The derivation of the norms of a legal order from the basic norm of that order is performed by showing that the particular norms have been created in accordance with the basic norm. To the question why a certain act of coercion—e.g., the fact that one individual deprives another individual of his freedom by putting him in jail—is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.
>
> If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition are the declarations of those to whom the constitution confers norm-creating power binding norms. It is this presupposition that enables us to distinguish between individuals who are legal authorities and other individuals whom we do not regard as such, between acts of human beings which create legal norms and acts which have no such effect.

All these legal norms belong to one and the same legal order because their validity can be traced back—directly or indirectly—to the first constitution. That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order."

and at pps. 117–8:

"*c. The Principle of Legitimacy*

The validity of legal norms may be limited in time, and it is important to notice that the end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy.

This principle, however, holds only under certain conditions. It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called *coup d'Etat*. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, that is in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals who so far have been the 'legitimate' organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order 'remains' valid also within the frame of the new order. But the phrase 'they remain valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which were introduced under the old constitution 'continue to be valid' under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. The phenomenon is a case of reception (similar to the reception of Roman law). The new order 'receives', i.e. adopts, norms from the old order; this means that the new order gives validity to (puts into force) norms which have the same content as norms of the old order. 'Reception' is an abbreviated procedure of law-creation. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus, it is never the constitution merely but always the entire legal order that is changed by a revolution.

This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only *de facto* but also *de jure*. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they

have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order—to which no political reality any longer corresponds—has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the norms of the old order can no longer be recognized as valid norms.

d. Change of the Basic Norm

It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm.

e. The Principle of Effectiveness

If we attempt to make explicit the presupposition on which these juristic considerations rest, we find that the norms of the old order are regarded as devoid of validity because the old constitution and, therefore, the legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behaviour of men does no longer conform to this old legal order. Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A *conditio sine qua non*, but not a *conditio per quam*. The efficacy of the total legal order is a condition, not the reason for the validity of its constituent norms. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way. They are valid, however, only on the condition that the total order is efficacious; they cease to be valid, not only when they are annulled in a constitutional way, but also when the total order ceases to be efficacious. It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness.".

See, also, the article in volume 51 of the *Law Quarterly Review* at p. 519, para. 31.

Again, in Paton's *A Textbook of Jurisprudence*, 3rd Edn. pp. 15–16, the author says:

"But how can we explain the legal force of a constitution? What is the legal basis of the power of the King in Parliament to change the law? Constitu-

tions ultimately have an extra-legal origin. Even if the whole community unanimously agrees to accept a particular constitution, that agreement has no legal force, for until a constitution is adopted the methods by which law is to be created are not laid down. A revolution may destroy an old constitution and create a new one, but such matters are beyond the sphere of jurisprudence which must posit an initial hypothesis or *Grundnorm* beyond which it cannot go. Once it has been accepted as a basis that the will of the King in Parliament ought to be obeyed, we may trace the validity of any particular legal rule; but to determine what is to be the initial hypothesis for any country we must go beyond jurisprudence, examine the world of reality, and discover an hypothesis that has some measure of correspondence with the facts. It would be futile to state as the initial hypothesis for the U.S.S.R. that the will of the Tsar ought to be obeyed. But it should be noted that the hypothesis need not *absolutely* correspond with the facts. In England the will of the King in Parliament ought to be obeyed, but no one supposes that every member of the community actually does obey the law on every occasion. This emphasizes again that law does not state what actually does happen, but lays down what ought to happen; yet if the legal order is to be effective, it must secure a certain measure of acceptance."

Mr. *Rathouse* also relied on *Friedmann's Legal Theory*, 3rd Edn. at p. 114, where the author says:

"Ultimately every legal norm in a given legal order deduces its validity from a highest fundamental norm (*Grundnorm*). This fundamental norm itself is not capable of deduction, it must be assumed as an 'Initial Hypothesis'. That Parliament is sovereign in England is a fundamental norm, no more logically deducible than that the command of the Führer was the supreme legal authority in Nazi Germany or that native tribes obey a witch-doctor."

"Theoretically it thus does not matter for the pure theory of law which fundamental norm is adopted, but at one point it cannot help facing political reality. Can the pure theory of law take note of a revolutionary change which establishes a new *'Grundnorm'* in defiance of the former one? Could a legal command for instance still be based, with any claim to theoretical validity, on the Czarist Constitution or on the German Republican Constitution? Neither has ever been abrogated by a legal process, reducible to anything but a conflicting Grundnorm. Kelsen here is forced to introduce an element which is neither formal nor normative. No fundamental norm can be recognised which has not a minimum of effectiveness, that is, which does not command a certain amount of obedience."

Lord Lloyd, in his book entitled *The Idea of Law* (of which there is only available to this court the Pelican edition), put the position at pp. 182–3 as follows:

"When, however, we are considering revolutionary situations such as Parliament transferring all power to another body, whether voluntarily or under compulsion, we are clearly in a realm where power is taking ascendancy over law to a degree where it becomes impossible to disregard the actual factors of power and obedience in determining legal validity itself. When, for example, the Cromwellian régime succeeded in superseding the monarchy, or when William was called in to replace James II after the latter's expulsion, the Austinian conception of habitual obedience to A rather than B is clearly relevant as explaining how legal authority can pass from

one to the other regardless of the legal regulations hitherto in operation. Certainly in this sense an operative legal system necessarily entails a high degree of regular obedience to the existing system, for without this there will be anarchy or confusion rather than a reign of legality. And where revolution or civil war has supervened it may even be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate *de facto* power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity.".

Mr. *Rathouse* also placed reliance on a work by the Swiss Professor, Karl Olivecrona, entitled *Law as a Fact,* published by the Oxford University Press in 1939. The book itself is not available to the court and a photostatic copy of certain extracts from it was supplied to the court from the Bar. At p. 66, under the subheading, *"The original laying down of a constitution",* the author says:

"A constitution may, of course, be altered according to its own rules. Sometimes even a completely new constitution may be created in a legal way. It can also happen that a constitution has been slowly evolved from a primitive stage as traditional law. In most cases, however, if not in all, the constitutions of civilized countries have originally been laid down by means of a revolution or a war, i.e. by force. At least the present holders of power or their antecessors have instituted themselves by such means, even if this did not imply a major alteration of the constitution. At some point, therefore, the chain of legal development is broken by acts of violence or generally unlawful acts, which consequently seem to be the ultimate source of the existing order.

These facts are often regarded as peculiarly puzzling. 'The problem of the revolution' has been thoroughly discussed in legal philosophy. It seems hard to understand how acts of violence can give rise to 'binding' rules. Legislation of this kind appears to be a still more mysterious process than ordinary legislation. The constitutional law-givers are supposed to have a right to give binding rules. But the revolutionaries are not only devoid of any right in this connexion. They are acting in defiance of existing law. Yet the new constitution is the basis for new laws, whose binding force is not questioned.

When the superstitious notion of a 'binding force' in the law is discarded, the dilemma is resolved, but only then. From the traditional standpoint, the birth of Law from Force must remain a mystery, puzzling for ever the brains of unfortunate philosophers. Actually, the laying-down of the constitution through revolutionary acts is no more mysterious than ordinary law-giving. In both cases what really happens is that a set of independent imperatives is laid down by some individuals with a claim to obedience in a whole country. The difference is in the causes which make the imperatives effective.

While ordinary legislation is made effective through the general reverence for the constitution, working as a *permanent* source of power, a revolu-

tionary constitution is pressed on the people by other means. There must be a *temporary* assemblance of forces strong enough to effect that change in the attitude of the citizens which is implied in the acceptance of a new constitution as binding . Perhaps the attempt fails. Then the planned constitution remains a scrap of paper, a mass of empty words. But if the revolution succeeds, if a government is set working according to the principles of the new imperatives, these are henceforth the constitution. To put it briefly: victory of the revolution corresponds to the *constitutional form* in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding. The whole machinery is functioning again, with more or less difference in regard to the aims and the means of those in power.".

Then, again, at p. 70, the author continues:

"The immediate obstacle to any revolutionary attempt is always the general loyalty to the existing constitution. When the constitution has once broken down, however, the inveterate habit of obedience to a set of rules of government is a source of strength to the new constitution. The attitude is simply transferred from one set of rules to another. This change-over is sometimes accomplished with astonishing ease, especially when the new rules are better adapted to the economic conditions and to prevalent ideas of justice.

More generally speaking, the principal source of strength to the constitution is in the social habits and instincts of the people. This is so *during* the reign of a constitution as well as when a new constitution is established. The revolutionaries can gain power only by utilising this force in the proper way. Paradoxical as it may seem, success in the revolution depends upon the working of those human characteristics which make for law-abiding.".

At p. 73, second paragraph:

"It was pointed out e.g. that it is the general respect for the constitution that makes new rules effective when introduced through legislation. The constitution itself was traced back to a revolution or war. But this does not mean that a revolution or war is to be regarded as the *ultimate* source of the law as a whole. Such a supposition would be entirely wrong. A revolution takes place in a society where a law is already in force. It is a way of changing the law. It affects immediately only certain parts of the legal system, in the first place the constitution, while many other parts of the law, especially the fundamental rules of criminal law, may remain unchanged for the time being.".

Mr. *Rathouse* then referred us to *Studies in History Jurisprudence,* by Bryce, vol. II (1901) and, in particular, to Chapter 10 under the title of *The Nature of Sovereignty,* in order to illustrate the way in which *de facto* sovereignty can merge with *de jure* sovereignty. At p. 516, the author says:

"Sovereignty *de iure* and sovereignty *de facto* have a double tendency to coalesce; and it is this tendency which has made them so often confounded.

Sovereignty *de facto,* when it has lasted for a certain time and shown itself stable, ripens into Sovereignty *de iure.* Sometimes it violently and

illegally changes the pre-existing constitution, and creates a new legal system which, being supported by force, ultimately supersedes the old system. Sometimes the old constitution becomes quietly obsolete, and the customs formed under the new *de facto* ruler become ultimately valid laws, and make him a *de iure* ruler. In any case, just as Possession in all or nearly all modern legal systems turns itself sooner or later through Prescription into Ownership—and conversely possession as a fact is aided by title or reputed title—so *de facto* power, if it can maintain itself long enough, will end by being *de iure*. Mankind, partly from the instinct of submission, partly because their moral sense is disquieted by the notion of power resting simply on force, are prone to find some reason for treating a *de facto* ruler as legitimate. They take any pretext for giving him a *de iure* title if they can, for it makes their subjection more agreeable and may impose some restraint upon him."

The doctrine propounded in the above authorities may well be correct, and there is no difficulty in applying it in the normal situation where one has a state which is already a sovereign independent state changing its form of government or its constitution by a successful internal revolution, whether peaceful or otherwise. All that need happen is the complete displacement of the old order within the territory itself by the new order. In those circumstances, provided that the old order has completely disappeared, the existing judges of the courts are in no difficulty. Their former allegiance to the old order disappears with its complete annihilation, and it is then a simple step to recognize their allegiance to the new order and to continue to function as if they had been appointed under the new order. Such was the situation in the case of *The State v. Dosso and Another* (1958) 2 Pakistan Supreme Court Reports, p. 180. In that case what happened was that the President of Pakistan had annulled the 1956 Constitution, by his Proclamation of the 7th October, 1958. In the same Proclamation he dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both the Provincial Assemblies. Simultaneously, martial law was declared throughout the country and General Muhammad Ayub Khan, the Commander-in-Chief of the Pakistan Army, was appointed as the Chief Martial Law Administrator. Three days later the President promulgated the Laws (Continuance in Force) Order, the general effect of which was the validation of laws, other than the late Constitution, which were in force before the Proclamation, and restoration of the jurisdiction of all courts, including the Supreme Court and the High Courts. The order contained the further direction that the Government of the country, thereafter to be known as "Pakistan" and not the "Islamic Republic of Pakistan", should be governed as nearly as may be in accordance with the late Constitution.

The court held that the President's Proclamation of the 7th October, 1958, constituted an abrupt political change, not within the contemplation of the 1956 Constitution, in other words a revolution, that the

revolution had been a successful one and that a revolution was an internationally recognized legal method of changing a Constitution. The Chief Justice, Muhammad Munir, said in the course of his judgment at p. 184–5 of the Report:

> "It sometimes happens, however, 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. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. 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. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or 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 regime, 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.. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary government and the new constitution are, according to International Law, the legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful *coup d'état* is an internationally recognized legal method of changing a Constitution.
>
> After a change of the character I have mentioned has taken place, 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 learned Chief Justice then quotes extensively from Kelsen, and continues at p. 186:

> "Bearing in mind the principle just stated let us now approach the question involved in these cases. If what I have already stated is correct, then the revolution having been successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws (Continuance in Force) Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined.".

As I have said earlier, the learned judges were able to arrive at that conclusion because, Pakistan having enjoyed independent sovereign status for some years at the time this case arose, the success of the revolution was complete and absolute when it succeeded internally within the boundaries of Pakistan. *Non constat* that the learned judges would have reached the same decision if the country had been still tied to British sovereignty at that time.

In this connexion, it is pertinent to remark that those who point to the examples of other recent revolutions in other parts of Africa, such as Zanzibar, Ghana and Nigeria, which have succeeded internally, and seek to equate them with the situation in this country, on the basis that those countries, too, have "illegal regimes" in power, fall into the error of overlooking the fundamental difference that those countries were already independent sovereign states before those revolutions occurred. Hence, in each of those countries, as in Pakistan, the change of its Constitution or form of government by means of revolution was entirely its own affair, and the successful overthrow of the old order brought with it lawful status to the new regime internally and recognition of the new regime by other countries internationally.

Where, however, as in the case of Rhodesia, the country, despite its autonomy in regard to its internal affairs, was not legally a sovereign independent State before the revolution but was subject to the legal sovereignty of a mother State, then it seems to me that the doctrine propounded by the authors quoted above can only apply where the revolution has not only succeeded internally but has also had the effect of successfully untying the apron-strings of sovereignty of the mother State. An obvious example of such a revolution is to be found in the American War of Independence.

Mr. *Rathouse* submitted, however, that even in the case of the American Revolution, the mere Declaration of Independence plus the setting up of the Constitution in pursuance of it, was sufficient to legally validate that Constitution and all that was done under it as from the date it happened. He sought to place reliance upon Salmond's well-known textbook on *Jurisprudence*, 11th edn., by Glanville Williams, where the learned author says at p. 101–2:

> "As an illustration of the proposition that every constitution has an extra-legal origin, we may take the United States of America. The original constituent states achieved their independence by way of rebellion against the lawful authority of the English Crown. Each of these communities thereupon established a constitution for itself, by way of popular consent expressed directly or through representatives. By virtue of what legal power or authority was this done? Before these constitutions were actually established, there was no law in these colonies save that of England, and it was not by the authority of this law, but in open and forcible defiance of it, that these colonial communities set up new states and new constitutions. Their origin was not merely extra-legal, it was illegal. Yet, so soon as these

constitutions succeeded in obtaining *de facto* establishment in the rebellious colonies, they received recognition as legally valid from the courts of those colonies. Constitutional law followed hard upon the heels of constitutional fact. Courts, legislatures, and law had alike their origin in the constitution, therefore the constitution could not derive its origin from them. So, also, with every constitution that is altered by way of illegal revolution. By what legal authority was the Bill of Rights passed, and by what legal title did William III assume the Crown? Yet the Bill of Rights is now good law, and the successors of King William have held the Crown by valid titles. *Quod fieri non debet, factum valet.*".

It seems to me, however, with respect to the learned author, that this statement of the position is misleading to the extent that it tends to suggest that legal validity followed immediately upon the commencement of the revolution. It is clear that once the revolution had entirely succeeded, with the defeat of the British, the American Courts, through hindsight, backdated the legal status of the Constitution to the date of the Declaration of Independence. That was a perfectly natural and proper thing to do because then it ensured a state of continuity in the law as from the date of independence. Regarding the attitude of the American judges while the War of Independence still raged, there seems to be a dearth of information and authority. It is clear, however, that prior to the American Declaration of Independence the American Colonists had no High Court judges of their own. The courts were created by the British King himself and the judges were appointed by him alone and the question of the payment of their salaries was entirely a matter for the King. The courts were therefore British courts in every sense of the word, and in fact it was one of the charges against the King contained in the American Declaration of Independence that "he has made judges dependent on his will alone, for the term of their offices, and the amount and payment of their salaries". When the revolution occured, therefore, the former British judges either fled the country or took an oath of allegiance to the revolutionaries and joined them as judges of the revolutionary courts. In those circumstances, it seems quite apparent that they were never called upon to pronounce on the legality of the revolutionary regime or the new constitution while the War of Independence was still being fought. Having joined the revolution, they became part and parcel of it.

It seems to be quite clear from decisions of the American Supreme Court long after the revolution that the *de jure* status of the American States depended on the success of the revolution itself and its commencement was backdated to the day when independence was declared. In the case of *Williams v. Bruffy* (1877) Supreme Court Reports 176 (24 Lawyers' Edition p. 716), MR. JUSTICE FIELD, in contrasting the position of the Southern States which had unsuccessfully rebelled against the United States during the Civil War in America with that of the American

colonies which successfully broke away from the British Crown, said, at the bottom of column 1 on page 718 of the Lawyers' Edition Report:

> "The other kind of de facto governments, to which the doctrines cited relate, is such as exists where a portion of the inhabitants of a country have separated themselves from the parent State and established an independent government. The validity of its Acts, both against the parent State and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such Acts perish with it. If it succeed, and become recognized, its Acts from the commencement of its existence are upheld as those of an independent nation. Such was the case of the state governments under the old confederation on their separation from the British Crown. Having made good their Declaration of Indpendence, everything they did from that date was as valid as if their independence had been at once acknowledged.".

The judgment of CHASE, C.J., in the case of *Shortridge v. Mason,* in the United States Circuit Court for the District of North Carolina, of which the court has been supplied with a photostatic copy, is to a similar effect. The date of the judgment does not appear from the copy supplied to us. At p. 99 of the Report, the learned Chief Justice says:

> "Nor can the defence in this case derive more support from the decisions affirming the validity of confiscations during the war for American independence.
>
> That war began, doubtless, like the recent civil war, in rebellion. Had it terminated unsuccessfully, and had English tribunals subsequently affirmed the validity of colonial confiscation and sequestration of British property and of debts due to British subjects, those decisions would be in point. No student of international law or of history needs to be informed how impossible it is that such decisions could have been made.
>
> Had the recent rebellion proved successful, and had the validity of the confiscations and sequestrations actually enforced by the insurgent authorities been afterwards questioned in Confederate courts, it is not improbable that the decisions of the State courts, made during and after the revolutionary war, might have been cited with approval.
>
> But it hardly needs remark, that those decisions were made under widely different circumstances from those which now exist. They were made by the courts of States which had succeeded in their attempt to sever their colonial connection with Great Britain, and sanctioned acts which depended for their validity wholly upon that success; and can have no application to acts of a rebel government, seeking the severance of constitutional relations of States to the Union, but defeated in the attempt, and itself broken up and destroyed.
>
> Those who engage in rebellion must expect the consequences. If they succeed, rebellion becomes revolution; and the new government will justify its founders. If they fail, all their acts hostile to the rightful government are violations of the law, and originate no rights which can be recognized by the courts of the nation, whose authority and existence have been alike assailed.".

Reference may also be made to the book entitled *Colonial America,* by Professor Barck, Professor of History at Syracuse University, and

Professor Lefler, Professor of History at the University of North Carolina, which, though not a legal authority, is recognized as an authoritative history of America during this period. At p. 602, the authors say much the same thing in laymen's language:

> "A mere declaration of independence did not mean that freedom from Great Britain was an accomplished fact; nor did it mean that the United States immediately became a strong and unified nation. Instead, there followed seven years of war, during the course of which the mother country attempted by force of arms to compel her unruly children to remain within her empire . In addition, there were unresolved questions in the field of diplomacy: would other nations recognize the new republic and aid it in maintaining its independence? These and other problems had to be faced before strength, unity and recognition were achieved."

The cases arising out of the dissolution of the Austro-Hungarian Monarchy, to which Mr. *Rathouse* referred the court, are also explicable on a similar basis. They are reported in the *Annual Digest of Public International Law Cases* for the years 1919–22, edited by Sir John Fischer Williams and H. Lauterpacht, at pp. 11–21, and for the years 1925–6, edited by A. D. McNair and H. Lauterpacht, at pp. 13–15. In these cases, the courts held that the Czechoslovak State and the other new States came into existence as sovereign independent States from the time they seized sovereignty in October, 1918, and did not owe their legal existence to the subsequent peace treaties at the end of the First World War. It seems clear, however, that this was because the Austro-Hungarian Monarchy was in the process of disintegration and hence powerless to resist such seizure. The *ratio decidendi* of these cases appears to be epitomised in Case No. 7 at p. 20 of the earlier collection of cases referred to, where the court said:

> " 'It is a juridical error to believe that the Austro-Hungarian Monarchy legally existed up to the date of the coming into force of the Treaty of St. Germain; it is, juridically speaking, an error to believe that the new States, created on parts of the territories of the former Monarchy, had, up to that date, no significance except as a fact. From the moment of the dissolution of the old Monarchy, the new States alone possessed an organization and exercised legislative, administrative and judicial capacity. Even the Peace Treaty presupposes that the new States already existed legally before it came into force, otherwise the new States could not have been parties'."

In other words, these cases merely provide further examples of revolutions involving a successful severance of the ties of sovereignty of the former mother state, resulting in the antedating of the sovereign independence of the new State to the time when the original seizure occurred. Accordingly, they afford no real assistance to the respondents in the present case.

Assuming for the purpose of this argument, that the present Government of Rhodesia is in complete and effective control, what does this

amount to? How can it make the Government a fully *de jure* government without breaking the tie of legal sovereignty of the mother country? Before the revolution of the 11th November, 1965, Britain was never in physical occupation of the country, and never administered it directly. Southern Rhodesia was never under Colonial Office administration. From 1961 onwards the country enjoyed full internal self-government on the basis of the Constitution, as described in Professor de Smith's book to which I have referred above. As the learned author points out, the convention by which Britain bound herself not to interfere in our internal affairs and not to legislate for this country without its consent was binding upon Britain unless there were "a fundamental change of circumstances". In other words, it was an implied term of the observance of this convention by the British Government that this country continue to honour and observe the 1961 Constitution. It is clear that the unilateral repudiation of the 1961 Constitution by the Declaration of Independence and the purported substitution of the 1965 Constitution on the 11th November, 1965, was such a "fundamental change of circumstances" entitling Britain, legally, to reassert its sovereignty over this country in regard to its internal affairs. In my view, 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 an 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 of 1965 [*Chapter 76*], on the 16th November, 1965. It is also clear that the British Government has taken measures to endeavour to put an end to the revolution. Sanctions have been imposed upon this country and the success or failure of these measures is still in doubt at the present time. Even if the contents of the affidavits of Mr. Bruce, the Governor of the Bank, and Sir Cornelius Greenfield, the Chairman of the Government Economic Advisory Committee, be accepted in their entirety, they do no more than forecast that the policy of sanctions will fail. A contrary opinion is expressed by Professor Taylor, Head of the Department of Economics at the University College of Rhodesia and Nyasaland, in his affidavit filed in support of the applicant's case, to the effect that it is impossible to say that this country will definitely survive the effect of the sanctions policy. The court cannot decide as a fact that the revolution has succeeded or that it must succeed on that evidence.

Quite apart from this, however, and even if this court were to assume that the economic measures taken by the British Government in an endeavour to put and end to the revolution are doomed to failure, it cannot also assume that the British Government would in that event abandon the struggle. The present world situation is vastly different

from what it was at the time when the American War of Independence was fought. There, the American Colonists, with the assistance of Britain's enemy at that time, France, succeeded in defeating the British on American soil by force of arms and Britain acknowledged her defeat. There was no international organization to concern itself in the struggle. 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.

In those circumstances it is obvious, as counsel on both sides frankly conceded, that the position of the judges of this court is unique and without precedent. The judges themselves hold office under the 1961 Constitution and derive their functions 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. In terms of section 55 of the Constitution, the Chief Justice of the court is appointed on the advice of the Prime Minister, and the Governor cannot disregard that advice. (See the *African Newspapers* case (*supra*)). The other judges are also appointed on the advice of the Prime Minister and with the agreement of the Chief Justice. The question of the removal of the judges is entirely an internal matter; so, too, is the fixing of their salaries, which salaries are paid out of the Consolidated Revenue Fund of this country. (See sections 56 B and C.) 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, that law being defined in section 56D of the Constitution to which I have already referred. At the time of the Declaration of Independence on the 11th November, 1965, 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".

Mr. *Rathouse*, at one stage of his argument, put forward the alternative submission that the court must recognize the legal validity of the 1965 Constitution because it was on that basis that the present Government had agreed to accept the continuance of the services of the judges of this court. He drew attention to section 128 of the 1965 Constitution, which reads as follows:

"(1) The High Court of Southern Rhodesia in existence immediately prior to the appointed day shall be deemed to have been duly constituted as the High Court of Rhodesia under this Constitution.

(2) Every person who immediately prior to the appointed day holds the office of Judge of the High Court shall, subject to subsections (3) and (4) of this section, continue to hold the like office as if he had been appointed thereto under the corresponding provisions of this Constitution.

(3) Any person who under the provisions of subsection (2) of this section holds the office of Judge of the High Court on or after the appointed day by virtue of having been the holder of the like office immediately prior to that day shall, subject to the provisions of subsection (4) of this section, be deemed to have complied with the requirements of this Constitution relating to the taking of oaths on appointment to such office.

(4) A person who under the provisions of subsections (2) and (3) of this section continues to hold the office of Judge of the High Court may be required by the Prime Minister or a person assigned thereto verbally or in writing by the Prime Minister to state forthwith whether he accepts this Constitution and will take the oath of loyalty and the judicial oath in the forms set out in the First Schedule, and if such person—

(a) agrees to accept this Constitution he shall forthwith take the said oath of loyalty and the judicial oath before the Officer Administering the Government or some person authorized by the Officer Administering the Government in that behalf;

(b) refuses to accept this Constitution his office shall be deemed to have become vacant on the day of such refusal and such person shall not be entitled to any compensation for his loss of office.".

I am unable to agree with this submission. If the attitude of the respondents was that the judges of this court had accepted the deeming clause of the 1965 Constitution quoted above, and had impliedly accepted office under the terms of the 1965 Constitution, then the defence of the respondents to these proceedings would surely have been based on the simple argument that in those circumstances the judges of this court were precluded from questioning or making any pronouncement upon the legal validity of the 1965 Constitution or the government set up thereunder, by virtue of the terms of section 142 of that Constitution, which reads as follows:

"The validity of this Constitution and, except as provided therein, of anything done thereunder shall not be inquired into in any court and the provisions of this Constitution and anything so done shall for all purposes be regarded as valid."

No such point was taken on behalf of the respondents, and it seems clear that both parties to the dispute in both these cases have in fact asked this court to decide on the question of the legal validity of the Constitution and the Government set up thereunder. For the reasons already given, I am unable to hold that the 1965 Constitution is the legal Constitution of this country and that the Government is the lawful Government of this country. If I were so to hold, 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 subsection (4) of section 128 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, despite the anomalies in it to which I shall shortly refer, it would be upheld on that ground alone and not because of the threat contained in that subsection. The independence of the judiciary is of paramount importance in any civilized democratic country, and that independence is enshrined in the provisions of section 56B of the 1961 Constitution, which lay down that a judge may only be removed from office on the limited grounds of "inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour", and then only on the recommendation of an independent tribunal, set up by the Governor, consisting of a chairman and at least two members selected from persons who have been or are judges, which has investigated the matter. Although the 1965 Constitution, in section 62, purports to reproduce these same safeguards for the independence of the judiciary, their value is rendered nugatory in advance by the provisions of section 128 (4) above. 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.

Apart from the question of the ties of sovereignty, there is another difficulty in the way of regarding the 1965 Constitution as the only legal Constitution of this country. It was stressed by Mr. *Rathouse* himself in his argument, when he placed such reliance on Kelsen and the other authors to whom I have referred, that the new Constitution displaces the old and becomes the *Grundnorm* of the country when it corresponds with the realities of the situation. There are important features in the 1965 Constitution which to my mind correspond neither with law nor with the factual realities of the situation. In terms of section 3 of the 1965 Constitution, it is provided that "there shall be an Officer Administering the Government". Under section 4 it is said that he "shall have such powers and duties as are conferred or imposed on him by or under this Constitution or any other law, and such other powers (not being powers to be exercised in his personal discretion) as Her Majesty may from time to time be pleased, on the advice of the Ministers of the Government of Rhodesia, to assign to him." Section 5 provides that the Officer Administering the Government "shall in Rhodesia represent Her Majesty the Queen as the Queen of Rhodesia, and in all matters and things appertaining to Her Majesty's powers and duties in terms of this

Constitution or any other law in force in Rhodesia, Her Majesty and the Officer Administering the Government in representing Her Majesty shall act on the advice only of the Ministers of the Government of Rhodesia, except where, under this Constitution, Her Majesty or the Officer Administering the Government has a discretion, in which case Her Majesty or the Officer Administering the Government shall act according to such discretion but in no case contrary to the provisions of this Constitution." In terms of section 12 it is provided that "the Legislature of Rhodesia shall consist of the Officer Administering the Government as the representative of Her Majesty and a Parliament."

It is clear, however, that Her Majesty has repudiated this situation and has repudiated the Officer Administering the Government as Her representative. No one can represent another person against that person's will; *a fortiori*, when the person whom it is sought to represent is none other than Her Majesty The Queen. Her Majesty has also repudiated the title which the new Constitution purports to confer on Her as "the Queen of Rhodesia". 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.

When the court mentioned this difficulty to Mr. *Rathouse*, his reply was, "My Lords, that part of the Constitution your Lordships may not consider binding on you". However, as far as the *de jure* aspect of the argument is concerned, it seems to me that Mr. *Rathouse's* admission in that regard is fatal. 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.

Accordingly, I am of the opinion that 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. Any judge who took such a step would be aiding the Government from a political point of view, but his decisions upholding without question everything done under the 1965 Constitution would have no value as legal decisions 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.

For the above reasons, I feel constrained to hold that the 1965 Constitution is not at the present time the lawful Constitution of this country and that the Government set up thereunder is not the lawful Government.

I turn then to consider the further alternative point relied on by Mr. *Rathouse*, that the Government is the only effective government of the country, and that some at least of the measures taken by it, including the detention of the first applicant's husband and of the second applicant, must be regarded as valid.

At an early stage of his argument for the first applicant, Mr. *Kentridge* produced a certificate, duly authenticated, from Her Majesty's Secretary of State for Commonwealth Relations, dated the 21st June, 1966, in the following terms:

> "In response to your request conveyed by letter of the 16th of June, 1966, from your London Agents Messrs. Sheridan & Co. to the Treasury Solicitor for certain information with regard to Southern Rhodesia, I, THE RIGHT HONOURABLE ARTHUR BOTTOMLEY, O.B.E., M.P., Her Majesty's Secretary of State for Commonwealth Relations, HEREBY CERTIFY as follows:—
>
> (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 as a State either de facto or de jure.
>
> (c) Her Majesty's Government in the United Kingdom does not recognnize 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 in Southern Rhodesia either de facto or de jure.".

This, he submitted, was binding on the judges of this court, and was conclusive as to the lack of either *de jure* or *de facto* status in the present revolutionary Government. This court was accordingly precluded from inquiring further into the question of whether this Government is in effective control and as to whether any of its functions or laws can be recognized by the court. Mr. *May*, for the second applicant, associated himself with Mr. *Kentridge* in this regard. It is therefore necessary at the outset to examine the validity of this submission. If it be correct, then that is the end of the matter, and the applications must succeed.

The principle of the doctrine of "Acts" or "Facts" of State is a well-known one. It includes, *inter alia*, the rule that the questions whether and when a particular government is to be recognized either *de jure* or *de facto* as the government of an independent state, is one to be decided by the executive, and that a certificate reflecting the attitude of Her Majesty's Government on the subject is conclusive and binding on all courts within Her Majesty's dominions. See *Halsbury*, Third Edition, Vol. 7, paragraphs 593–603 at pp. 279–286.

Thus, in the case of *Sultan of Johore v. Abubakar Tunku Aris Bendahar* (1952), A.C. 318, their Lordships had before them a letter from the Secretary of State to the Rulers of the Malay States, in which it was

categorically asserted that "His Majesty's Government regard Your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned." This was accepted by their Lordships as conclusive in regard to the sovereign independence of the appellant, the Sultan of Johore, and at page 340 of the report, VISCOUNT SIMON said:

> "At the hearing before the Board this document was tendered to their Lordships, without objection from the respondents, as containing the necessary and conclusive information from the proper quarter. Their Lordships so accept it and take judicial notice of the fact so certified. They can therefore proceed on the admitted basis that the appellant was recognized by His Majesty's Government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attach to that status."

In the earlier case of *Duff Development Company, Limited v. Government of Kelantan and Another*, 1924 A.C. 797, VISCOUNT CAVE, at pp. 808–9, said:

> "No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: Wheaton, 5th ed., p. 50; Halleck, 4th ed., p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts. In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point."

See, also, *Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, (1952) 2 Q.B. 390.

That such a certificate in regard to the status of a foreign country is binding not only on British courts but also on all courts of those countries falling within British sovereignty, is illustrated by the case of *Civil Air Transport Incorporated v. Central Air Transport Corporation* (1953) A.C. 70, which came before the Judicial Committee of the Privy Council. That case concerned the question of the *de jure* and *de facto* status of the rival governments of Nationalist and Communist China respectively, in so far as this question affected certain contractual rights which were the subject of an action brought before the Hong Kong courts. At p. 86 of the report, VISCOUNT SIMON said:

"Before reaching a decision in the present action the Hong Kong courts required to know what government was recognized by His Majesty's Government in the United Kingdom as the government of China, whether *de jure* or *de facto*, and between what dates, and this information was, as is usual (see *The Arantzazu Mendi*), obtained from the Foreign Office in London. A series of questions for this purpose has been propounded and answered before trial of the present action, and their Lordships thought it well to address an additional question to the Foreign Office during the hearing of the appeal in order to clear up any possible ambiguity that remained."

His Lordship then sets out replies received from the Foreign Office by the Hong Kong court, and continues at p. 89:

"Her Majesty's Government in the United Kingdom is the sovereign government of Hong Kong, and the effect of the above replies is to establish that, at any rate in the courts of Hong Kong and in the present appeal, the former Nationalist Government must be regarded as the sole *de jure* sovereign government of China up to midnight of January 5-6, 1950; that the present Communist Government was not the *de jure* government until that time; and that, while the Foreign Office, in its answer of March 13, 1950, acknowledged that from October 1, 1949, onwards the *de facto* government of those parts of China in which the Nationalist Government had ceased to be in effective control was the Communist Government, H.M. Government had not announced or communicated their recognition of the Communist Government as the *de facto* government over any part of China before they recognized the Communist Government as the *de jure* government of China on January 5-6, 1950."

However, the rule as to the conclusive nature of such certificates seems to be restricted to the realm of foreign affairs. Professor Wade deals with the matter in an article entitled *Act of State in English Law: Its Relations with International Law*, published in *The British Year Book of International Law*, Vol. 15 (1934) at pp. 98–103. In particular, at p. 101, he says:

"The subject receives full treatment in Keir and Lawson, *Cases in Constitutional Law*, where the distinction between what may be called the external and the internal powers of the prerogative is emphasized:

'At municipal law and in the eyes of municipal courts the Crown is absolute in relation to foreign affairs. Therefore it may act towards foreign states and their subjects outside the realm in a perfectly arbitrary fashion; towards them the Crown has no duties, but only powers. Such powers are not strictly speaking a part of the Prerogative . .' citing Warrington L.J. in *In re Ferdinand, Ex-Tsar of Bulgaria.*"

The passage continues:

" 'The acts of the Crown in foreign affairs are called acts of state—*nowadays they are the only acts of state*—and their validity cannot be questioned in any British court'."

Later, at p. 103, he continues:

"Act of state means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown."

See, also, Professor Hood Phillip's *Constitutional and Administrative Law*, 3rd edn. p. 259.

The decision of the Transvaal Supreme Court in the case of *Van Deventer v. Hancke and Mossop*, 1903 T.S. 401, which was followed by the same court in the subsequent cases of *Lemkuhl v. Kock*, 1903 T.S. 451 and *Olivier v. Wessels*, 1904 T.S. 235, upon which counsel for the applicants placed great reliance, is also explicable upon a similar basis. The Transvaal had been annexed to the Crown by British Proclamation No. 15 of 1900, dated the 1st September, 1900, at a time when the war between Britain and the Boers of the South African Republic had not yet ended, and when the British troops were still not in occupation and command of large portions of the Transvaal. After the British Proclamation, the Executive Council of the South African Republic purported to pass a law in the area over which they still exercised *de facto* control on the 26th December, 1900, and the question of the validity of that law was before the court in 1903.

At pages 409–10, INNES, C.J., in coming to the conclusion that the law could not be recognized as valid, said:

> "It was argued for the plaintiff that the Annexation Proclamation was premature; that at the time when this wool was confiscated the district of Vryheid was subject to the *de facto* control and administration of the Boer forces; that although the Proclamation purported to annex the territory of the Transvaal to the empire, there had, at the time of the annexation, been no effectual occupation of it as a country, and no subjugation of its people; and that therefore the Republic continued to exist as a State, and its Government was entitled to exercise legislative and administrative functions. It is no doubt correct as a general rule of international law that two circumstances are necessary to create a complete title by conquest: the conqueror must express in some clear manner his intention of adding the territory in question to his dominions, and he must by the exercise of military force demonstrate his power to hold it as part of his own possessions. It is also true that in March, 1901, large portions of the Transvaal, including the district of Vryheid, were neither occupied nor dominated by British troops; but on the contrary were under the *de facto* control of the Boer forces. And if this were a foreign Court engaged in trying a cause in regard to which the question of when the conquest of the Transvaal was complete became relevant to the inquiry, it is possible that points of considerable intricacy and difficulty would present themselves. But those considerations are not present here. This is a Court constituted by the British Crown, exercising powers and discharging functions derived from the Crown. In its dealings with other States the Crown acts for the whole nation, and such dealings cannot be questioned or set aside by its Courts. They are acts of State into the validity or invalidity, the wisdom or unwisdom, of which domestic Courts of law have no jurisdiction to inquire.".

In order to appreciate the basis of this decision, it is necessary to examine briefly the historical background. Prior to the Boer War, the South African Republic was an independent Republic recognized as such by Britain herself. The Boer War ended in the conquest of the

Transvaal and of the Orange Free State by Britain, the Boers being finally subjugated in 1902 when the Treaty of Vereeniging was signed on the 31st March, 1902. After the formal annexation of the Transvaal in September, 1900, the territory was administered as a British Colony by Lord Milner, as Governor and High Commissioner, on behalf of the Crown by means of a Legislative Council, the members of which were nominated by him. Lord Milner first arrived in Pretoria in March 1901 for the purpose of commencing the task of setting up a civil administration for the Transvaal, and at a time when the war was still in progress. There was no form of responsible government at all until December, 1906. On the 15th April, 1902, by Transvaal Proclamation No. 14 of 1902, Lord Milner set up the court of four judges, of which Sir James Rose Innes was Chief Justice, and he himself appointed those judges. By section 4, the Governor had the power to remove the judges on the grounds of misconduct, subject to his making an immediate report to one of His Majesty's Secretaries of State for transmission to His Majesty the King. In terms of section 6 the Judges were to receive such salaries as were granted to them by the Governor.

During the years 1903 and 1904, therefore, when those cases were decided, the Transvaal was in effect as much a part of Britain as if it were geographically a portion of it, and the Transvaal Supreme Court was a British court. The court, looking at the matter from hindsight after the conquest of the Boers was an established fact, came to the conclusion that the operative date of the commencement of the British annexation was the date of the Proclamation itself, that is to say, September, 1900. Therefore, at the time when the Executive Council of the former South African Republic purported to pass the law in question it was the action of a foreign enemy state in British territory. Hence, there could be no recognition of it by a British court, which was bound by the British Act of State, and the *de facto* control of that part of the territory by the foreign enemy at the time the law was passed was irrelevant.

That is not the situation here. This is not a United Kingdom court. The position of this court under the 1961 Constitution has already been dealt with above. Apart from that, there is no question here of having to consider past acts of a foreign enemy government in British territory after the conquest of the enemy. 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. It seems to me that there is no room here for the "Act of State" or "Fact of State" doctrine. There can be no doubt, on the authorities relied upon by Mr. *Kentridge*, that this Certificate of Her Majesty's Secretary of State for Commonwealth

Relations, if put before a British court sitting in the United Kingdom, in any litigation in that court involving the status of the present Rhodesian Government, would be binding on that court and conclusive on the matter both as regards the *de jure* and the *de facto* status of the present government in Rhodesia. 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.

Where, however, 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.

Reliance was also placed by counsel for the applicant on the case of *The Fagernes*, 1927, p. 311, and the case of *Direct United States Cable Company v. Anglo-American Telegraph Company*, (1877) 2 A.C. 394. In the *Fagernes* case, ATKIN, L.J., said at p. 324:

> "The question to be decided in this case is no less momentous than whether the Bristol Channel is part of the realm of England. What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. In these circumstances the Court requested the assistance of the Attorney-General who, after elaborate and valuable argument on the municipal and international law, so far as it affects the question, eventually informed the Court that he had consulted the Home Secretary, and was by him instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extends. I consider that statement binds the Court, and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed.".

Similarly, in the second of these two cases, LORD BLACKBURN said at p. 420:

> "It does not appear to their Lordships that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart

from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination. If it were necessary in this case to lay down a rule the difficulty of the task would not deter their Lordships from attempting to fulfil it. But in their opinion it is not necessary so to do. It seems to them that, in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to shew that the bay has been for a long time occupied exclusively by *Great Britain*, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of *Newfoundland*."

It seems to me that those cases merely decide that the Act of State is conclusive as to the geographical extent of Crown territory in any of Her Majesty's Dominions, and that question is not really relevant here. If, however, the true *ratio decidendi* was that British Acts of State are conclusive on the question as to what territories fall within the *de jure* sovereignty of the Crown, even in the court of the territory where that sovereignty is disputed, then I have already decided that question in favour of the applicants on other grounds, for the reasons given above, and the certificate in this case does not take the matter any further.

To my mind, however, these cases are no authority for the further proposition relied upon by the applicants that the certificate in the present case binds this court to hold that the existing Government is not in effective control of this country at the present time. The certificate merely tells the court what it already knows, that is to say, that the British Government does not recognize the Government of this country either as the *de jure* or the *de facto* Government. The British Act of Parliament (Southern Rhodesia Act of 1965 [*Chapter 76*]), also tells us the same thing.

I therefore come to the conclusion that this court is free to reach its own decision on whether or not the Government of this country is the only effective Government and hence the "*de facto* Government".

Applicants' counsel have contended that whether or not the court found that the present Government is in effective control of the country, this would be an irrelevant consideration because this court, being bound by the 1961 Constitution, could not recognize any laws passed by any legislature in this country other than the lawful legislature in terms of the 1961 Constitution, and could not recognize the exercise of any administrative functions performed by the Executive purporting to derive its powers from the unlawful 1965 Constitution, however necessary such laws and such functions might be for the preservation of peace, good government and the maintenance of law and order in this country.

This is a very far-reaching submission, and it means, in effect, that this court must accept the extraordinary position that as from the 11th November, 1965, there has been and still is a vacuum in the law in this country. Whatever the abstract legal situation may be, one cannot escape the conclusion that, in reality, the 1961 Constitution is in a state of suspense as far as its law-making and executive provisions are concerned. As already pointed out above, the Legislature and the Executive of this country under the 1961 Constitution, prior to the 11th November, 1965, exercised very full powers of self-government, and in particular the preservation of peace and good government and the maintenance of law and order within the country were matters which lay within their exclusive control. In conformity with the convention, to which I have already referred, the British Parliament never legislated in respect of these matters. Those same powers are still being exercised in fact exclusively by the revolutionary Government in this country under the new Constitution which it has purported to give to the country, the 1961 Constitution having been repudiated. The convention having fallen away, the British Parliament has reasserted its legal right to legislate in this country and has divested the present Parliament and Executive of power and has purported to vest executive powers in persons who are not in reality exercising those powers within the territory. The affidavits show that the civil service, the police and the armed forces are apparently carrying on with their ordinary duties in obedience to the laws and administrative directions of the present Government. Furthermore, it seems to be implicit in the statement of the Governor, announced on the 14th November, a copy of which is annexed to the applicants' replying affidavits, in which the Governor says:

> "It is my sincere hope that lawfully constituted Government will be restored in this country at the earliest possible moment, and in the meantime I stress the necessity for all people to remain calm and to assist the armed services and the police to continue to maintain law and order";

that there is a recognition that government in terms of the 1961 Constitution has been suspended and has to be restored in the future.

It is clear that since the 11th November, 1965, there are no laws or administrative orders which are capable of being made and enforced within the territory to deal with the preservation of peace and good government and the maintenance of law and order, other than those of the present Government. The British Parliament may enact legislation for this country—I shall assume that promulgation within this territory of British Acts of Parliament is unnecessary—but in regard to any subsidiary legislation of the British Government purporting to deal with the ordinary day-to-day government of this country (which, as far as I am aware, has not yet been forthcoming), lack of promulgation within Rhodesia might well prove fatal to its validity. Promulgation is not necessary under English law, but it is essential to the validity of legis-

lation under the Roman Dutch law which is the common law of this country. The question of promulgation was not argued in these proceedings, and it is therefore unnecessary to decide that issue. Apart from the question of promulgation, the important point is that any such British laws, whether promulgated or not, 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.

The Commissioner of Police, in his affidavit, has said:

"2. In the discharge of my duties as such I accept the Constitution of Rhodesia, 1965, as being the only and effective Constitution of Rhodesia and the present Government of Rhodesia as being the only and effective Government of the country.
3. Instructions given to my subordinates are given on this basis and are carried out without objection to the authority of the present Government.
4. Not only are the personnel of the Police paid by the present Government but both I and the personnel of the Police continue to obey not only the administrative, but also the policy directives, of the present Government of Rhodesia.
5. In the exercise of my functions as Commissioner of Police, I would observe and obey any laws relevant thereto which were passed by the present Rhodesian Parliament and assented to by the Officer Administering the Government.
6. Since the assumption of independence on the 11th November, 1965, I have received no instructions from the British Government as to the discharge of my duties, and if I did receive such instructions I would not obey them."

The reality of the situation, therefore, is that no one would be arrested for disobedience of a British law relating to this country and passed since the 11th November, 1965.

The Attorney General, in his affidavit before the court, has said:

"2. In terms of section 12 of the Criminal Procedure and Evidence Act [*Chapter 31*] as read with Government Notice No. 56 of 1945, I am the person vested with and exercising all powers, functions and authorities relating to the prosecution of offences in Rhodesia.
3. The aforesaid powers, functions and authorities are by law vested in and exercisable by me alone.
4. Since the assumption of independence on the 11th November, 1965, I have at all times regarded the Constitution of Rhodesia, 1965, as being the only and effective Constitution of Rhodesia and the present Government as being the only and effective Government of Rhodesia and the Parliament of Rhodesia as presently constituted as being the only and effective Legislature for Rhodesia.
5. I do not regard, and have not at any time regarded, the Southern Rhodesia Act, 1965, of the United Kingdom or any subordinate legislation made thereunder as having the force of law in Rhodesia. Apart from all else, neither the said Act nor the said subordinate legislation nor any other legislation purported to be made by the United Kingdom in respect of Rhodesia since the 11th November, 1965, has been promulgated in Rhodesia.
6. I exercise the aforesaid powers, functions and authorities accordingly."

Whether the Attorney General is right or wrong in his opinion expressed in the first sentence of paragraph 5 quoted above, the only reasonable inference to be drawn from his affidavit is that, as a matter of hard fact, he would decline to prosecute anybody for breach of any British law in this country, and, as was pointed out in the case of *Central African Examiner (Pvt.) Ltd. v. Howman, N.O. and Others* 1966 (2) S.A.L.R. 1, this court could not compel him to do so. Unless, therefore, recognition be given to some laws of the present Government, which relate to the preservation of peace and good government and the maintenance of law and order, as the only effective Government of the country, then this court must hold that there has been a vacuum in the law since the 11th November, 1965.

One cannot have a vacuum in the law. One cannot say that since the 11th November, 1965, no valid and effective laws whatsoever have been made in this country. The law is a living organism, it is an essential part of the life of the community and moves with it; this is especially so in a modern State. For example, the Income Tax Act of 1954, as amended, lays down the basic machinery for the levying and collection of revenue in the form of income tax which is essential for the running of the State, but each year it is necessary for the legislature to enact a charging Act determining the rate of tax to be levied for the current year. Even the basic Act itself requires constant amendment to adapt it to the changing needs of the community. Without a charging Act, the revenue necessary for the ordinary day-to-day Government of the country, the provision of hospital and medical facilities, educational facilities, and maintenance of the police force and all the other innumerable needs of the people of this country, African and European alike, would not be forthcoming.

To maintain consistency with their argument, counsel for the applicants were obliged to go further and to contend that this court must adopt the same attitude of non-recognition in regard to any of the administrative functions of the present Executive. On that basis, and on the purely hypothetical assumption that this court's orders to that effect would be obeyed, the whole operation of the civil service, whose members are enjoined by the Governor to carry on with their normal tasks, would grind to a halt. The machinery of the administration of justice of this very court might come to an end. In terms of section 50 of the High Court Act (No. 22 of 1964), the Registrar and Sheriff, and Deputy Registrars and Assistant Registrars of this court, are appointed by the Minister of Justice. In practice, the office of Master, (an appointment made under the Administration of Estates Act [*Chapter 51*]), is combined with that of Registrar and Sheriff, and service of process of the court, including the service of indictments in criminal cases, is effected by deputy Sheriffs appointed by the Sheriff, "subject to the approval of the Minister". Unless the judges of this court are to recog-

nize the validity of such ministerial appointments of these officers of the court, they might find themselves unable to sit at all. This is not a mere theoretical possibility. The Master retired on the 5th August, and the appointment of his successor as Master, Registrar and Sheriff of this court has been made by the person presently carrying out the functions of the Minister of Justice, the first respondent in the first application. See Rhodesia Notices Nos. 962 and 963 of 1966, published in the Government *Gazette* dated 5th August, 1966. If the judges of this court were to refuse to recognize the validity of those appointments the court would be without a Master, Registrar or Sheriff, and would be without the services of the process-servers appointed by the Sheriff with the approval of the Minister. For obvious reasons, the court could not carry on. There is no one else who could effectively make the appointments. As a matter of practical reality, therefore, the judges of this court could not continue to function at all on the basis of absolute non-recognition which has been urged upon us by the applicants' counsel.

For the applicants it was argued that it is not for the judges of this court to concern themselves with a vacuum in the law, and to attempt to fill it by applying a doctrine of necessity or expediency which in itself, so the submission went, has no foundation in law. It was contended that the blame for the vacuum lies at the door of those who created it through the illegal action of the revolution itself, and it is for them to end the vacuum by returning to Constitutional rule. That argument, however, again ignores the reality of the situation. 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 present Government to abandon the revolution, 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. The instruction from the Governor does not include a direction to take active steps to end the revolution; it is merely a direction to refrain from acts which will have the effect positively of aiding the revolution, while at the same time to continue in one's normal task and to continue to maintain law and order.

Those who embarked on the present revolution were not deterred by the illegality of their actions at the time, and it would be naïve to suppose that, if faced now with a decision of the court that nothing whatsoever done by the present Government could be recognized, the Government would tamely capitulate. The only course open would then be the drastic one of filling the vacuum by replacing all nine of the existing judges with revolutionary judges, who, regardless of judicial conscience, would be prepared to accept without question the 1965 Constitution as the *de jure* Constitution of this country, despite the ties of sovereignty and despite the anomalies in the Constitution itself to which I have already referred.

If I were satisfied that the law demands of this court complete and absolute non-recognition of any laws or administrative actions of the present Government in this extraordinary situation, as contended for by the applicants' counsel, the drastic consequences to which I have referred would not deter me from applying that law. However, I am not so satisfied. Of the large number of decided cases to which counsel referred us, none dealt with the unique and unprecedented situation with which this court is faced. Generally speaking, they involved decisions of the courts dealing *ex post facto* with the situation during the revolution, at a time when the revolution was over and done with and had culminated either in complete success or in total failure. The law to be applied in those circumstances is not necessarily the same as that which should be applied by this court in the present circumstances, though it may afford some guidance as to the appropriate approach. If the judges of this court are to continue functioning at all, it seems to me that they must accept the fact of the present effective control of the present Parliament and Executive, and the corresponding inefficacy of the *de jure* Parliament and Executive as far as this country's affairs are concerned, and it does not seem to me that this court, in deciding what is the law to be applied now in these existing circumstances, can project itself into the future and make a decision as if it were looking back on either a successful or unsuccessful revolution. When the court is so looking back after the end of the revolution, a different law may have to be applied. For example, even in America, it appears that while certain laws confiscating loyalist property made during the War of Independence were recognized as valid by the revolutionary courts during the war, nevertheless, after the successful revolution some of the American courts held them to be invalid as being inconsistent with the Treaty of Paris of 1783 whereby Britain recognized American independence. In this regard, I should say, however, that I have been unable to obtain access to the reports of the cases which dealt with the matter, and I can only rely on what the authors Barck and Lefler say about it in *Colonial America* (to which I have already referred earlier) at page 680 under the heading *Postwar Loyalist Problems*. So, too, where the revolution is unsuccessful, it is primarily a matter for the *de jure* Government, when it regains effective control, to determine, as a matter of policy, which measures of the revolutionary Government will be recognized and allowed to stand and which will be repealed. That policy may be either harsh or charitable, depending upon the circumstances in which the revolution comes to an end, and the attitude of the courts, when dealing with that which has not been expressly dealt with by the Legislature, may be determined accordingly.

A further important point of distinction is that in all those cases where the court was dealing with the matter *ex post facto* after the revolution was over—whether successful or not—there was no problem

of filling a vacuum; the problem was to avoid the chaos which would have resulted from undoing what had already been done. While the revolution was in progress, the judges were judges either appointed or re-appointed by the revolutionary Government in effective control, who, rightly or wrongly, according to the ultimate success or failure of the revolution, applied the laws of the revolutionary Government. There was thus no vacuum in the law as regards the preservation of peace and good government and the maintenance of law and order within the State during the period of the revolution.

I have already given my reasons for being unable to hold that the 1965 Constitution is the legal Constitution of this country, and there is no need to repeat them. If it is an inevitable consequence of that decision, as the applicants contend, that I cannot recognize anything done by the present Government, then it means I can no longer function as a judge of this court. I am, however, instructed by the Governor, by whom I was appointed to my office as a judge on behalf of Her Majesty the Queen, to maintain law and order and to carry on with my normal task subject to my refraining from "all acts which would further the objective of the illegal authorities". In the context of this instruction, the last phrase must mean all acts which would directly and deliberately aid the revolution. The civil servants are similarly instructed to carry out their normal tasks. They, too, would find it impossible to comply with this instruction unless they recognized and obeyed the laws passed by the Rhodesia Parliament, and administrative actions carried out by the present Executive, for the purposes of the preservation of peace and good government and the maintenance of law and order.

In this unique situation, therefore, the only way in which this court can continue to function as a court consistently with the Governor's instruction and consistently with its duty to the State is to invoke the maxim *"salus populi suprema lex"*, which is, in effect, a doctrine of State necessity, and to recognize such laws and such administrative actions as are designed for the purposes just mentioned.

Counsel for the applicants referred the court to a number of cases where the courts, both in South Africa and in England, have held that that maxim has no application in our law. In particular, reliance was placed on the decisions in the cases of *Sachs v. Dönges N.O.* 1950 (2) S.A.L.R. 265 at p. 276, *per* WATERMEYER, C.J., *Africa v. Boothan* 1958 (2) S.A.L.R. 459 at p. 463, *per* SCHREINER, J.A., *Sprig v. Sigcau* (1897) A.C. 238, and *Eshugbayi Eleko v. Government of Nigeria* (1931) A.C. 662 at p. 671, *per* LORD ATKIN.

There is no need to deal in any detail with these cases. They all lay down the general proposition, which can be accepted as unquestionably correct, that the Government of a country cannot justify the taking of action which affects the rights of the citizens of the country, simply

on the basis that such action is necessary in the interests of the State, unless such action is clothed with legal authority. However, all those cases presuppose the normal situation where the Executive and the Legislature are both lawful and *effective* within the State, and where, therefore, the necessary legal authority for the proposed action can be obtained, even if it means rushing a bill through Parliament at an emergency session of the House.

That is not the situation here. Here the State necessity arises from the very fact that the *de jure* Legislature and Executive are ineffective within the State. If the only way the judges of this court can save the machinery of justice from breaking down, is by recognizing appointments of their officers by the person *de facto* exercising the powers of the Minister of Justice, then they must afford such recognition, and in doing so it seems to me that they must invoke the doctrine of State necessity. Once the doctrine thus obtains a foot in the doorway—despite the strenuous endeavours of counsel for the applicants to shut it out altogether—then in my view it must be let in as regards other matters, including legislation, affecting the welfare of the State. It is suggested that an Act of the present Parliament, assented to and signed by the Officer Administering the Government, is no more than a worthless piece of paper. That may be so from the standpoint of the 1961 Constitution, but then the same consideration applies equally, from that same standpoint, to the exercise of any function by a Minister who does not hold office in terms of section 43 of the 1961 Constitution. If one has to recognize the exercise of some ministerial functions, it is not illogical to recognize the exercise of some legislative functions as well.

Suppose, for example, that there were a sudden widespread outbreak of cholera or smallpox within the country, necessitating either new legislation or amendment of existing legislation to cope with the situation by setting aside quarantine areas and providing for compulsory inoculation and the like? Or supposing, again, that a large-scale invasion of terrorists belonging to the banned Zimbabwe African National Union Party were to take place from Zambia and it became necessary to pass special emergency legislation to deal with the situation? It would be idle to suppose, in the latter example which I have given, that the purpose of the invasion would be the restoration of the 1961 Constitution. This Court has already dealt with cases recently, under the existing criminal law, involving infiltration of small gangs of such people who were armed with Chinese and Russian machine-guns, grenades and other weapons, who admittedly received military and special sabotage training in Communist countries and who were admittedly instructed to commit acts of violence and terrorism in this country. It would be manifestly absurd if the judges of this court were obliged to sit back and refuse to recognize such laws or administrative actions of the present Government designed

to deal with the crises to which I have referred, as imperative measures for the safety of the State, when the situation is that there is no other Parliament or Executive which can effectively pass those necessary laws or perform those necessary functions. I am satisfied that that cannot be the law.

The mere fact that there is no known precedent in any decided case in the Roman Dutch law for applying the maxim "*salus populi suprema lex*" in a situation like this, is not a bar to its application. The absence of any judicial precedent in the Roman Dutch law is explicable on the simple basis that the present extraordinary situation in which this court finds itself has never apparently been dealt with by the courts before.

Mr. *Rathouse* referred the court to a series of *dicta* of the old jurists which lend some support to the application of this doctrine of necessity in the present circumstances. The first of these is a passage from Grotius, "*De Jure Belli ac Pacis*", Book I, Chapter IV, section XV, translated by F. W. Kellsley (Oxford Press 1925) under the sub-title *How far obedience should be rendered to a usurper of sovereign power.* This passage reads:

> "1. We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts.
>
> Cicero disapproved of the laws of Sulla as harsh toward the children of the proscribed, whom they did not permit to become candidates for public office. Nevertheless he thought that it was necessary to live up to them, asserting, as Quintilian informs us, that the welfare of the state was so bound up with these laws that if they should be done away with the state itself could not survive. Of the acts of the same Sulla, Florus says: 'Lepidus was making ready to annul the acts of this great man; and there was good reason for such procedure, provided only the result could be accomplished without bringing disaster upon the state.' A little further on he adds: 'The interest of the state, sick, as it were, and suffering from injuries, required that it have rest in any way possible, in order that the wounds might not be torn open by the application of remedies.'.
>
> 2. In the case of measures promulgated by the usurper which are not so essential, and which have as their purpose to establish him in his unlawful possession, obedience is not to be rendered unless disobedience would involve grave danger. But whether it is permissible to use violence in overthrowing such a usurper of authority, or even to put him to death, is the question before us.".

The side-notes to this passage show that Grotius relies on three earlier jurists. The first of these is Francisco de Vitoria in his work

De Potestate Civili translated by G. L. Williams. The relevant passage from this work is as follows:

> "Another question arises, namely: Whether the laws of tyrants are binding. It might seem that they are not binding, since tyrants have no power at all. Nevertheless, the contrary is true: For if the State is oppressed by a tyrant and is not *sui juris*; and if the tyrant has not the power to create laws, while at the same time it is impossible to put into execution the laws laid down before his time: then, unless obedience is rendered to the tyrant, the State must perish. It seems indeed that those laws which are acceptable to the State are binding, even when they have been created by a tyrant—not, to be sure, because he established them, but by the agreement of the State; for it is better to obey the laws created by a tyrant, than to obey no law at all. It is certain and obvious that the State would suffer injury if, owing to the fact that princes possessed of no just title have seized the country, there should be no provision for judicial trials, and no way in which to punish or restrain malefactors; for if the laws laid down by a tyrant are not binding, then he is not a legitimate judge."

The concluding sentence is apparently explicable on the basis that the ruler in that case was also the court; in other words, this related to a time when there was no separation of legislative, executive and judicial functions as there is in the modern State.

Grotius also relies on Franciscus Suarez, who wrote *De Legibus*. In Book III (Cap. 10) section IX, under the title "When it is lawful to observe the orders of a usurper of sovereignty and when it is not", the author says, speaking of the usurper:

> " but it happens that the State, because it is not able to resist him, may tolerate him, and allow itself to be governed by him, and may tacitly give its consent, and it may wish that justice be administered by him for a convincing reason, because it is a less evil to be governed by him than to lack all orderly constraint and direction; and in that case there will be no wrong in obedience even in respect of the said acts, because the lack of power of the usurper is made good by the consent of the State."

Suarez was a Professor of Law who taught in Italy, Spain and Portugal.

The third jurist upon whom Grotius relies is Lessius, who was a Dutch jurist who studied under Suarez in Rome. Lessius, in his work entitled *De Justitia et de Jure*, Book II (Cap. 29) *Dubitatio* IX, says of the usurper:

> ". nay rather would he act wrongly, if while retaining the sovereign power he would not administer justice when the circumstances would require it; because he would cause more harm to the citizens and impose greater injustice: just as one who holds a thing belonging to another and uses it, acts wrongly by using it; however he does not when that use is useful, or necessary, add a new offence to his detention of the thing; and he would rather act wrongly by not using it."

He later continues as follows:

> " . . his judgments and just orders, though they do not derive their binding force from the tyrannical power, have nevertheless binding force from else-

where; firstly, and inchoately from the natural law, which, on such a state of affairs having been presupposed, dictates obedience for the common good, because otherwise there would be everywhere thefts and robberies: secondly, and completely from the State (Respublica) and this, either because as long as the aforesaid state of affairs lasts the State gives him authority by a kind of tacit consent while it wishes him to administer justice and to fulfil his usurped office as it ought to be fulfilled; or rather because it tacitly approves his orders and acts which are in agreement with the laws and the common benefit, and wishes his just judgments by which litigation between citizens is decided, and criminals are punished, to be valid and to be binding on the subjects: for unless these would be valid and binding, nobody would be obeying otherwise than in deceptive outward appearance, but everybody would secretly do the opposite, such to the great detriment of the State. The State may give this force to the judgments and the acts of the Usurper, because it is the superior of the individuals even though it is under usurped rule; and it may consider the just judgments of the usurper as its own.".

Mr. *Kentridge*, in his reply, submitted that this court could take no account of what was said by Grotius, and the three earlier jurists upon whom Grotius relied, because, in effect, all they were doing was to give moral advice to the citizens of the State as to how to behave in their own interests when a usurper temporarily ousts the rightful sovereign from power in the State. I do not agree, however, that they can be dismissed so lightly. In my view, Grotius was putting the matter on the basis of having to apply the doctrine of State necessity as a part of the *jus gentium* (in the old sense of that phrase, as meaning natural law or the law common to all civilized nations), during the currency of the usurper's period of effective control, which is the situation in which we find ourselves here. Lessius also speaks of it as being part of the natural law. It seems to me that what these jurists say is founded on the proposition, which commends itself to me as a sound one, that it is a part of the *jus gentium* that the usurper, during the period when he is in effective control of the State, has not only the power but the duty to govern so as to preserve the State. Accordingly, his laws, necessarily made for that purpose and directed to that end, should be upheld on the basis that there must be no vacuum in the law during that period, but such laws as are not necessary for that purpose but are made, as Grotius says, in order to "establish him in his unlawful possession", should not be upheld. In seeking to belittle the value of this passage from Grotius, Mr. *Kentridge* referred the court to the somewhat scathing comment by Professor Whewell, of Cambridge, at page 7 of the preface to his edition of *De Jure Belli ac Pacis*, where the author says:

"The *jus gentium* is a phrase which, at about the time of the Grotius, was passing from its ancient Roman meaning, the law common to most nations, to its modern meaning, the law between nations. The prolix and multifarious character of Grotius's work arises in a great measure from his setting out from the first of these meanings in order to discuss the second. He thus begins with the philosophy of ethics and ends with exhortation

to humanity, truth and justice, even in the conduct of wars. The latter indeed was more peculiarly his object than the former."

This is, at least, an acknowledgment by the author that this particular passage of Grotius's work was dealing with the application of the *jus gentium* within the State itself as the law common to all civilized nations—the law of nature—and not with international law in the modern sense. For the rest, I am more impressed by the assessment of the value of the work by that eminent South African Judge, SIR JOHN WESSELS, whose own knowledge of the Roman Dutch Law was profound, in his *History of the Roman Dutch Law.* The great contribution made by Hugo De Groot (Grotius) to the Roman Dutch law, which, of course, is the common law of South Africa and of this country, has always been recognized by the judges of South Africa and of this court. SIR JOHN WESSELS says at p. 269:

"It was during his stay in Paris that he wrote his great work, *De jure Belli ac Pacis.* It was this work which raised Grotius to the first rank among European jurists and publicists."

At pages 271–2 he continues:

"For our purposes there are two works of Grotius to which we must devote some attention. The first is the *De jure Belli ac Pacis,* and the second is the *Introduction to the Jurisprudence of Holland.* It may be said that we should dismiss the *De jure Belli ac Pacis* with a passing notice, inasmuch as we are considering the development of the Roman Dutch law. The answer to this is that it is in the *De jure Belli ac Pacis* that we find a full exposition of De Groot's philosophy of law, and that a due appreciation of this is necessary in order to grasp fully the work that he did for the Netherlands in composing the *Introduction.*

It was the *De jure Belli ac Pacis* which raised Grotius to the first rank among European jurists and publicists. It placed international law upon a new footing, and sought to base the relations of civilized nations towards one another upon law and morality. It created a new epoch and a complete breach with the views that prevailed during the middle ages. It breathed the spirit of the Reformation, and liberated mankind from the theocratic views then predominant. Whatever there had been of international law, prior to this work of Grotius, was based upon the unity of the Church and the authority of the Pope. Grotius sought to base the law of nations not upon religious belief and Church authority, but upon a general idea of law and order. The papal authority had been so undermined that some new compensating foundation had to be sought upon which to build a law of nations. Grotius sought that foundation in a new fundamental idea of Right which was to regulate the relation of the individual to other individuals, of the individual to the State, and of the State to other States.".

On page 273 SIR JOHN WESSELS quotes with approval what was said of *De Jure Belli ac Pacis* in Hallam's *Literary History,* vol. 3 p. 181.

"Those who sought a guide to their own conscience or that of others, *those who dispensed justice*", (the italics are my own), "those who appealed to the public sense of right in the intercourse of nations, had recourse to its copious pages for what might direct or justify their actions."

I know 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. On the contrary, Professor Wille in his well-known textbook *The Principles of South African Law*, 5th edn. at pp. 22–3, seems clearly to indicate that the *jus gentium* or the law of nature "chiefly through the conception thereof formed and applied by Grotius" is still a part of our modern law.

Mr. *Rathouse* referred us to two Dutch cases decided by the Hooge Raad in 1840 and 1847. We were supplied with photostatic copies of the original judgments and a translation. They seem to me to confirm the correctness of the statement of the law by Grotius. The first of these is a report of a judgment of the Hooge Raad of the 15th October, 1840, published in Weekblad van het Recht, No. 124 of the 15th October, 1840, and the second is a report of a judgment of the same court on the 28th August, 1847, published in Weekblad Voor Het Recht, 1847 p. 872. In both these cases, the measures of internal government enacted by those in *de facto* control of the Province of Limburg, during the period of the *de facto* secession of that Province from the Kingdom of the Netherlands from 1830–9 as a result of the Belgian revolt, were regarded as those of a usurping power by the Hooge Raad after Limburg had been brought back under the government of the King of the Netherlands by the Treaty of London in 1839. Nevertheless, the court held in both cases that in accordance with "a principle of the law of nations" accepted by "all civilized nations", all such measures, except those especially dealt with by the legal government after the restoration (i.e., by repeal or amendment), should remain in force "*ex utilitate publica* in order to avoid the incalculable consequences and detriments which necessarily result from a contrary system". In the context, it seems to me that the phrase "the law of nations" was used in the old sense of the *jus gentium*, and that the doctrine being applied by the Hooge Raad was similar to that propounded by Grotius and quoted above. On the wording of that part of the judgment, there does not seem to be any room for Mr. *Kentridge's* suggestion that the court was merely giving effect to some implied term of the Treaty of London.

In the second of these two cases, the Hooge Raad added the additional reason in its judgment "that in society all public authority will never be lacking".

Furthermore, it seems to be implicit in these two judgments that if at any time during the period of illegal secession there had been the extraordinary situation that Dutch judges had been left in office in the courts at Limburg still owing allegiance to King William and

with instructions from him to carry on with their normal tasks while refraining from any acts which would further the rebellion, the judges would have been constrained to give effect to laws made by the usurper for the purpose of the ordinary good government and the preservation of law and order in Limburg *ex utilitate publica.* For, just as after the restoration, the Hooge Raad declined to create chaos by undoing *ex post facto* what had already been done by the usurper for that purpose, *a fortiori* chaos and a vacuum in the law would not have been allowed to develop during the actual period of the usurper's rule, and while the lawful sovereign was powerless to enact effective laws of his own in Limburg.

This passage from Grotius was also relied upon in argument by successful counsel in the well-known American case of *Texas v. White* (1869) S.C. 7 Wall. 700: 19 Law. Ed. 227, and although CHASE, C.J., delivering the majority judgment of the court, does not specifically refer to Grotius, there is one passage in his judgment which seems to indicate that he had in mind what Grotius said. The passage appears at p. 240 col. 1 of the Lawyers' Edition Report, and is as follows:

> "It is not necessary to attempt any exact definitions, within which the Acts of such a State Government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example, as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void.".

I shall deal with this case, and the other American cases to which we were referred in argument, more fully at a later stage. I only mention this now to show that the passage from Grotius is not to be cast aside as a mere worthless piece of philosophy.

Counsel for the respondents also relied upon passages from Van Bynkershoek, another well-known Dutch jurist, in his book entitled *Questionum Juris Publici* (1739 edn.), translated by Tenney Frank (Oxford Press 1930). The passages relied upon appear in Chapter XXV entitled *Miscellaneous Questions of Minor Importance.* However, I am inclined to agree with counsel for the applicants that not much weight can be attached to the scant treatment of the subject by this author. The very title of the chapter is in itself discouraging.

We were also referred to Samuel Pupendorf's *De Jure Naturae et Gentium* (1688 edn.), translated by C. H. and W. A. Oldfather (Oxford Press 1934). Counsel for the respondents relied on passages from Book

VII Chapter XVII of this work, entitled *On the Sanctity of Supreme Sovereignty in States.* This author takes the same view as Grotius and says at pp. 1114–5, section 10:

> "But when a man seizes the sovereignty by driving out the lawful prince, and acts the king, although he is in fact a usurper of another's right, what should a good citizen do under such circumstances, who apparently still owes fealty to his lawful prince so long as he still lives? Here our decision must be that the matter may come to such a pass that it is not only lawful but also obligatory to obey as one's sovereign him who has possession, no matter how secured, of the kingdom, it being understood that the lawful lord is reduced to such a state that he can no longer fulfil any of his duties as a prince toward his subjects. For although the other's commands lack the force to obligate, because they lack lawful power, it is still the part of a prudent man to take counsel for himself and his affairs, and to watch out for the future, as well as cautiously to weigh his present condition, lest he rashly imperil his life and fortune.".

He then quotes part of the passage from Grotius which I have already set out earlier and continues:

> ". . surely it should always be presumed that every prince is humane enough to prefer that his citizens be preserved by any means whatsoever, rather than have them perish to no avail in uselessly struggling against fate and showing him an ill-timed and ineffectual devotion.".

Counsel for the applicants sought to dismiss Pupendorf as "an obscure German professor", but it is of interest to note that both he and Grotius receive an honourable mention as jurists in the judgment of MILLER, J., in the American case of *Keith v. Clarke* S.C.R. 454–483:— 24 Law. Ed. 1071 at p. 1074, col. 2. of the Lawyer's Edition, a case with which I shall deal later.

Coccejus, a Professor of Law at Heidelberg and at Utrecht in the seventeenth century, was also relied upon. This author wrote *A Commentary on Grotius' 'De Jure Belli ac Pacis'*, and in particular he deals at p. 376 *et seq.* with the passage which I have just referred to earlier. Coccejus seems to suggest that the allegiance to the rightful sovereign is suspended and transferred temporarily to the *de facto* usurper, which, as counsel for the applicants rightly pointed out, is contrary to the opinion of the Privy Council in *De Jager v. Attorney General of Natal* (1907) A.C. 326, which is binding on this court. To that extent, therefore, what Coccejus says is of no weight. In other respects, however, he follows substantially the same line as Grotius. He says that where the effective control is in the hands of the usurper and not of the lawful sovereign, then the exercise of the sovereignty, or the government "is entirely with the usurper: this has now to be proved by the principles of the law of nations". He continues by saying:

> ". . . (2) it follows necessarily that some kind of management and government lies in the hands of the usurper; because the state cannot subsist by itself and by its own worth; consequently the usurper does all that without which the

realm cannot be safe and protected. For (3) thus far no detriment is caused to the ejected ruler: on the contrary it is rather in his interest that the State is preserved, which cannot be done without government. (4). The usurper has not only the power to govern, but he is also bound to govern; for bad faith does not have the effect that one is less, but that one is even more bound to keep guard of a thing."

To that extent, his views are the same as those expressed by Grotius, and the other jurists upon whom Grotius relied, because he stresses what in my view is a sound point that there is a duty on the usurper to govern for the welfare of the State and not to neglect that welfare. Coccejus then criticizes Grotius for suggesting that this is what the rightful sovereign would prefer to happen because he says:

"For, firstly: that conjecture of a wish has nowhere been proved: nor, secondly, can it adduce any reason for allowing the power to enact binding measures. Indeed, thirdly, the measures of the usurper have meanwhile the force of law, even though a contrary wish both of the king and of the people were to have been established. And, fourthly, this follows from the nature of possession, which involves the power to govern. But, fifthly, on this fiction the usurper would act in pursuance of a tacit mandate, and to this extent would act lawfully, inasmuch as then the person would consent, who has the power to forbid.".

Whether or not Coccejus be correct in that respect, that part of the opinion of Grotius which he criticizes does not depend upon a mere fiction in the present case, because on a proper construction of the Governor's instructions to which I have already referred, it appears that the wish of the sovereign is expressed in similar terms in the present situation for the preservation of the country.

Later on, Coccejus quotes with approval what Grotius says, to the effect that while such a usurper is in possession, the acts of government which he performs may have a binding force, and says that this follows from the nature of possession, "which brings upon the capacity, nay, the necessity, to govern. The subjects who are under the authority of the usurper, follow the possession" If, therefore, there is a duty cast upon the usurper to govern for the good of the country, then it seems to me that the court (whether it be a court of the usurper's creation or the court of the rightful Sovereign functioning within the territory) has a corresponding duty to assist in the good government of the country to that extent by enforcing those laws which are designed to achieve that result. After all, one of the essential features of the rule of law is the concept that the exercise of the powers of government shall always be conditioned by law, and that the subject shall not be exposed to the arbitrary will of the ruler. If the usurper, while refusing to restore the sovereignty which he has usurped, nevertheless shows that he is prepared to govern in accordance with that principle, should not the court assist him to that extent? Is the subject not better protected by judicial recognition of laws made for the purpose of ordinary good government and

the maintenance of law and order as binding upon all persons, including those exercising the powers of government, than by exposure to the risk of arbitrary rule through the withholding of such recognition?

Again, it is significant that Coccejus bases his views on the principles of "the law of nations", and again it is clear that what he means by this is the *jus gentium* or natural law, common to all civilized countries, and not international law in the modern sense of the word.

Some support for the application of the doctrine of State necessity, in circumstances such as these, is also to be found in the decisions of the American courts after the American Civil War. I have already made a brief reference to one of the first and most important of these, which was the case of *Texas v White (supra).* Counsel for the applicants submitted that those decisions could only be justified in the context of the particular constitutional framework of the United States. To quote the *ipsissima verba* of Mr. *Kentridge:*

> "An attempt to apply *Texas v. White* outside this peculiar Federal sphere would appear astonishing to an American constitutional lawyer and would appear to him a ludicrous distortion of a Federal doctrine.".

It was further contended that the basis for affording some limited recognition *ex post facto* to the internal acts of the Governments of the individual seceding States during the war, and no recognition to the acts of the Confederate Government itself, was that each of the individual States was a separate sovereign State with an identity of its own. Hence, so it was argued, the giving of such recognition by the State Courts and by the United States Supreme Court after the end of the war did not involve these courts in the doing of anything contrary to the State Constitutions or to the Constitution of the United States. I am unable to agree with this view. If the individual Southern States had been "sovereign" States in the strict sense of that term, they would have had the right to secede from the United States and they would not have been regarded—as they undoubtedly were regarded by the American courts after the war—as rebel States with illegal Governments. In fact, there would have been no civil war.

In this connexion, Bryce, in his work entitled *The American Commonwealth*, vol. 1, p. 422, says:

> "What State sovereignty means and includes was a question which incessantly engaged the most active legal and political minds of the nation, from 1789 down to 1870. Some thought it paramount to the rights of the Union. Some considered it as held in suspense by the Constitution, but capable of reviving as soon as a State should desire to separate from the Union. Some maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic legislative and administrative authority as had not been conferred upon Congress. The conflict of these views, which became acute in 1830 when South Carolina claimed the right of nullification, produced Secession and the war of 1861–65. Since the defeat of the Seces-

sionists, the last of these views may be deemed to have been established, and the term 'State sovereignty' is now but seldom heard.".

Again, Willoughby, in his well-known work on *The Constitution of the United States*, 2nd Edn., vol. 1, points out at p. 129 that in the type of union where the individual States remain severally sovereign, there is no real central State at all but only a Government which acts as the common agent of the severally sovereign States. In a true Federal State, such as the United States of America, "there is a single sovereign national State, legally omnicompetent, and a number of subordinate political bodies, which may or may not be termed 'States', but which, juristically viewed, act as agents of the sovereign national State, and possess such political status as they have only within, and as members of, this national body" Later, on the same page, he continues "that the United States of America is to be constitutionally viewed as a Federal State, that is, as a sovereign national body, there is now no doubt and has not been since the Civil War". At p. 130, Professor Willoughby continues:

> "This division of governmental powers, or, rather, of the right to exercise them, between the National and State Governments has, since the time when the United States Constitution was adopted, been spoken of as a 'division of sovereignty'. From what has been said, it is clear that this is, and has always been, a juristically improper, and politically unfortunate description. That it is a juristic error springs from the very nature of sovereignty, and that its implications cannot be realized in practice has been consistently and repeatedly shown since the present Constitution was put into operation. This will abundantly appear throughout the present treatise. The States have never been treated upon a basis of equality with the United States, such as would have resulted from a division of sovereignty—had such a thing been juristically possible—but, in every instance, whether with reference to the use of the so-called concurrent powers, or to the many instances in which State and Federal powers have, in their exercise, come into conflict with each other, the States have been obliged to yield to the United States. This supremacy of Federal authority over that of the States has resulted from, and its continued enforcement has demonstrated, the sovereignty of the United States.".

See, also, the *Introduction to American Government*, by Professor Ogg and Professor Ray, 10th Edn., p. 51, where the authors say:

> "In other words, while the state governments may be, and are, supreme within their reserved spheres, these spheres are circumscribed not only by the delegation of numerous vital powers to the national government, but by the basic operating principle that whatever the national government ordains—within the broad and still expanding area of its authority—is *supreme law*, enforceable as such and binding no less upon state executives, legislatures, courts and people than upon officers and people of the nation itself. Nothing of this sort can be said for the laws or other governmental actions of any state. So long, it is true, as these go unchallenged by federal authority, or indeed if, upon being challenged, they are held to be not inconsistent with that authority, they may be said—so far as the national government is concerned—to flow from 'supreme' power within the boundaries of the

state. If shown, however, to be incompatible with any legitimate exercise of power by the national government, they lose all claim to validity; and many have in this way been rendered of no force and effect.".

It is true that in one passage of his judgment in *Texas v. White* (*supra*), CHASE, C.J., at p. 237, col. 2 of the Lawyers' Edition Report, used the term "sovereignty" in relation to the individual States, but it is clear from the context in which he did so that he was using it loosely as meaning simply local autonomy within the framework of the Union and not in the strict legal sense. As Professors Ogg and Ray point out in a footnote to p. 27 of the textbook just referred to:

" 'Sovereignty' is a tricky word. As someone has remarked, the history of it in the United States illustrates the familiar fact that in all argument, if you insist on making certain words mean what you want them to mean, you always can reach the conclusion you wish to reach. With easy fluency, the States are to-day sometimes spoken of sentimentally, even by the Courts, as 'sovereign'."

In *Texas v. White*, CHASE, C.J., was dealing with "sovereignty" in the context of the main issue in that case, which was one of jurisdiction. The main issue turned on the question whether or not Texas remained a State within the Union after what its government had purported to do during the Civil War. If it was no longer a State within the Union, then the court had no jurisdiction to decide the case. The court decided that Texas never ceased to be a State of the Union. At p. 238 col. 1 of the Lawyers' Edition, CHASE, C.J., says:

"Considered, therefore, as transactions under the Constitution, the Ordinance of Secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the Acts of her Legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, must have become a war for conquest and subjugation.".

At p. 240, col. 1, he continues with the words:

"The Legislature of Texas, at the time of the repeal, constituted one of the departments of a State Government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful Legislature, or its Acts as lawful Acts. And yet it is an historical fact that the Government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such,

would be effectual and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary as to the United States.

It is not necessary to attempt any exact definitions, within which the Acts of such a State Government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example, as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void.".

It seems clear, therefore, that it was the very lack of sovereignty in Texas, in the strict sense of that term, which rendered its government unlawful and unconstitutional when it purported to secede from the United States, and to repudiate the legal sovereignty of the United States and its allegiance to it. The secession alone was sufficient to bring about that result, and it is on that same account, as I have already pointed out earlier, that the present government of this country must be considered unlawful. The fact that, after so seceding, Texas purported to transfer its allegiance to the Confederacy, merely served to aggravate the illegality, not to create it. Yet, notwithstanding that the Government of Texas during the Civil War was held to be unlawful, it was the only effective government during that period and some or its Acts were therefore regarded as valid on that basis. Surely this is the application of a doctrine of necessity and nothing else?

The judgment of the United States Supreme Court in the case of *The First National Bank of Washington v. Texas*, Supreme Court 20, Wall. 72: 22 Law. Ed. 295, also supports this view of the matter. MR. JUSTICE SWAYNE, at p. 298 col. 1 of the Lawyers' Edition, says:

"The effort of Texas to leave the Union was revolutionary. All her legislative Acts for the accomplishment of that object were void. Her position has been aptly resembled to that of a country in rebellion against the State. *Hickman v. Jones*, 9 Wall., 197, 19 L. ed., 551. While her enactments outside of the sphere of her normal authority were without validity, those within it, passed for the ordinary administration of her powers and duties as a State, had the same effect as if the rebellion had not occurred. The latter principle springs from an overruling necessity. A different rule would involve the dissolution of the social compact, and resolve society back into its original elements.".

To the same effect are the judgments of the United States Supreme Court in *Horn v. Lockhart*, S.C. 17 Wall. 570: 21 Law. Ed. 657; *Huntington v. Texas*, S.C. 16 Wall. 402–413: 21 Law. Ed. 316; *Sprott v. United States*, S.C. 20 Wall. 459: 22 Law. Ed. 371; and *Taylor v. Thomas*, S.C. 22 Wall. 479: 22 Law. Ed. 789. In the case of *United*

States v. Home Insurance Company, S.C. 22 Wall. 99: 22 Law. Ed. 816, all of these authorities were referred to in argument and most of them were considered and applied by Mr. JUSTICE STRONG in delivering the opinion of the full court. At pages 817, col. 2, to 818, col. 2, of the Lawyers' Edition report, the learned judge said:

"We do not, however, rest our decision upon this ground. We prefer answering the question which the appellants attempt to raise. No doubt the Legislature of Georgia in 1861 and 1863, when the enactments were made for the incorporation of these plaintiffs, was not the legitimate Legislature of the State. The State had thrown off its connection with the United States, and the members of the Legislature had repudiated or had not taken the oath by which the 3rd section of the 6th article of the Constitution requires the members of the several State Legislatures to be bound. But it does not follow from this that it was not a Legislature, the Acts of which were of force when they were made, and are in force now. If not a Legislature of the State *de jure*, it was at least a Legislature *de facto*. It was the only law-making body which had any existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the Constitution of the United States. Now, while it must be held that all their Acts in hostility to that Constitution, or to the Union of which the State was an inseparable member, have no validity, no good reason can be assigned why all their other enactments, not forbidden by the Constitution, should not have the force which the law generally accords to the action of *de facto* public officers. What that is was well stated by Kent in the second volume of his Commentaries, p. 295. 'In the case of public officers,' he says, 'who are such *'de facto,'* acting under the color of office by an election or appointment not strictly legal, or without having qualified themselves by the requisite tests, or by holding over after the time prescribed for a new appointment, as in the case of sheriffs, constables, etc., their acts are held valid as it respects the right of third persons who have an interest in them, and as concerns the public, in order to prevent the failure of justice.' And thus this court has ruled in regard to the Legislatures of the insurgent States in several cases which have come up for our decision. In *Texas v. White*, 7 Wall., 700 19 L. ed. 227, Chief Justice Chase, in delivering the opinion of the court (while declining to attempt any exact definition within which the Acts of an insurgent state government must be treated as valid or invalid), remarked: 'It may be said, perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfers of property, real and personal, providing remedies for injuries to person and estate, and other similar Acts which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful Government; and that Acts in furtherance, or in support of the rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void.' This language was intended only as an outline, but it sufficiently indicates where is the line between valid and invalid Acts of the Legislatures of the insurgent States. Similar opinions were expressed in *Sprott v. U.S.*, a case decided at this term, not yet reported, *ante*, 371. There, when speaking of the powers of the insurgent States, our language was: 'It is only when in the use of these powers substantial aid and comfort was given, or intended

to be given to the rebellion, when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the Government of the Union, that their Acts are void.' And with equal distinctness was it said in *Horn v. Lockhart,* 17 Wall., 580, 21 L. ed. 660, 'We admit that the Acts of the several States (in insurrection) in their individual capacities, and of their different departments of government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws . . . No one that we are aware of seriously questions the validity of judicial or legislative Acts in the insurrectionary States, touching these and kindred subjects, when they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution.' After these emphatic utterances, controversy upon this subject should cease. All the enactments of the *de facto* Legislatures in the insurrectionary States during the war, which were not hostile to the Union or to the authority of the General Government and which were not in conflict with the Constitution of the United States, or of the States, have the same validity as if they had been enactments of legitimate Legislatures. Any other doctrine than this would work great and unnecessary hardship upon the people of those States, without any corresponding benefit to the citizens of other States, and without any advantage to the National Government.

Tried by the rule thus stated, the enactments by which the plaintiffs in these cases were incorporated must be treated as valid. They had no relation to anything else than the domestic concern of the State. Neither in their apparent purpose nor in their operation were they hostile to the Union, or in conflict with the Constitution. They were mere ordinary legislation, such as might have been had there been no war, or no attempted secession; such as is of yearly occurrence in all the States of the Union."

It is true that in the later case of *Keith v. Clark*, S.C. 454–483: 24 Law. Ed. 1071, the majority of the United States Supreme Court appeared to reject the premise that the governments of the individual seceding States were usurpers and hence unlawful, and to treat them as lawful governments. At p. 1073, col. 2, of the Lawyers' Edition report, MILLER, J., says:

"We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government; it is opposed to the recognized principles of public international law; and it is opposed to the well considered decisions of this court."

He continues at p. 1074, col. 1:

"The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its Executive, its Legislative, its Judicial Departments have continued without interruption and

in regular order. It has changed, modified and reconstructed its organic law or State Constitution more than once. It has done this before the rebellion, during the rebellion and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

This political body has not only been all this time a State, and the same State, but it has always been one of the United States; a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement."

The learned judge seeks support for this view from the finding of the court in *Texas v. White (supra)* that Texas, during the Civil War, never lost its identity as a State within the Union, and at p. 1075, col. 2, he also relies on the following passage from the judgment of Mr. JUSTICE FIELD in *Williams v. Bruffy*, 24 Law. Ed. 716:

"While thus holding that there was no validity in any legislation of the Confederate States which this court can recognize, it is proper to observe that the legislation of these States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the State prior to the rebellion, remained during its continuance and afterwards. As far as the Acts of the States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens under the Constitution, they are, in general, to be treated as valid and binding.".

The view thus taken by MILLER, J., in *Keith v. Clark* appears to be inconsistent with that expressed in the other cases. With respect, it seems to me that the learned judge misinterpreted the effect of the decisions in *Texas v. White* and *Williams v. Bruffy*. The fact that Texas did not lose its identity as a State within the Union, did not mean that the government of the revolutionary period was not a usurping and unlawful government, and in fact CHASE, C.J., in the passage from *Texas v. White*, already quoted above, described it as such. In the event of the Rhodesian revolution being an unsuccessful one, and in the absence of recognition of Rhodesian independence on an agreed basis, the court in the future would similarly hold that Rhodesia never lost its identity as a self-governing territory within Her Majesty's Dominions, but its government during the revolution was an unlawful one. Nor is there anything in the judgment in *Williams v. Bruffy* which says that, because of the situation described by FIELD, J., in the passage relied upon, the governments of the individual seceding States were lawful governments during the Civil War. In my view, the correct position, and one which

accords with the decisions in the majority of the cases, was that stated in the dissenting judgment of BRADLEY, J., in *Keith v. Clark*, at p. 1078, col. 2, to 1079, col. 2, of the Lawyers' Edition. The learned judge says:

> "Now if the position of the majority of the court is correct, that there never was any usurpation of the State Government in Tennessee during the late civil war and that the State had all the time a lawful government of its own (for that is what the argument amounts to), then I concede that the conclusion reached is unavoidable. If this be true, then I do not see why all the obligations issued by the State during the war, whether in the shape of bonds or certificates of indebtedness or otherwise, are not equally obligatory as these bills. How is it to be proved which of them was issued for carrying on the war, and which were not? Upon the assumption made, they are all prima facie valid. But this, of course, is only a collateral consideration.
>
> I deny the assumption that the governments of the insurgent States were lawful governments. I believe and hold that they were usurping governments. I understand this to have been the opinion of this court in *Texas v. White*, 7 Wall., 700, 19 L. ed., 227. The very argument in that case is, that whilst the State, as a community of people, remained a State rightfully belonging to the United States, the government of the State had passed into relations entirely abnormal to the conditions of is constitutional existence."

He then quotes from the judgment of CHASE, C.J., in *Texas v. White*, and at p. 1079, col. 1, he continues as follows:

> "The actual course of things taken in the seceding States, so fully detailed by the Chief Justice in *Texas v. White*, are demonstrative, it seems to me, of the position which I have assumed. The several State Governments existing or newly organized at the times when the Ordinances of Secession were respectively adopted, assumed all the branches of sovereignty belonging to the Federal Government. The right to declare war, raise armies, make treaties, establish post-offices and post-roads impose duties on imports and exports and every other power of the Government of the United States were usurped by the said State Governments, either singly or in concert and confederacy with the others. They assumed to sever the connection between their respective communities and the Government of the United States, and to exercise the just powers belonging to that government. That such governments should be denominated legal State Governments in this country, where the Constitution of the United States is and ought to be the supreme law of the land, seems to be most remarkable. The proposition assumes that the connection between the States and the General Government is a mere bargain or compact, which, if broken, though unlawfully broken, still leaves the States in rightful possession of all their pristine autonomy and authority as States.
>
> I do not so read the constitution of government, under which we live. Our government is a mixed government, partly state, partly national. The People of the United States, as one great political community, have willed that a certain portion of the government, including all foreign intercourse, and the public relations of the Nation, and all matters of a general and national character, which are specified in the Constitution, should be deposited in and exercised by a National Government; and that all matters of merely local interest should be deposited in and exercised by the State Governments. This division of governmental powers is fundamental and

organic. It is not merely a bargain between States. It is part of our fundamental political organization. Any State attempting to violate this constitution of things not only breaks the fundamental law, but, if it establishes a government in conformity with its views, *that government is a usurping government, a revolutionary government;* as much so as would be an independent government set up by any particular country in a State. If the City of New York should set up a separate government independent of the Government of the State, it would be a usurping and revolutionary government. It might succeed and make itself independent, and then there would be a successful revolution. But if it did not succeed, if it were put down, every one would call it a usurping and unlawful government whilst it lasted, and none of its Acts would be binding on the lawful government.

I do not mean to say that States are mere counties or provinces. But I do mean to say, that the political relation of the People of the several States to the Constitution and Government of the United States is such, that if a State Government attempt to sever that relation, and if it actually sever it by assuming and exercising the functions of the Federal Government, it becomes a usurping government."

Notwithstanding that clear pronouncement as to the illegality of the usurping government, the learned judge comes to the conclusion, in harmony with the earlier decision to which I have referred, that recognition must be given to some of its laws, for he continues:

"We have always held, it is true, that, in the interests of order and for the promotion of justice, the courts ought to regard as valid all those Acts of the State Governments which were received and observed as laws for the government of the people in their relations with each other, so far as it can be done without recognizing and confirming what was actually done in aid of the rebellion. This is required by every consideration of justice and propriety, But this is only what is always conceded to the Acts and laws of any actual government however invalid.".

The last word on the subject appears to have been said by the United States Supreme Court in 1898 in the case of *Baldy v. Hunter,* S.C. 388–404: 43 Law. Ed. 208, where, after reviewing the authorities, including *Texas v. White, Horn v. Lockhart* and *Sprott's* case (*supra*), MR. JUSTICE HARLAN said, at p. 213, col. 1, of the Lawyers' Edition:

"From these cases it may be deduced—

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

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

That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were or-

ganized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate states did not relieve those who were within the insurrectionary lines from the necessity of civil obedience nor destroy the bonds of society nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame 'except when proved to have been entered into *with actual intent* to further invasion or insurrection;' and,

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

The weight of authority of the American cases appears, therefore, to support the view that the governments of the individual States were treated as usurping governments and hence unlawful: but recognition was afforded to some of their Acts because they were the *de facto* governments in the sense of being the only effective governments of the States concerned. In those circumstances, recognition could only have been afforded on the basis of necessity, and in my view the contention of the applicants' counsel that in affording such recognition the courts did nothing contrary to the constitutions of the United States or of the States themselves, is unsound. The very fact of secession from the Union was unconstitutional, coupled with the usurping of the sovereign functions of the United States, and rendered the State Governments unlawful, and it seems to me that the courts were obliged to condone the constitutional breach in giving recognition on the basis of necessity. Surely, if the State Governments were regarded by the courts as unlawful governments, this can only mean that they could not legally exercise the powers of government at all in the individual States, whether within the framework of their existing State Constitutions or under any other form of constitution which they might have purported to establish for themselves? They functioned as *de facto* governments and were recognized on that basis. If, instead of joining the Confederacy, they had purported to remain individual sovereign states under new State Constitutions which severally purported to incorporate the usurped powers of the United States in addition to their own State powers, there is no logical reason to suppose that the American courts would have refused to recognize anything at all done by the unlawful State Governments, even as regards the exercise of powers in the ordinary day-to-day running of the State which the lawful State Government had always exercised under the old Constitution prior to the secession.

It so happened that they formed a Confederate Government and purported to vest the usurped sovereign powers in the Confederate

Government. As Bryce points out in an appendix at p. 683 of volume I of "The American Commonwealth", to which I have already referred, the so-called constitution of the Confederate States was substantially a reproduction of the Federal Constitution, with certain variations. Consequently, the courts were able—and, indeed, bound—to treat all acts of the Confederate Government itself as a nullity, except where recognition was afforded in isolated cases to things done on the basis of according belligerent rights to an enemy in *de facto* control of the territory during a state of war. See *Hickman v. Jones*, S.C. 9 Wall. 197–203: 19 Law. Ed. 551; *Thorington v. Smith*, S.C. 8 Wall. 1–14: 19 Law. Ed. 361 at p. 364 following *United States v. Rice*, 4 Wheat. 253: 4 Law. Ed. 245; *Williams v. Bruffy*, 24 Law. Ed. 716, at 718, col. 1, per FIELD, J., and *Sprott's* case, S.C. 20 Wall. 459: 22 Law. Ed. 371. In the same way, INNES, C.J., in the Transvaal cases of *Van de Venter v. Hancke and Mossop, Lemkuhl v. Kock* and *Olivier v. Wessels* (*supra*) recognized that the Boer forces were entitled to be accorded belligerent rights, in respect of certain action taken for the purpose of prosecuting the war, before the date of the proclamation annexing the Transvaal to the British Crown in September, 1900.

No question, however, of belligerent rights arises in the present case.

In *Sprott's* case (*supra*) the reason for treating all acts of the Confederate Government, as distinct from those of the individual States, as invalid, appears clearly. At p. 372, col. 1, of the Lawyers' Edition Report, it was said:

> "The recognition of the existence and the validity of Acts of the so-called Confederate Government, and that of the States which yielded a temporary support to that government stand on very different grounds, and are governed by very different considerations.
>
> The latter, in most, if not in all instances, merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or the false Federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only, when in the use of these powers, substantial aid and comfort was given or intended to be given to the rebellion; when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the Government of the Union, that their acts are void. *Texas v. White*, 7 Wall., 700, 19 L. ed., 227.
>
> The Government of the Confederate States can receive no aid from this source of reasoning. It had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing

Federal Government. Its single purpose, so long as it lasted, was to make that treason successful. So far from being necessary to the organization of civil government, or to its maintenance and support, it was inimical to social order, destructive to the best interests of society, and its primary object was to overthrow the Government on which these so largely depended. Its existence and temporary power were an enormous evil, which the whole force of the Government and the people of the United States was engaged for years in destroying.

When it was overthrown it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence. So far as the actual exercise of its physical power was brought to bear upon individuals, that may, under some circumstances, constitute a justification or excuse for acts otherwise indefensible; but no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose."

It does not necessarily follow, however, that if the usurped sovereign powers had been written into a new constitution for an individual State, the courts would have felt unable to recognize anything done by the unlawful government. It does not seem to me that it would have been impossible for the courts to regard the new constitution as illegal and the government set up as unlawful, while at the same time giving limited recognition, on the basis of necessity, to Acts passed or things done by the unlawful government which could have been passed or done under the old constitution, which were not hostile to the United States Constitution and which were not for the purpose of aiding the rebellion.

I fail to see why the same doctrine of necessity cannot be applied in the present situation. Up to the time of the Declaration of Independence in November, 1965, this country, for all practical purposes, enjoyed as much self-government as Texas did, yet, like Texas, it was constitutionally tied to the sovereignty of a mother State. Like Texas, it unilaterally repudiated that sovereignty. Like the unlawful government of Texas, it is the only effective government of this country. In regard to the making of laws for the preservation of peace and good government within the territory and the maintenance of law and order within the territory, the Government of this country exercised the exclusive power prior to the 11th November, 1965; because, although under the 1961 Constitution the Governor assented to Acts of the Southern Rhodesia Legislature in the name of Her Majesty the Queen, he had no power to refuse such assent. The Officer Administering the Government under the 1965 Constitution purports to assent in the name of Her Majesty the Queen in place of the Governor, and is similarly unable to refuse to assent to such laws. From the point of view of practical reality, therefore, the continued making of laws by the present *de facto* Government for this essential purpose 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.

It was contended, however, by the applicant's counsel, that these American cases, even if they established the principle of applying a doctrine of necessity in the American situation, are of only persuasive authority and cannot be followed in this court because our law knows no such doctrine. I have already pointed out earlier, however, that I regard the principle as one belonging to the *jus gentium*, and the fact that it has received recognition within the last century in the courts of other civilised countries of the world is, in my view, a strong reason for applying it in the present case.

Counsel for the respondents also referred the court to a judgment of the Swiss Bundesgericht—the highest court in Switzerland—delivered on the 5th October, 1905, in the case of *Zieglersche Tonwarenfabrik von Gebrüder Ziegler ca. Kanton Schaffhausen* (re water right). We were supplied with a photostatic copy of the judgment in the original German, with an English translation of extracts from it. In that case, a part of the river Rhine used by the plaintiff had been mistakenly regarded as falling under the legal "sovereignty" of the Canton of Zurich, but by a decision of the Federal Court, dated the 8th November, 1897, it had been declared that it fell under the legal "sovereignty" of the defendant, the Canton of Schaffhausen. The question then arose as to whether the plaintiff's water rights had been validly established during the period when that portion of the Rhine was under the *de facto* control of the Canton of Zurich, and the Bundesgericht had this to say:

> "The sovereignty is in its relationship to the individuals who are subjected to it by reason of territory or nationality, essentially a factual relationship; who exercises the powers of the State, is from the point of view of constitutional law the lord of the territory and the persons belonging to it, irrespective of whether this factual state of affairs conforms with the position of the territory concerned under the law of nations, or, in other words, whether the powers concerned externally in relationship to other states, has a lawful existence. In the cases too of the existence of a power of states which was not established in accordance with the law of nations, a power lacking the so-called legitimacy, even if recognition were to be refused to it by all or some other states—here a usurped government, but one functioning in good order, comes to mind—therefore the more so when that power of state is generally though mistakenly considered to be lawful, will the internal acts of government of such a power of state have to be equated to the acts of a government which has a lawful existence in the sense of the law of nations, that is the institutions of that commonweal by which the subjects are in fact ruled, are available to the subjects in the same way whether this commonweal is in conformity with or contrary to the law of nations. According to this theory, which is the prevailing one in the modern doctrine of constitutional law and which is based on the principle of the necessary continuity of the legal order within the state, the fact that for a

given territory an illegally functioning power of state is replaced by the lawful power of state has the same effect as the transition of a territory from one sovereignty to another.".

It appears, therefore, that the court adopted a similar line of reasoning to that adopted in the Dutch cases to which I have already referred. Even if the *de facto* control had come about by a deliberately wrongful usurpation on the part of the Canton of Zurich, recognition would have followed on the basis of "preserving the necessary continuity of the legal order in the State"; *a fortiori,* should this be so, when the *de facto* control arose from a *bona fide* mistake of law.

Counsel for the applicants submitted that this had no value even as a persuasive authority, because the extracts translated did not reveal exactly what law was being applied and the Swiss court might have been relying on some statutory provision. He stated, however, that he would have no objection if this court were to have the whole judgment reliably translated. This has now been done and it does not appear that the principle enunciated by the Swiss court was based on any provision of the Swiss code or on any other statutory provision; it was apparently stated as a general principle of law, and one can only infer that it was regarded as part of the *jus gentium.*

To the same effect is the American decision in the boundary dispute case of *Cullins v. Overton,* decided in the Supreme Court of Oklahoma in 1898. We have been supplied with a photostatic copy of the judgment in that case. After considering *Texas v. White (supra),* and the other cases to which I have referred arising out of the Civil War, BURFORD, C.J., went on to hold that the exercise of powers by the *de facto* local government of Greer County, while it was erroneously included as part of the State of Texas and was under the control of the *de jure* government of that State, up to 1896, must be recognized, again apparently on an *a fortiori* basis.

I would also refer to the *obiter dictum* of LORD WILBERFORCE in the recent House of Lords case of *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd. and Ors.,* (1966) 2 A.E. Reports (Part 8) p. 536, merely as illustrating the point that the application of the doctrine of necessity, even in English law, might well have to be seriously considered in order to avoid a vacuum in the law if the circumstances should arise. At p. 577 of the Report, his Lordship says:

"My lords, if the consequences of non-recognition of the East German 'government' were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. As Locke said: 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' and this must be true of a society—at least a civilized and organized society—such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be

pressed to its ultimate logical limit, and that where private rights, or acts of every-day occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and commonsense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *U.S. v. Home Insurance Co.* (110)), and have been developed and reformulated, admittedly as no more than dicta, but dicta by judges of high authority, in later cases. I mention two of these: *Sokoloff v. National City Bank of New York* (111) and *Upright v. Mercury Business* (112), a case which was concerned with a corporate body under East German law. Other references can be found conveniently assembled in PROFESSOR O'CONNELL'S INTERNATIONAL LAW (1965) pp. 189 ff. No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total validity of all laws and acts flowing from unrecognised governments. In view of the conclusion which I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked."

After a consideration of all these authorities, I am satisfied that what was said by Grotius and the other jurists, was not the mere exposition of a philosophical or ethical doctrine. It was the formulation of a sound principle of law applied in at least three civilized countries in the context of the modern framework of government, and in my view it should be applied in the present situation.

Since the adoption of the principle in the present case depends on the finding of fact that the present Government is in complete and effective control in this country, it follows that the application to strike out those portions of the respondent's affidavits which deal with that aspect, as irrelevant, must fail. In so far as those affidavits are also objected to as containing hearsay, it was eventually conceded by counsel for the applicants that the averments of the Heads of the Departments of the Civil Service and of the Commissioner of Police to the effect that there was total obedience to the laws and directions of the present Government among their subordinates, were properly admissible in evidence. In so far as they purported to speak of the personal feelings of loyalty of their subordinates to the present Government, I agree that those parts of their affidavits are inadmissible and must be struck out as hearsay. In any event, it is not necessary for the respondents to rely on the positive loyal support of these persons in order to establish effective control; mere obedience is sufficient. The affidavits on both sides also purported to deal with the feelings of the African people as a whole towards the present Government; this evidence is inadmissible and valueless. No satisfactory method has yet been devised for testing

African opinion as a whole in this country. Regarding the armed forces, although no affidavits from the Army or Air Force were tendered, it was also conceded that the court could take judicial notice of the fact that the commanders of both branches of the armed forces attended the official Opening of Parliament in June and performed their customary official duties at the ceremony. It seems to me that an inference of obedience on their part, too, can be drawn from this. Accordingly, for these reasons, I am quite satisfied on the evidence that the present Government of this country is in complete and effective control of the country. The effective control of the Government is in any event a matter so notorious that judicial notice can be taken of the fact.

The extent to which the doctrine of recognition through necessity can be applied in the present circumstances, is a matter which occasions me some difficulty. The attitude of the American courts, looking back at the acts of the rebel States after the suppression of the rebellion, is only a rough guide because the factual circumstances were very different. Here, there has been a bloodless revolution involving the usurpation of the sovereign power of the mother state. It has been called a "rebellion", but the term "rebellion" usually connotes the use of armed force.

What the Southern States of America did was not only to secede from the Union but to transfer their allegiance to the Confederate Government, and, through the medium of that Confederate Government, to wage a bitter and bloody war against the Union for four years, involving untold misery and enormous loss of life. Because the Southern States were fighting a large-scale war, a great number of measures taken, which would otherwise have been simply measures of ordinary good government, were tainted with aid to the rebellion. For instance, a considerable proportion of revenue, received from taxation and other means, must have gone towards the actual prosecution of the war against the Union. The object of the rebellion was not only to defend and preserve the secession of the Southern States but to conquer and subdue the Union as well by force of arms; this was inevitable because of the existence of a state of war. Hence the term "aiding the rebellion" as used in the American cases, had a much wider scope than it has in the present situation.

Furthermore, it is clear that the bitterness engendered by the war endured for many years after it ended, and that bitterness even seems to find its way into some of the judgments, for example, in the strong language employed by MILLER, J., in *Sprott's* case *(supra)* in the latter part of the passage already quoted above, when speaking of the Government of the Confederate States. So might JUDGE JEFFREYS have expressed himself before passing sentence of death upon the unfortunate participants in the Monmouth Rebellion at the Somerset Assizes of 1685.

In the circumstances, it is not surprising that in some of the earlier American cases relied upon by the applicants' counsel the test of recognition was formulated in very narrow and circumscribed terms. For example, in the case of *Leak v. Commissioners of Richmond County* (1870) North Carolina Supreme Court p. 130, notes taken for money lent to the County during the war to enable it to supply salt for its citizens and thus to avoid one of the penalties of the blockade, were held to be void as against the lawful County authority after the end of the war. At pps. 134–5, PEARSON, C.J., says:

> "It follows that the courts of the rightful State government, which has regained its supremacy, cannot treat the acts of persons so unlawfully exercising the powers of the State and county authority as valid, unless the Court is satisfied that the acts were innocent and such as the lawful government would have done. So when the plaintiff asks the Court to compel the defendants, who are in the rightful exercise of the power of the county, to perform a contract made by a set of men who were wrongfully exercising the power, the *onus* of showing that the contract was for an innocent purpose, and not made in aid of the rebellion, is upon the plaintiff; if the matter be left in doubt, the courts cannot enforce the claim against the rightful authorities of the county.
>
> So far from being left in doubt, it is clear that the contract was in aid of the rebellion. Any act which would not have been done except for the existence of the rebellion, and which was calculated to counteract the measures adopted by the government of the United States for its suppression, and to enable the people in insurrection to protract the struggle, was in aid of the rebellion.
>
> The idea can be more clearly expressed by examples: Statutes sanctioning and protecting marriage and the domestic relations, and the appropriations for the ordinary administration of justice, or for the support of the lunatic asylum, are acts having no reference to the rebellion, and would have been done in any event. So, although it may be true that the doing of these things made the condition of the people more endurable, in no fair sense can they be considered as having been done in aid of the rebellion: On the other hand, statutes and appropriations to run the blockade, and introduce for the use of the people, cotton-cards and medicine; or to supply the people with salt by erecting works for its production, and providing for its transportation and distribution: whether done directly by the State, or indirectly, through the agency of the country authorities, are acts of a novel and unprecedented character and such as would not have been done except for the existence of the rebellion. So the case is covered by the first requisite in the definition of an act in aid of the rebellion.
>
> That the act of providing salt for the use of the people was calculated to counteract the blockade and other measures of the United States to suppress the rebellion, and to enable the people of the insurgent States to protract the struggle, is a matter too plain for discussion; any one who attempts to prove the contrary must confess the soft impeachment of allowing his reasoning faculties to be obscured by prejudice and sympathy for 'the cause of the South', as it was called on the argument.".

At pps. 136–7, he continues:

"The act, *per se*, did aid the rebellion, and its being done by the wrongful authority, acting as part and parcel of the wrongful State government, organized for the avowed purpose of sustaining the rebellion, tends the more strongly to fix its character. The Court is not at liberty to shut its eyes to the historical fact, that furnishing salt was not a single act, but one of a long series of acts in aid of the rebellion: *'noscitur a sociis'*.

The ordinances of the Convention of 1861 assuming legislative powers, the acts of the Legislatures during the war, and the acts of the county authorities, *all*, follow out a common purpose, *to resist the invasion!* A military board is established; appropriations are made to procure clothes and arms for the soldiers, cotton-cards, medicine, salt, etc., for the people; bounties are offered for volunteers; the powers of the county authorities are enlarged; the counties equip volunteers, and transport their baggage to camp; take measures to provide salt, etc., and give every assurance that the wives and children of soldiers will be cared for; in short, the authorities, both State and county, strain every nerve to 'resist the invasion'. Witness, the debt of the State and counties accumulated *during the war!*

A change takes place: what was then considered *'resisting an invasion'* turns out to have been *'aiding a rebellion'*. Thereupon it is said with seeming seriousness: 'Certain of these acts ought not to have been entered as items under the head of 'resisting invasion', and should now be transferred and posted as items under a distinct head, viz., 'charity and humanity!' for such acts were not calculated or intended, either to resist invasion or to aid rebellion, and did not have that effect'.".

The judgment in the case of *Garlington v. Priest* (1869) Federal Supreme Court Reports 599, adopts a similar line of reasoning. In *Hanauer v. Doane* (1870) Supreme Court 12 Wall. 443: 20 Law. Ed. 439, at p. 440 col. 2 of the Lawyers' Edition Report, the phrase "tinctured with the vice of giving aid and support to the rebellion" is used. The judgments in the cases of *Isaacs, Taylor and Williams v. City of Richmond* (1893) Virginia Ch. App. p. 30 at p. 32, and *Williams v. Bruffy (supra)* at p. 720 col. 1 of the Lawyers' Edition Report, speak of giving validity to such acts of the State as "do not impair or tend to impair the supremacy of the national authority", from which it is inferred by counsel for the applicants that, even if the act was principally designed for an innocent purpose, it was nevertheless void if incidentally and indirectly its effect was to aid the rebellion.

However, as I have indicated earlier, the last word appears to have been said in the United States Supreme Court in *Baldy v. Hunter (supra)* in 1898, which laid down a far more liberal test. In the passage which I have quoted above, it is stressed that transactions in the ordinary course of civil society "although they may have indirectly or remotely promoted the acts of the *de facto* or unlawful government organized to effect a dissolution of the union, were without blame except when proved to have been entered into with actual intent to further invasion or insurrection", and that legislative and judicial acts of the individual States "should be respected by the courts if they were not hostile in their purpose or mode of enforcement to the authority of the national

government" and did not "impair the rights of citizens under the constitution". I construe the phrase "mode of enforcement" as meaning simply this: That if a law is being administered in a manner hostile to the national authority those acts of administration are invalid even though the purpose in enacting the law may have been an innocent one.

Since these views represented the unanimous views of the United States Supreme Court in 1898 and since those views appear to be the final views of that court, it seems to me that they are of more persuasive authority than those expressed in the earlier cases to which I have just referred. The words "tend to impair" disappeared, as did the "tincture" test. If those views represented the correct approach in the American Supreme Court, looking back on the rebellion after it was suppressed, then it seems to me *a fortiori* they represent the correct approach for a court sitting in the middle of the revolution, the outcome of which is as yet undecided. It would be well nigh impossible for the court to determine at this stage, whether or not legislation, *prima facie* enacted for the purpose of ordinary good government and of the same type which could validly have been enacted under the 1961 Constitution, might ultimately have the indirect effect of aiding the rebellion. Furthermore, the court could not adopt the approach laid down in *Leak v. Commissioners of Richmond County (supra)* without necessarily assuming the role of actively trying to suppress the revolution. As I have already pointed out above, that is not the function of this court, nor is it any part of the instruction from the Governor to make any such attempt. The court's duty is to maintain law and order, to assist in the ordinary good government of the country so as to preserve the State, and passively to refrain from rendering direct aid to the revolution. Apart from that, it cannot be said in the present situation, as it was said in *Leak's* case, that the "laws of war are paramount to motives of charity and humanity" This country is not in a state of war with Britain, and its government is accordingly not organized on the basis of fighting a war as were the Southern States, where virtually everything done was tainted to some degree with the prosecution of war and hence with treason against the United States. It was the existence of a state of war which was the basis of the decision in *Leak's* case, and which led the court to hold that even the supply of salt to the County to enable the inhabitants to hold out longer against the United States blockade, amounted to aiding the rebellion.

The question then arises what is meant by "aiding the rebellion" in the present circumstances, in the absence of any state of war? It seems to me that it is a matter for Britain to implement its policy of economic sanctions against this country and, in so doing, it will have to rely largely upon the co-operation of other countries. That is a political matter, and if, despite the policy of sanctions, other countries are prepared to trade with this country and do so, that merely means that, politically, Britain has failed to secure the co-operation of those countries. In my view, it

is no part of this court's duty to assist in the implementation of this policy or to concern itself with the economic measures adopted by the unlawful Government of this country to circumvent sanctions. Provided such measures could validly have been taken by the lawful Government prior to the 11th November, 1965, in terms of the 1961 Constitution, and provided they involve no unlawful interference with the rights of citizens under that Constitution, this court will not interfere. For example, if statutory measures were taken to encourage and organize an increase in the growing and marketing of wheat for local consumption, to counteract a shortage of imported wheat resulting from the sanctions, *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.

Counsel for the applicants submitted that it would be entirely wrong for this court to adopt the role of legislator by attempting to decide, on evidence placed before it, what was the purpose in enacting a particular piece of legislation and in what manner it was being enforced, and this was an additional reason for not applying the *Texas v. White* doctrine in the present case. It is perfectly true that in normal circumstances this would be quite foreign to the function of the court. Normally, the court has to ascertain the intention of Parliament from the words of the statute itself and it cannot pay regard to what was said in Parliament as to the intention of the enactment nor can it call in aid any other extraneous mode of interpretation. However, as I have already indicated, I am satisfied that the doctrine must be applied in the present situation and the necessity of resorting to this procedure is inherent in the application of the doctrine itself. This appears to have been recognized in the American courts. For example, in the case of *Isaacs, Taylor and Williams v. City of Richmond (supra)*, LEWIS, P., delivering the opinion of the court, said at p. 32:

> "There is certainly nothing on the face of the ordinance under which the first notes were issued, or on the fact of the act of March 19th, 1862, which, in terms, shows that either the city council or the legislature had in view an unlawful object. Nor is the general rule disputed that the legislative intent must be gathered from the language used by the legislature, and that the validity of a statute, unobjectionable on its face, cannot be made to depend upon the result of a judicial inquiry into the motives of the legislature; and yet we are not prepared to say that an exception to this rule does not obtain in a case where the question is whether a statute passed by the legislature of a *de facto* State government during the late war, was or was not in aid of the rebellion. The reasoning of the court in *Keith v. Clark*, 97 U.S., 454,

would seem to favour the proposition that in such a case, when the question is properly raised on the record, extrinsic evidence is admissible to show the real object and purpose of the enactment. But it is unnecessary to decide that question, because there is another principle, thoroughly established, and which is sufficient for the purposes of the present case, and that is, that any act the necessary operation of which impairs, or tends to impair, the supremacy of the Constitution, is void, no matter what may have been the purpose of the legislature in enacting it."

It is also true, as counsel pointed out, that the task of deciding by way of evidence the purpose and mode of enforcement of a statute is more difficult for a court sitting *in medias res*. The courts in America, looking back after the end of the Civil War, were in a better position to decide these matters. However, if the adoption of this procedure is necessary, and I am satisfied that it is, the difficulties involved in applying it should not deter the court from undertaking the task. Moreover, as the *Solicitor General* rightly points out, certain provisions of the 1961 Constitution itself place the court in a somewhat analogous position. For example, in Chapter VI, containing the Declaration of Rights, subsection (1) of section 62 makes provision for the protection of the individual against the search of his person or entry into and search of his dwelling-house. Subsection (2) then lists the exceptions where such search and/or entry are permitted. Subsection (3) then provides:

"(3) If, in any proceedings by virtue of section 71, it is alleged that anything contained in or done under the authority of any law is inconsistent with or in contravention of subsection (1) of this section and a certificate in writing is produced to the court signed by a Minister of the Government of Southern Rhodesia that in the opinion of that Minister the law in question is necessary on such of the grounds mentioned in subsection (2) of this section as is specified in the certificate, that law shall be deemed to be so necessary unless the court decides as the result of hearing the complainant that, in a society which has a proper respect for the rights and freedoms of the individual, the necessity of that law on the grounds specified in the certificate cannot reasonably be accepted without proof to the satisfaction of the court."

Similar provisions are contained in sections 64 (5) and 66 (3).

Considerable argument was also addressed to the court on the question of the *onus* of proof in regard to the validity of the laws passed or the administrative action taken by the present unlawful Government. It seems to me that the proper inference to draw from the decision in *Baldy v. Hunter (supra)* is that the *onus* may vary according to the particular type of measure under consideration. 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 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.

It seems to me that the present applications fall into the third category. In deciding on the validity of the detention of the first applicant's husband and of the second applicant, it is necessary to determine first of all the validity of the extension of the state of emergency, and secondly, the validity of the Emergency Regulations contained in Government Notice 71 of 1966, made in pursuance of such extension, under which the continued detention of these two persons was authorized. The Declaration of Rights contained in Chapter VI of the 1961 Constitution—which was reproduced in identical terms in the 1965 Constitution—safeguards the fundamental freedoms of the individual and, in particular, section 58 protects him, in normal circumstances, from detention without trial. However, section 69 (1) of that chapter provides that nothing contained in any law shall be held to be inconsistent with section 58 (and kindred sections) "to the extent that the law in question makes provision with respect to the taking during any period of public emergency of action for the purpose of dealing with any situation arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the action taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question".

In other words, such detention is authorized only during a state of emergency declared in terms of section 3 of the Emergency Powers Act [*Chapter 33*], the relevant provisions of which have been set out above. I have already pointed out that the Governor, in declaring a state of emergency in terms of section 3 and in making the necessary regulations under section 4, acts by and with the advice of the "Government" and has no discretion to refuse to act or to act otherwise than in accordance with that advice. The Officer Administering the Government, since the 11th November, 1965, purports to be in the same position. In effect, therefore, the decision was before the 11th November, 1965, and still is that of the "Government".

It is true, as the applicants' counsel point out, that a declaration of a state of emergency, carrying with it the power to detain persons without trial, is a drastic and far-reaching measure which makes a

serious inroad into the rule of law and offends against the ordinary principles of justice. It is therefore to be tolerated only as a necessary evil. It cannot be said, however, that on that account alone it falls outside the scope of ordinary measures necessary for the preservation of peace and good government and the maintenance of law and order, and the 1961 Constitution expressly recognized that it might have to be resorted to. On this aspect, it is relevant to examine briefly the history of similar measures taken by the lawful Governments of this country prior to the 11th November, 1965. The first of these occurred in 1956, when the Government, led by Mr. Garfield Todd, declared a state of emergency for the whole Colony by a proclamation contained in Government Notice 332 of 1956, and issued emergency regulations in Government Notice 333 of 1956 in terms similar to those complained of in the present case, which contained like provision for the summary arrest and detention of any person where it appeared to the Minister of Justice to be expedient in the public interest. From February, 1959, to August, 1965, and at various times, five further states of emergency were declared of varying duration, the longest period being one of nine months, and during these times similar emergency regulations were in force providing for detention of persons without trial.

It will be seen, therefore, from this unfortunate history, that it has been found necessary to resort to these drastic measures on frequent occasions in the past ten years.

Then, as I have already pointed out at the commencement of this judgment, the lawful Government on the 5th November, 1965, and prior to the Declaration of Independence, declared a further state of emergency and issued the Emergency Regulations contained in Rhodesia Government Notice 735 of 1965, and no question of the legality of those measures is in issue here nor is there any question but that they were necessary in order to maintain law and order in this country. The respondents aver in their affidavits that it was necessary to extend the period of emergency on a similar basis. The applicants, on the other hand, contend that the sole reason or, alternatively, one of the reasons, was in order to aid the rebellion. They rely on certain passages in a speech by the first respondent in the first application, when moving the extension of the state of emergency in Parliament, a copy of which is annexed to their replying affidavits. It seems to me, however, reading the speech as a whole, that the effect of it is that stress is primarily laid on the need to maintain law and order, and cogent examples are given of matters which are threatening the continued existence of law and order in this country, apparently unconnected with the revolution itself. The Minister also says in effect that the extension of the state of emergency being necessary in any event on those principal grounds, the Government proposes to make use of certain emergency powers under it to "fight the war on the economic and propaganda fronts".

On the basis of this, coupled with the background of events to which I have already referred, I am satisfied that the *prima facie* position is that the extension of the state of emergency was predominantly actuated by the necessity of maintaining law and order and peace and good government within the territory and that, on the authority of *Baldy v. Hunter (supra)* the mere fact that there was also an additional and subordinate motive, does not vitiate the measure itself; the evidence of the applicants does not rebut that *prima facie* position. The fact that there was this additional and subordinate motive 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.

I turn, then, to consider the Emergency Powers (Maintenance of Law and Order) Regulations themselves, contained in Government Notice 71 of 1966. They are an exact replica of the admittedly valid regulations contained in Government Notice 735 of 5th November, 1965, under which these two persons were originally detained. In particular, sections 21 and 46 of the new Regulations read as follows:

"21. (1) If it appears to the Minister that the detention of any person is expedient in the public interest, he may by order under his hand direct that such person be detained—

(a) by being kept in such prison or other place; or

(b) by being prohibited from absenting himself from such place;

as the Minister may direct and in accordance with instructions issued by the Minister.

(2) Any person who is detained in terms of subsection (1) shall be arrested and removed to the place in which he is to be detained.

(3) Any police officer may without warrant arrest any person he suspects of being a person against whom an order has been made under subsection (1), if he suspects that that person is outside the place in which the Minister has directed his detention.

(4) Every person detained in terms of an order made under subsection (1) shall be deemed to be in lawful custody.

(5) The Minister may amend or revoke any order made under subsection (1).

(6) In this section and in sections 22 and 23—

'place' means any place, whether or not it is a public place, and includes any premises, building, dwelling, flat, room, office, shop and any part of a place.".

"46. (1) Any order or prohibition made in terms of section 10, 11, 12, 21 or 34 shall come into force immediately it is delivered or tendered to the person to whom it relates. Such order or prohibition shall contain a statement informing the person of his right to object and to make representations in writing to the Minister within seven days after the order or prohibition has been delivered or tendered to him.

(2) If any such representations in writing are made within the time herein prescribed, the Minister shall consider them and may revoke or vary the order or prohibition or refuse to do so.".

Prima facie, these regulations were also necessarily made for the maintenance of law and order, and the evidence of the applicants does not rebut this position. In my view, the regulations should therefore receive recognition from the court.

There remains the question whether, in continuing to detain these two persons, the regulations were *bona fide* used by the first respondent in the first application for the purpose for which they were intended. It is not alleged in the affidavits that the original Emergency Powers Regulations made on the 5th November, 1965, conferring on the then lawful Minister powers of detention, were made *mala fide* in order to further the aims of a contemplated revolution by enabling the Minister to detain people who might otherwise prejudice the success of the revolution if left at liberty, and during the currency of those regulations up to the 4th February, 1966, no challenge of the validity of the detention of these two persons was made. After the expiration of the admittedly legal regulations, the present challenge was raised on the principal basis that the extension of the Declaration of the State of Emergency and the new regulations made thereunder were illegal and of no force and effect. It is now also alleged in the replying affidavits of both applicants that the Minister, when he was a lawful minister, exercised his powers under the admittedly legal regulations *mala fide* and for the purpose of aiding the rebellion in ordering the original detention of those two persons in November, 1965, and that the same *mala fides* attaches to their continued detention.

As far as the original detention is concerned, the court could only interfere with the discretion vested in the then lawful Minister by way of common law review on well-recognized principles, that is to say, on being satitsfied that the discretion was exercised from improper motives, or that the Minister did not properly apply his mind to the matter and hence exercised no discretion at all, or that he acted *ultra vires*. Furthermore, his refusal to give reasons on the grounds of public security could not in itself give rise to any inference of *mala fides*. (See *Shidiack v. Union Government* 1912 A.D. 642 at p. 651; *Crown Mines Ltd. v. Commissioner of Inland Revenue* 1922 A.D. 91 at p. 102; *Union Government v. Union Steel Corporation* 1928 A.D. 220 at p. 237; *Swanson v. National Industrial Council of the Building Industry of Southern Rhodesia* 1946 S.R. 30 at pp. 33–34, *per* HUDSON, C.J., *Clan Transport Co. (Pvt.) Ltd. v. Swift Transport Services (Pvt.) Ltd and Others* 1956 R. & N. 135 (1956 (3) S.A. 480); *Jeewa v. Dönges, N.O.* 1950 (3) S.A.L.R. 414 at p. 423, and *Edwards and Sons (Pvt.) Ltd. v. Stumbles, N. O. and Another* 1963 (2) S.A.L.R. 140. See, also, the House of Lords case of *Liversidge v. Anderson* (1942) A.C. 206, and, in particular, the opinion of LORD MACMILLAN at pp. 253–8).

In regard to the original detention, both applicants ask the court to find *mala fides* in the Minister by way of inference from the facts.

In the case of Mr. Madzimbamuto, he was detained on the 6th November, 1965. He has filed no affidavits himself, but his wife, the applicant, avers that he has never been convicted of any crime. Then in her replying affidavit, she denies the allegations in the Minister's affidavit to the effect that her husband has been, and is, a serious threat to the peace, order and good government of Rhodesia, and continues in paragraph 4 (d):

> "I respectfully submit that, in the absence of evidence of facts justifying the opinion expressed in the first sentence of paragraph 9 of the First Respondent's affidavit and the belief alleged in paragraph 2 of annexure 'A' thereto, the only inference reasonably to be drawn from the fact that my husband's removal from the Sengwe Restriction area for detention in Gwelo Prison was ordered by the First Respondent so shortly before the purported declaration of independence is that such detention formed part of the preparations for such declaration and was wholly, or alternatively partly, for the purpose of aiding and furthering the aims of the rebellion in which the First Respondent participated, and that my husband's continued detention after 4th February, 1966, was for the same purpose."

Similarly, Mr. Baron, in his replying affidavit, after denying that any grounds existed for his original or continued detention, and averring that he has never done or said anything to justify the view that his detention was, or is, necessary or expedient in the public interest or for the preservation of peace or for the maintenance of law and order or good government, continues, in paragraph 11, sub-paragraphs (7) and (8):

> "(7) On the 11th November, 1965, at 7 a.m., it was announced by the Rhodesia Broadcasting Corporation that the then Prime Minister would make an important announcement at 1.15 p.m. on that day, which announcement, when made at that time on that day by the then Prime Minister was, *inter alia*, to the effect that he and certain other persons, including the fourth/fifth respondent, declared Rhodesia to be a sovereign independent state and adopted the alleged constitution.
>
> (8) In the premises, I say that my original detention at the instance of the fourth/fifth respondent was wholly, or alternatively partly, for the purpose of aiding and furthering the aims of the rebellion in which the fourth/fifth respondent participated, and that my continued detention after the 4th February was and is for the same purpose.".

The Minister categorically denies these allegations in his supplementary affidavit and reiterates the purpose for which the two applicants were detained.

One may say, at the outset, that if, as the applicants allege, both detentions were *mala fide* ordered in contemplation of the Declaration of Independence and in furtherance of the revolution and the Minister never genuinely applied his mind to the question of the preservation of law and order at all in either case, one wonders why Mr. Baron's detention was not ordered at the same time as Mr. Madzimbamuto's on the 6th November, bearing in mind the fact that both had been the subjects of restriction orders up to that time. There would have been no good

reason to delay the order—on the contrary, it would have been foolish to wait until after the final decision to declare independence had been publicly foretold over the radio.

In my view, the facts relied upon by Mrs. Madzimbamuto do not justify the inference which she asks the court to draw, that the Minister's decision to detain her husband on the 6th November was made *mala fide* and for the purpose of aiding the revolution. Nor do they justify the inference that the Minister's averment on oath that this was not the reason, and that the sole reason was the safeguarding of law and order, must be false. On the contrary, Mr. Madzimbamuto's past record of detention and restriction, the details of which I have already outlined at the commencement of this judgment, strongly supports the inference that he has been and continues to be a threat to the maintenance of law and order and to peace and good government. This history reveals that it was found necessary to deal with him similarly in the past for reasons quite unconnected with any declaration of independence. Although his wife makes the bald assertion that his detention formed part of the preparations for the Declaration of Indpendence and was for the purpose of aiding and furthering the rebellion, neither she nor he attempts to explain what is meant by this. On his past record he could hardly have put forward the explanation that, but for his detention, he would have campaigned for the preservation or the restoration of the 1961 Constitution. I have therefore come to the conclusion that there are no grounds for holding that Mr. Madzimbamuto's original detention on the 6th November, 1965, was illegal for the reason that it was prompted by improper motives.

As far as Mr. Baron's original detention is concerned, the timing of this is a factor which certainly gives rise to grave suspicion as to the motives underlying it, but it does not seem to me that that factor alone justifies the court in holding that the discretion of the Minister, who was a lawful minister acting under a lawful regulation at the time, was exercised *mala fide* or for an improper motive and that his denial on oath of the motives attributed to him by Mr. Baron and his averment on oath that the only basis of the original detention was to preserve peace and good government and maintain law and order, are false. Had this been the first occasion on which Mr. Baron's liberty had been interfered with on the alleged grounds of public security, and had the applicant put forward other facts, apart from the timing of his detention, in support of a reason why he might have been singled out at that stage as a person likely to thwart or hinder the success of the *coup d'état* unless he were detained, the position would have been different. As early as May, 1965, however, the same Minister had found it necessary to restrict him for a period of one year to an area within a radius of fifteen miles of Bulawayo in terms of section 50 of the Law and Order (Maintenance) Act, and it has not been suggested, nor could it be suggested, that that

action was taken for the purpose of aiding the rebellion in November of that year.

Mr. *May*, on his behalf, suggested that on the probabilities the original detention order "was made at least in part to ensure that he, as a political opponent of the illegal government, with others whose numbers might prove embarrassing, was rendered unable to oppose it or to help bring it down". However, the applicant himself does not suggest that he was in a position to exercise any influence in this regard: he does not even say that prior to his detention he was a politician who championed the cause of preserving the 1961 Constitution and had openly opposed the unilateral seizure of independence, thus rendering it necessary to stifle his opposition by detention. On the other hand, the court can take judicial notice of the fact, which was a matter of notoriety at the time, that there was a number of politicians, both European and African, with a considerable following, who, in May, 1965, fought the last General Election (most of them unsuccessfully) on the platform of resisting any unilateral declaration of independence by this country, and against whom no such measures have been taken. There does not appear to be any substance, therefore, in Mr. *May's* suggestion.

In all the circumstances, it does not seem to me that the timing of his detention leads to the conclusion, on a balance of probabilities, that it was aimed at aiding the rebellion by removing Mr. Baron from the scene of active opposition to it. Assuming, as I have already found to be the case, that Mr. Madzimbamuto's original detention has not been shown to have been in aid of the revolution, then it is reasonable to suppose that the Minister may still have been considering security reports in regard to other people, including Mr. Baron, five days later, and that it might well have been a mere coincidence that his decision to detain Mr. Baron, after applying his mind to such reports, happened to be made on the same day as the Declaration of Independence occurred. At all events, there is insufficient material before the court to justify the positive finding that the Minister not only acted *mala fide* at the time of the original detention of Mr. Baron but swore to false affidavits in these proceedings.

Since it has not been suggested that any new circumstances may have influenced the continued detention of these two persons after the expiration of the original state of emergency and of the regulations made thereunder, it follows that there are no grounds for setting aside the detention orders in either case. Had any such new circumstances been alleged, indicating *prima facie* that the continued detention was in order to further the revolution, by suppressing criticism of, or lawful opposition to, the revolutionary Government, the situation would have been different. Since the court's duty is to test the validity of acts done by the *de facto* Government by considering whether or not they could properly have been done by the lawful Government under the 1961 Con-

stitution, for the purposes of the preservation of peace and good government and the maintenance of law and order, it cannot in all cases yield to the *de facto* Minister's discretion as to what he believes to be in the public interest when dealing with a matter affecting the liberty of the subject. However genuine his belief might be, he could be considering public interest solely from the point of view of aiding the revolution. If a person, detained for the first time since the 11th November, 1965, should seek to have his detention order set aside by alleging facts indicating *prima facie* that the sole purpose of his detention was to stifle legitimate criticism of or lawful means of opposing the *de facto* Government, the Minister might have to disclose the precise grounds of the detention and the information upon which they were based by way of rebuttal. I stress the phrase "lawful means" because it is easy to imagine cases where the object in opposing the Government is not the restoration of constitutional rule but the setting up of some other form of Government such as a dictatorship.

I appreciate that this might place the Minister in a dilemma because, as LORD MACMILLAN said in *Liversidge v. Anderson (supra)* at p. 254:

> "It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure."

However, if the court is to do what I conceive to be its duty in cases involving the liberty of the subject, during the circumstances of the present situation, such disclosure in appropriate cases may be inevitable, and the only solution would appear to be to provide for a secret hearing of the matter before a judge in chambers. I may say that it will also be the court's duty, if the occasion arises, to scrutinize with particular care any further extensions of the state of emergency to ensure that this drastic machinery is not abused and that it is resorted to only in cases of genuine emergency and in accordance with the spirit of the 1961 Constitution.

To sum up, my conclusions in the present case are as follows:

1. The 1965 Constitution is not the lawful constitution of this country, and the Government of this country set up under it is not the lawful government; 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.
2. The Government 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.

3. The extensions of the state of emergency and of the Emergency Powers (Maintenance of Law and Order) Regulations contained in Rhodesia Government Notice 71 of 1966 made thereunder, are measures falling within the above category, and neither in their purpose nor in their mode of enforcement in the present cases have they been shown to be hostile to the authority of the sovereign power, or to have impaired the just rights of citizens under the 1961 Constitution, or to have been taken with actual intent to further the revolution.

In the result, I am of the opinion that both applications must fail.

Counsel for the respondents did not ask for costs. In case this was an oversight, I should say that in any event an order of costs against the applicants would be inappropriate in the present cases. As was pointed out by LORD DE VILLIERS, C.J., in the case of *In re Willem Kok* 1879 9 *Buchanan* S.C. at p. 72, costs are not usually awarded against an unsuccessful applicant in *habeas corpus* proceedings; apart from that, the respondents were only partially successful on the legal issues, and a considerable proportion of the time taken up in the course of the whole argument related to submissions by the respondents which have not been upheld.

Since my Brother GOLDIN, in his judgment, has reached the same conclusions, the order of the court is that both applications are dismissed, but with no order as to costs.

I would like to place on record the court's indebtedness to counsel on both sides for their very thorough and helpful argument in these difficult cases.

GOLDIN, J.: In 1923, in terms of the Southern Rhodesia (Annexation) Order in Council, Southern Rhodesia was annexed to and declared part of His Majesty's Dominions, as the Colony of Southern Rhodesia, thus terminating its administration by the British South Africa Company, which exercised its functions and duties by the authority of the Crown. The factual and legal position of Southern Rhodesia before 1923 is set out *In re Southern Rhodesia* (1919) A.C. 211. Upon being constituted a colony, responsible government "amounting almost to self-government" was conceded in the same year (see *Halsbury's Laws of England* 3rd edn. vol. 5 pp. 591–2). In 1961 Her Majesty granted Southern Rhodesia a "new Constitution" in substitution for the Southern Rhodesia Constitution Letters Patent 1923, which, with the exception of certain provisions, came into operation on the 7th December, 1961. For the sake of convenience I will refer to this as the "1961 Constitution".

Under the 1961 Constitution the Governor is appointed by Her Majesty to hold office during Her Majesty's pleasure after the Prime Minister of Southern Rhodesia is consulted concerning the person to be appointed (section 1). Subject to the provisions of this Constitution and of any law by which such powers or duties are imposed, he "shall do and execute all things that belong to his office according to such Instructions, if any, as Her Majesty may from time to time see fit to give him" (section 2). The Legislature consists of Her Majesty and a Legislative Assembly and no bill can become law until the Governor has assented thereto in Her Majesty's name (sections 6 and 29). Disallowance of Acts by Her Majesty (on the advice of the United Kingdom Government) is limited to measures which may adversely affect government stockholders or be inconsistent with any obligation imposed on Her Majesty relating to her international obligations (section 32). Provision exists for compulsory reservations of bills dealing with constitutional amendment in respect of which alternative procedures are prescribed (sections 10–11). The executive authority is vested in the Queen and may be exercised on Her Majesty's behalf by the Governor "or such other persons as may be authorized in that behalf by the Governor or by any law of the Legislature" (section 42). In the exercise of his functions, the Governor must act on the advice of the Cabinet with certain exceptions laid down in section 45. As regards the dissolving of the Legislative Assembly and the appointment of a Prime Minister and other Ministries of the Government, he is explicitly directed to observe the relevant United Kingdom conventions (section 45). The provisions relating to the judicature, which were amended by the Constitution Amendment Act 19 of 1964, constitutes a High Court "in and for Southern Rhodesia . . . with full jurisdiction, civil and criminal, over all persons and over all matters within Southern Rhodesia" and consists of an Appellate Division and a General Division. Section 56D sets out the law to be administered as follows:

> "Subject to the provisions of any law for the time being in force in Southern Rhodesia relating to the application of customary law, the law to be administered by the High Court and by any courts in Southern Rhodesia subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the tenth day of June, 1891, as modified by subsequent legislation having in Southern Rhodesia the force of law."

Full power and authority is reserved to Her Majesty by Order in Council to amend, add to or revoke certain provisions relating to the powers of Her Majesty and the Governor (see section 111).

On the 11th November, 1965, the Prime Minister and members of the Cabinet appointed under the 1961 Constitution, published and declared their adherence to a new constitution, to which I will refer as "the 1965 Constitution" to replace the 1961 Constitution as the constitution of Southern Rhodesia. The main purpose and reason for this

conduct was to deprive the Government and Parliament of the United Kingdom of all its power and control within or concerning Southern Rhodesia, and thus create a sovereign independent state. In order to achieve this object in this manner, it became necessary to restrict or alter the position and powers of Her Majesty under the 1961 Constitution, and it is particularly in this respect that it is necessary to set out the more relevant provisions of the 1965 Constitution.

In section 3 an Officer Administering the Government is created as follows:

> "3. (1) There shall be an Officer Administering the Government in and over Rhodesia who shall be Commander-in-Chief of the armed forces of Rhodesia.
>
> (2) The Officer Administering the Government shall be either—
>
> (a) a Governor-General who may be appointed by Her Majesty the Queen on the advice only of the Ministers of the Government of Rhodesia; or
>
> (b) until Her Majesty appoints a Governor-General under paragraph (a) of this subsection, an Officer appointed by the members of the Executive Council presided over by the Prime Minister or in such other manner as may be prescribed by a law of the Legislature.
>
> (3) Pending the appointment of the first Officer Administering the Government under subsection (2) of this section, the members of the Executive Council, presided over by the Prime Minister, may appoint an Acting Officer Administering the Government."

The Officer Administering the Government is declared as representing the Queen as the Queen of Rhodesia and he and Her Majesty must act on the advice of the Ministers of the Government of Rhodesia only, in the exercise of their powers. The Legislature of Rhodesia consists of the Officer Administering the Government as the representative of the Queen and a Parliament. The executive powers are dealt with in section 47 as follows:

> "47. (1) The executive government of Rhodesia in regard to any aspect of its internal or external affairs is vested in Her Majesty acting on the advice of the Ministers of the Government of Rhodesia and may be exercised by the Officer Administering the Government as the representative of Her Majesty or such other persons as may be authorized in that behalf by the Officer Administering the Government or by any law of the Legislature.
>
> (2) For the avoidance of doubt it is hereby declared that in addition to any other powers conferred by this Constitution or any other law, the Officer Administering the Government shall have power, acting on the advice of the Ministers of the Government of Rhodesia, as the representative of Her Majesty—
>
> (a) to appoint and to accredit, to receive and to recognize ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
>
> (b) to enter into and ratify international conventions, treaties and agreements;
>
> (c) to proclaim and terminate martial law or a state of emergency;

(d) to declare war and make peace;

(e) to confer honours and precedence.

(3) The Officer Administering the Government, as the representative of Her Majesty, shall in addition have such powers and functions as were immediately prior to the appointed day possessed by Her Majesty by way of prerogative."

The Executive Council consists of the Prime Minister and "such other persons, being Ministers, as the Officer Administering the Government, on the advice of the Prime Minister, may from time to time appoint" (section 49). A High Court is constituted in the same manner, with the same jurisdiction as the High Court under the 1961 Constitution, and the law to be administered under the 1965 Constitution is the same as that laid down under the 1961 Constitution. Section 125 (1) provides that every person who immediately prior to the appointed day held the office of Prime Minister, or of Minister or any other office constituted by or under the old Constitution, except that of Governor and a Judge of the High Court, shall "continue to hold the like office as if he had been appointed or elected thereto under the corresponding provisions of this Constitution". Section 128 provides that the High Court created under the 1961 Constitution "shall be deemed to have been duly constituted as the High Court of Rhodesia under this Constitution", and every judge appointed under the 1961 Constitution "shall continue to hold the like office as if he had been appointed thereto under the corresponding provisions of this Constitution" and is "deemed to have complied with the requirements of this Constitution relating to the taking of oaths on appointment to such office". But it is also provided that the Prime Minister may require a judge "to state forthwith whether he accepts this Constitution and will take the oath of loyalty and the judicial oath set out in the First Schedule", and if he refuses to do so "his office shall be deemed to have become vacant on the day of such refusal".

Since the 11th November, 1965, the internal affairs of Southern Rhodesia have been governed and administered by the 1965 Constitution, the following having been the factual consequences of what has been described as the "assumption of independence" or the "Unilateral Declaration of Independence".

Firstly, the Governor issued the following statement on the 11th November, 1965:

"The Government have made an unconstitutional declaration of independence.

I have received the following message from Her Majesty's Secretary of State for Commonwealth Relations:—

'I have it in command from Her Majesty to inform you that it is Her Majesty's pleasure that, in the event of an unconstitutional declaration of independence, Mr. Ian Smith and the other persons holding office as Ministers of the Government of Southern Rhodesia or as Deputy Ministers cease to hold office.

I am commanded by Her Majesty to instruct you in that event to convey Her Majesty's pleasure in this matter to Mr. Smith and otherwise to publish it in such manner as you may deem fit.'

In accordance with these instructions I have informed Mr. Smith and his colleagues that they no longer hold office. I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in the country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police, and the public service."

Secondly, while the Governor has remained in his official residence in Salisbury, and has retained his office as Governor under the 1961 Constitution, he has not exercised the functions or duties imposed upon him by that Constitution.

Thirdly, the civil service and the armed forces continue to operate as before but receive their orders, instructions and directions from the Government set up under and which governs in terms of the 1965 Constitution.

Fourthly, the Legislative Assembly elected under the 1961 Constitution continues to sit and considers and passes Bills as the Parliament created by the 1965 Constitution. The Cabinet consists of persons who owe their appointment to, purport to derive their powers from and exercise their functions as Ministers appointed under, the 1965 Constitution. All Bills passed by Parliament are given assent to in the manner provided by the 1965 Constitution by the Officer Administering the Government.

Fifthly, the Government so created and operating as aforesaid has complete and effective control within the boundaries of Southern Rhodesia.

Sixthly, not a single foreign power has accorded either *de jure* or *de facto* recognition to the new regime.

Seventhly, Her Majesty's Government in the United Kingdom has declared its intention to bring down this regime and to replace it by what it considers to be "constitutional government". While it cannot be disputed that the former has the physical means and influence to do so, to date it has only resorted to and relied upon the imposition of economic sanctions to achieve the said result. In the application of sanctions the British Government has been assisted by most countries in the world and the United Nations has authorized the British Government to forcibly prevent petroleum products from reaching Beira for delivery to Southern Rhodesia. The Royal Navy has exercised such power.

Eighthly, by an Act of Her Majesty's Government in the United Kingdom (1965 Chapter 76), it is declared that Southern Rhodesia "continues to be part of Her Majesty's Dominions" and the Southern Rhodesia Constitution Order 1965, which came into full operation on

the 18th November, 1965, makes temporary provision for the exercise of legislative and executive powers in respect of Southern Rhodesia by the Secretary of State on behalf of Her Majesty. But such measures as have been taken in terms of the said Order in Council have not been enforced within Southern Rhodesia.

The applications before the court relate to the power to detain persons by the Government established under the 1965 Constitution and by virtue of legislative measures enacted by it, in the circumstances which I have described and with which I shall have to deal more fully.

A state of emergency was declared by the Governor on the 5th November, 1965, and emergency regulations were made in terms thereof. Upon the expiration of the period of three months, which is the maximum period during which such proclamation of a state of emergency can be in force, a declaration of another emergency was made by the Officer Administering the Government under the 1965 Constitution and emergency regulations were made thereunder. It is now contended that the detention of Mr. Baron and Mr. Madzimbamuto under the Emergency Powers (Maintenance of Law and Order) Regulations 1966 is wrongful and that each is being unlawfully deprived of his liberty because these measures "were and are of no force and effect because they could not validly be made". The applicants further contend that the respondents do not hold any lawful office or lawfully exercise any duties or powers under the 1961 Constitution and the 1965 Constitution "is invalid and of no force and effect".

The first question that arises for consideration is whether the 1965 Constitution has lawfully replaced the 1961 Constitution. The respondents allege in their affidavits that "on the 11th November, 1965, the government of the day declared Rhodesia to be a sovereign independent state and adopted enacted and gave to Rhodesia the constitution of Rhodesia, 1965 . . .", which was published in a *Government Gazette Extraordinary*. An examination of the Constitution of 1961 clearly reveals that it was not legally competent for the Cabinet constituted thereunder to replace it with another constitution. No valid laws could be made under the 1961 Constitution unless they were made in accordance with the powers conferred upon the law-making body created for that purpose in that Constitution. What is described as the "government" is not a law-making body, but the Legislature is, and that, as has been seen, consists of "Her Majesty and a Legislative Assembly". Under the 1961 Constitution granted by the Queen, the members of the Cabinet or the "government" derived their powers from that Constitution and that clearly did not include the lawful authority to replace it by a new constitution. The "assumption" of power to "give" or "enact" or "declare" a new constitution has no greater validity than if a Town Management Board had presumed to do so.

That the 1961 Constitution was not lawfully replaced by the 1965 Constitution is clear beyond any doubt and, in fact, counsel for the respondents did not even attempt to argue to the contrary. Similarly, counsel for the respondents placed no reliance upon any contention that the 1965 Constitution acquired legal validity by virtue of the Constitution Ratification Act, 1966 which "declares" the 1961 Constitution to be of "no force or effect . . . and shall be deemed to be repealed or revoked" by the 1965 Constitution (section 1). This Bill is alleged to become law upon being enacted by the Officer Administering the Government "as representative of the Queen by and with the advice and consent of the Parliament of Rhodesia". It is not necessary to state the numerous reasons why this act of ratification is of no legal force or effect. As Mr. *May* said on behalf of one of the applicants, "to try to rely on that Act is to argue in a circle. Mr. Dupont has to say: 'I have power in terms of the 1965 Constitution because I have enacted the 1965 Constitution'." In other words, this "Act" is not law until signed by the Officer Administering the Government and he has no right to sign it until it has become law. Even the fact that the "Parliament" which passed this bill consisted of members elected under the 1961 Constitution is irrelevant because in the words of VAN DEN HEEVER, J.A., "No legislative organ can perform an act of levitation and lift itself above its own powers by the bootstraps of method" (*Minister of the Interior v. Harris* 1952 (4) S.A. at p. 290).

It was accepted by counsel for all the parties, and this is certainly the position at law, that the 1965 Constitution was "given" or "enacted" by virtue of power assumed in a revolution. The court cannot be concerned with, and was not asked to consider, the reasons and motives for what has been done. As MUHAMMAD MUNIR, C.J., said in *The State v. Dosso and Another* (1958) Pakistan Supreme Court Reports, at p. 184:

> "A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. 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. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends."

It was, however, submitted for the respondents, that an existing lawful constitution can be replaced by a constitution adopted and enforced by a revolutionary government. In such circumstances, counsel for the Officer Administering the Government and the Minister for Justice, Law and Order, submitted that 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

(*The State v. Dosso and Another (supra)* pp. 184–5). For proof of this reference was made to examples in history where, despite the change in the constitution of a country by unlawful means, the constitution introduced by the persons responsible for the revolution acquired validity regardless of its unlawful origin. It is on this basis that Mr. *Rathouse* submitted that the present government is a "valid *de jure* government" and the 1965 Constitution is a valid constitution, and that all laws made under it or acts done pursuant to it are equally valid. He went on to submit, to use his own words, "that a legal order ceases to have validity when it loses efficacy, and that this applies whether the new order which replaces it came about in a legitimate way or not, so long only as the prior efficacy of the old order has passed to the new one". Alternatively, Mr. *Rathouse* submitted "that some laws and acts at least of the present government are legal, even if it is an unlawful government, because the rejection of this submission would be a refusal to face reality, resulting in chaos, confusion and would offend against the view that you cannot have a vacuum in the law"

Counsel for the applicants submitted that this court cannot hold the 1965 Constitution to be valid or have the force of law and if this is the position the court cannot give effect to any "law" made under the 1965 Constitution. The contention being that a court constituted by, and judges appointed under, the 1961 Constitution can only give effect to laws that are valid under that Constitution and this court cannot have regard to any legal "vacuum", if one exists, or to the acts of a *de facto* government. Mr. *Kentridge*, for the applicants, went on to submit that even a disturbed state of the country arising from the effective control by an unlawful government cannot influence the court, because it is not the law of Southern Rhodesia that if there is an unlawful Executive then its acts must be given effect to because there is no one to replace it or because there is no one else doing its work.

It is necessary to consider the relevance of "*de facto*" or "*de jure*" recognition, concerning which subject many authorities were cited and arguments were advanced. In the first place, recognition of a new state by foreign governments must not be confused with recognition of a new government of an existing state. In *Oppenheim's International Law*, by Lauterpacht, 8th Edn. vol. 1 pp. 129–30, the position is stated as follows:

> "Recognition of a change in the headship of a State, or in the form of its Government, or of a change in the title of an old State, are matters of importance. But the granting or refusing of these recognitions has nothing to do with recognition of the State itself. If a foreign State refuses to recognise a new Head or a change in the form of the Government of an old State, the latter does not thereby lose its recognition as an International Person, although no official intercourse is henceforth possible between the two States as long as recognition is not given either expressly or tacitly. If recognition of a new title of an old State is refused, the only consequence is that the latter cannot claim any privileges connected with the new title."

As has been pointed out, the persons responsible for the "assumption" of independence or "giving" the 1965 Constitution held power and enjoyed office under the 1961 Constitution. Because Her Majesty's Government of Southern Rhodesia established under the 1961 Constitution could not agree with Her Majesty's Government of the United Kingdom on the terms upon which this country should be granted independence, the former declared independence "unilaterally" in the manner described. The reason, therefore, for the 1965 Constitution was the creation of a new state by what amounts to an act of unlawful secession. It is in these circumstances that a new government came into existence under the 1965 Constitution, but the object for its creation was not that the persons responsible would thereby acquire power or replace anybody in office. The relevance of recognition by foreign governments would therefore relate to the creation of a new sovereign state. I will refer to this aspect when I consider the respondents' submission that the old order has lost its efficacy and therefore the 1965 Constitution has replaced the 1961 Constitution.

Secondly, the fact that no State has given Southern Rhodesia recognition under the 1965 Constitution, either *de facto* or *de jure,* 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. It would simply mean that that number of countries are prepared to treat her within the sphere of international law and international relations as an independent State. On the other hand, all those States which did not recognize her would be adopting and acting in a contrary manner. A state is not lawfully created merely by recognition by foreign States. Non-recognition does not even mean that the existence of an unrecognized state is a matter of doubt; there is no obligation or right to demand or enforce recognition by a new state or a new government, and the decision to grant recognition is often determined by political consideration or is used to further national policy. (See *The Law of Nations*, by Brierly, 6th Edn. pp. 139–141.) Very often the recognition of a government or of the independence of a state *de jure* or *de facto* has taken place in two stages and in circumstances described by D. P. O'Connell on *International Law*, vol. 1 p. 175:

> "In recent times Great Britain has recognized in two stages where internal or external politics would have made recognition *de jure* embarrassing. The Soviet was recognized *de facto* in 1921 and *de jure* in 1924; the Italian conquest of Ethiopia *de facto* in 1936 and *de jure* in 1938; the Nationalist Government of Spain *de facto* over the areas under its control in 1937 and *de jure* the whole of Spain in 1939."

The learned author goes on to give examples of the lack of any defined legal principles governing the question of recognition of one state by another at pp. 175–6:

> "It is sometimes suggested that *de facto* recognition is probationary and provisional, whereas *de jure* recognition is irrevocable, but British withdrawal of the *de jure* recognition of the Italian conquest of Ethiopia demonstrates that this is not the case. Great Britain failed to recognize the Soviet *de jure* for seven years; the United States recognized Panama *de jure* after one week. The Soviet, one might conclude, had demonstrated its ability to survive rather better than had Panama, and it is clear that politics prompts the occasions when recognition is to be in the halfhearted *de facto* form. One can imagine the furore on the Labour benches if the United Kingdom had recognized the Spanish Nationalists as the government *de jure* in 1937, or that on the Conservative if it had recognized the Italian conquest of Ethiopia *de jure* in 1936. The recognition *de facto* sweetens the pill by taking into account the actualities of power without approval of them. Where two governments are competing for power the recognizing government may treat the one as a title-holder, and the other as the actual adminstering authority, and it is a matter for political judgment which of the rivals should be acknowledged as having the superior claim."

I am only concerned with the legal aspects of recognition. There is no doubt that recognition by foreign States of a newly-created state or a newly-established government has useful economic and political consequences. It is clear, however, that recognition of a new state or new government does not usually depend upon, and often takes place without regard to, whether the new state or new government came into existence by lawful means. The same holds true when a court of any country has to determine whether a government of a foreign country has acquired control *de jure* or *de facto* or whether a new state exists. (See *The Annette; The Dora* (1919) p. 105, *Princess Paley Olga v. Weisz and Others* (1929) 1 K.B. 718, *British International Law Cases* vol. 2. pp. 1–200).

Mr. *Kentridge* submitted that it is a matter solely within the prerogative of Her Majesty whether there exists any independent sovereign state or any *de facto* or *de jure* government and that the recognition or non-recognition of governments or sovereign powers is part of Her Majesty's prerogative relating to foreign affairs. Accordingly, Mr. *Kentridge* submitted that it is not possible for this court "to grant recognition to this Government as a *de facto* Government" He put in a certificate from Her Majesty's Secretary of State, stating that "Her Majesty's Government in the United Kingdom does not recognize Southern Rhodesia or Rhodesia as a State either *de facto* or *de jure*", and submitted that this statement must be accepted as conclusive by this court. (See *Halsbury* 3rd Edn. vol. 5 p. 546 and vol. 7 at p. 263, *Carl-Zeiss-Stiftung v. Rayner and Keeler* (1966) 2 A.E.R. 536 at 544, and *Civil Air Transport Incorporated v. Central Air Transport Corporation* (1953) A.C.

70 at 86). As a statement of what the law is, Mr. *Kentridge* is undoubtedly right, but this principle of law has no application to the issues before me. The question of *de jure* or *de facto* recognition does not arise in this case, where the court of Southern Rhodesia is called upon to decide the legal validity of what is alleged to be the constitution of Southern Rhodesia or the validity of certain laws. It is not in dispute before us that Her Majesty's Government does not recognize this country as a State *de facto* or *de jure*. But as the position stands I have to determine the validity of these measures and no Act of State in the form of this certificate can deprive this court of its jurisdiction to do so. The effect of such a certificate is summarized in the *Carl-Zeiss-Stiftung* case *(supra)* at p. 544 as follows:

> "It is a firmly established principle that the question whether a foreign state, ruler or government is or is not sovereign is one on which our courts accept as conclusive information provided by Her Majesty's government: no evidence is admissible to contradict that information.
>
> > 'It has for some time been the practice of our courts to take judicial notice of the sovereignty of a state and for that purpose (in any case of uncertainty) to seek information from a Secretary of State: and when information is so obtained the court does not permit it to be questioned by the parties'.
>
> (per *VISCOUNT CAVE* in *Duff Development Co. Ltd., v. Kelantan Government).*
>
> > 'Such information is not in the nature of evidence: it is a statement by the sovereign of this country through one of his ministers upon a matter which is peculiarly within his cognizance'."

Clearly, the validity of any law of this country cannot be decided by seeking information from the Secretary of State or upon the principle enunciated above. Furthermore, in considering whether any laws of an unlawfully constituted government can be effective and treated as if valid, the question whether Her Majesty's Government in the United Kingdom recognizes Rhodesia as a State *de facto* or *de jure* is irrelevant. I will deal later with the law relating to this aspect, which is based upon the doctrine of public policy in circumstances of State necessity. In this respect also the statement from the Secretary of State is neither binding upon this court nor, in fact, relevant to this issue. I may say at this stage that "recognition is a political act of the executive branch of government, wherein acknowledgment of the claims to governmental authority of foreign entities is made *and* the legal consequences flowing from such acknowledgment is admitted. It is to be distinguished from cognition, which is a mere noting of the facts on which the relevant claims are based, and cognizance, which is an acknowledgment of those facts by the legislative or judicial branches of governments not involving executive admission of the legal consequences" (see O'Connell, p. 179). While non-recognition implies a refusal to

admit the validity of the change, it does not necessarily involve a refusal to admit the consequences of it (see O'Connell *(supra)* at p. 159).

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, because "there can be no law unless there is already a State whose law it is and there can be no State without a constitution" (see *Salmond on Jurisprudence* 11th Edn. pp. 99–102). This court was established and created under the 1961 Constitution, from which it derives its origin and existence. If it were otherwise and this court is to be held as having been established by the 1965 Constitution, then the question concerning the legality of the latter Constitution and the consequent validity of the orders challenged by the applicants could not arise. Both Mr. *Kentridge* and Mr. *May* conceded that this would be the position and that they made their submissions on the basis that this court was created by the 1961 Constitution. Section 128 of the 1965 Constitution deems this court to have been "duly constituted as the High Court of Rhodesia under this Constitution" and every judge is "deemed to have complied with the requirements of this Constitution relating to the taking of oaths on appointment to such office". If these provisions were lawfully valid, then this court and the judges of this court would derive their origin from the 1965 Constitution and would be precluded from pronouncing upon its validity. This is particularly so since the judicial oath referred to under the 1965 Constitution includes the words, "I will respect and uphold the aforesaid Constitution", and because section 142 provides—

> "The validity of this Constitution and, except as provided therein, of anything done thereunder shall not be inquired into in any court and the provisions of this Constitution and anything so done shall for all purposes be regarded as valid."

It is also relevant that the respondents have filed affidavits to prove their effective control in support of their contention that the 1965 Constitution is valid by reason only of such effective control. At no stage was it suggested by the respondents that the 1965 Constitution was lawfully created or enacted and therefore that the judges' position or right to determine its validity is governed by the aforesaid provisions of the 1965 Constitution.

Mr. *Rathouse*, as I said above, submitted, however, that the 1961 Constitution has lost its validity because reality no longer corresponds with it because the revolution emanated from those in governmental positions and was carried out peacefully and, the new government having been in full and effective control since the Declaration of Independence, it became the effective authority immediately upon such a

declaration. He relied upon the case of *The State v. Dosso and Another (supra)*, in which the Chief Justice said at pp. 184–5:

> "It sometimes happens, however, 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 . For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organise 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 regime, 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."

Kelsen, on the *General Theory of Law and State*, upon which great reliance was placed by Mr. *Rathouse*, propounds this principle and his views were adopted by the Chief Justice of Pakistan. Similar views are expressed by Karl Olivecrona, *Law as a Fact*, at pp. 66–68, as follows:

> " 'The problem of the revolution' has been thoroughly discussed in legal philosophy. It seems hard to understand how acts of violence can give rise to 'binding' rules. Legislation of this kind appears to be a still more mysterious process than ordinary legislation. The constitutional law-givers are supposed to have a right to give binding rules. But the revolutionaries are not only devoid of any right in this connexion. They are acting in defiance of existing law. Yet the new constitution is the basis for new laws, whose binding force is not questioned . . New men step into their positions and boldly declare: This is to be our constitution, thus shall the country be governed. Perhaps the attempt fails. Then the planned constitution remains a scrap of paper, a mass of empty words. But if the revolution succeeds, if a government is set working according to the principles of the new imperatives, these are henceforth the constitution. To put it briefly: *victory* of the revolution corresponds to the *constitutional form* in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding."

These opinions are submitted as principles of law but they are really a statement of the obvious proposition that what is destroyed no longer exists, so that if a lawful government is seized by a group of persons who successfully overthrow the existing order and effectively replace it by a new order, the men whom a revolution brings to power often annul the lawful constitution and replace it "by a new constitution which is not the result of constitutional alteration of the former" (see Kelsen *(supra)* at pp. 117–8). History abounds with examples of this nature proving that a lawful constitution has been replaced by a new

constitution as a result of a successful revolution. The process is explained by Bryce, *Studies in History Jurisprudence*, vol. II (1901) Chapter 10, at p. 516, as follows:

> "Sovereignty *de facto*, when it has lasted for a certain time and shown itself stable, ripens into sovereignty *de iure*. Sometimes it violently and illegally changes the pre-existing constitution, and creates a new legal system which, being supported by force, ultimately supersedes the old system. Sometimes the old constitution becomes quietly obsolete, and the customs formed under the new *de facto* ruler become ultimately valid laws, and make him a *de iure* ruler. In any case, just as Possession in all or nearly all modern legal systems turns itself sooner or later through Prescription into Ownership—and conversely possession as a fact is aided by title or reputed title—so *de facto* power, if it can maintain itself long enough, will end by being *de iure*. Mankind, partly from the instinct of submission, partly because their moral sense is disquieted by the notion of power resting simply on force, are prone to find some reason for treating a *de facto* ruler as legitimate. They take any pretext for giving him a *de iure* title if they can, for it makes their subjection more agreeable and may impose some restraint upon him."

The facts, however, do not justify the conclusion that, because the present government is the only effective government within Rhodesia and created the 1965 Constitution, in terms of which it governs, the 1961 Constitution has ceased to exist on the basis mentioned above. Southern Rhodesia enjoyed virtually complete self-government under the 1961 Constitution and the effective control exercised by the present government is no greater than the powers conferred by the 1961 Constitution upon a lawful government and administration. At this stage, Her Majesty or Her Majesty's Government of the United Kingdom have neither abandoned their respective rights and powers under the 1961 Constitution, and it cannot be said that the Government of the United Kingdom is not capable of overthrowing or rendering ineffective the present regime. Mr. Dupont says in his affidavit, and this is denied by the applicants, that "the United Kingdom Government has repeatedly disavowed any intention to use force against Rhodesia", but he does not mention by whom this assurance was given, how binding it is or that he believes it. He also says "the United Kingdom Government has taken economic measures supported by other countries with the stated aim of bringing about the collapse of my Government and putting an end to the independence declared by the Government on the 11th November, 1965", and is supported by economic experts, that there is "little likelihood of either of these results being brought about". There are affidavits filed by applicants expressing a contrary view. But while it is not possible to make any positive finding upon such bare assertions it cannot be said, and indeed nobody says, that there is no likelihood of the present economic sanctions having the intended result or that, if the economic measures now taken fail, more severe measures cannot be taken which would prove successful.

In the case of Pakistan, relied upon by Mr. *Rathouse*, that country was a sovereign State where a successful revolution had the result described therein, and accordingly the court "joined" the revolution which destroyed and replaced the existing order. The object of the revolution in Rhodesia is to create a sovereign State as described above, and at least until the mother country, namely, Britain, accepts the position either expressly or impliedly by abandoning the struggle to end the present regime or by being proved incapable of doing so, the doctrines expounded by Kelsen and in the Pakistani case do not apply. (See *Oppenheim's International Law*, 8th Edn. vol. 1 pp. 128–9). In the short time that has elapsed since the 11th November, 1965, Great Britain is still actively determined to bring about the downfall of the present government, and has received support from the United Nations Organization and from most countries in the world for this purpose, including all the members of the Commonwealth. While the Officer Administering the Government alleges that since "its assumption of sovereign independence Rhodesia . . . has been fully capable of carrying on its own international affairs", there is no proof that this amounts to any more than willingness or readiness to do so. There is certainly no evidence to prove that outside the borders of this country, in the sphere of international relations, the British Government and Her Majesty have ceased to exercise effectively their rights and powers conferred upon them by the 1961 Constitution. In other words, although this 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 (see *Oppenheim's International Law*, vol. 2 7th Edn. pp. 153–4). The latter aspect is of particular relevance in deciding whether the 1961 Constitution has ceased to exist. In the case of Pakistan the sovereignty of the State was not in issue but only the form and composition of its government. But in this case 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 has ceased to exist.

While this court is sitting, in what Mr. *Rathouse* aptly described as "*in medias res*", it cah only observe that there is a struggle between the Government of the United Kingdom and the Government created under the 1965 Constitution, in which the former is seeking the downfall and collapse of the latter. Assertion of its ultimate victory by each is understandable but unhelpful and inconclusive. The court is not even faced with the task of deciding, assuming it were relevant or possible, who is likely to succeed, because the affidavits only contain expressions of opinion unsupported by any fact. Even on the authority of Kelsen or the judgment in *Dosso's* case, the submission by Mr. *Rathouse* that

a successful revolution is now "a law-creating fact", is based on confidence and not reality, on the facts before me. Irrespective of who is more likely to succeed, the outcome of the struggle has still to be awaited. It is even likely that the struggle may not determine whether the revolution has failed or succeeded because a settlement of the dispute cannot be excluded. But the court is not entitled to speculate concerning the future and must consider the present position on the facts before it. Accordingly, even the doctrines invoked by Mr. *Rathouse* by which a successful revolution can successfully replace an existing lawful constitution have no application in the circumstances and upon the facts before the court.

For the reasons stated I hold the 1965 Constitution has not lawfully replaced the 1961 Constitution and that 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. It follows that the said provisions deeming this court to have been constituted under the 1965 Constitution or to derive its authority thereunder, or deeming the judges of this court as having been appointed as aforesaid, are devoid of any legal force or effect. This court therefore derives its origin from and was lawfully constituted under the 1961 Constitution, and the judges thereof continue to hold office and are bound by the oaths taken by them in terms of the 1961 Constitution.

The position therefore arises that while the 1961 Constitution is the lawful constitution of this country, since the 11th November, 1965, the Governor appointed thereunder has not been exercising his functions as described above. At the same time, although he has dismissed the Cabinet, no other Prime Minister or Ministers have been appointed by him. The Legislative Assembly elected under the 1961 Constitution has ceased to function as such and the members thereof discharge their duties as if they were the Parliament constituted under the 1965 Constitution. Whatever are their motives, members of the Civil Service in the discharge of their duties "accept the Constitution of 1965 as being the only effective Constitution of Rhodesia and the present Government of Rhodesia as being the only effective Government of the country", and it is averred that they would refuse to obey any instruction from the British Government as to the discharge of their duties. The fact that the 1961 Constitution is inoperative within this country was acknowledged by the Governor on the 14th November, 1965, (whose statement is annexed by the applicants), as follows:

> "It is my sincere hope that lawfully constituted Government will be restored in this country at the earliest possible moment."

It is upon these facts and in these circumstances that Mr. *Rathouse* submitted in the alternative "that some laws and acts at least of the present Government are legal even if it is an unlawful Government (in-

cluding) laws made for the preservation of peace, for the maintenance of law and order and for the general good government of the country . . . (because) the rejection of this submission would be refusal to face reality, resulting in chaos, confusion and would offend against the view that you cannot have a vacuum in the law". Mr. *Kentridge* maintained that a court constituted under the 1961 Constitution can only apply and give effect to laws made under the Constitution and has no jurisdiction to recognize an enactment of any person or persons who, however well intentioned, are not the lawful law-making authority of the country. In his submission the court is not concerned with the question of necessity or with whether "a vacuum" in the law exists, because a court does not legislate and the court cannot act on a doctrine of State necessity. He relied upon authority for these contentions but it is only necessary to mention a few of them because they are all to the same effect. *In re Willem Kok* 1879, *Buchanan*, 45, LORD DE VILLIERS said at p. 66:

> "The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice . . and not to preserve the peace of the country . . The Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue."

In *Sachs v. Dönges, N.O.* 1950 (2) S.A. 265 at 276, WATERMEYER, C.J., said:

> "It was argued that the interests of the State may require the Crown to perform executive acts which infringe the rights of subjects. No doubt that is so, but such acts are not legally validated by State necessity. The Crown may be compelled by State necessity to break contracts or commit torts, but if it does so it is not acting lawfully and must suffer the legal consequences, unless it is indemnified by Parliament."

In *Africa v. Boothan* 1958 (2) S.A. 459, SCHREINER, J.A., said (at pp. 462–3):

> "For such a presumption assumes substantially normal conditions, *salus populi suprema lex*. This contention cannot succeed. If emergency conditions require special action by Parliament such action will presumably be forthcoming, and the legislation will presumably give effect to Parliament's assessment of the seriousness of the situation. There seems to be no justification for going further and giving to the legislation a more drastic operation than the language shows was intended. If Parliament, sensible to the presence of an emergency, had intended private rights to be interfered with it would in all probability have made provision therefor."

I respectfully agree with the views expressed by the learned judges. But the situation and the issues with which they were concerned are clearly distinguishable from, and have no application to, the issues involved in this case and the circumstances which I have described, and with which I will deal more fully at this stage.

Almost every human activity in the modern State is regulated or controlled by laws and regulations having the force of law. For

example, schools and hospitals as well as other essential services are owned, controlled and financed by the State and accordingly appointments must be made, money raised, and decisions taken by persons empowered to do so by law in a manner provided by law. The enforcement of law and order requires, and has at its disposal, a police force, prisons, *etc.*, which again must be financed, controlled and governed by laws validly and lawfully enacted. It is not neceessary to cite the numerous administrative decisions that have to be made by Ministers and other officials who lawfully hold office under the Crown, or the frequency with which laws have to be made or amended, including the power to raise money by taxation. Now, the present government has displaced the lawful authority and, having established itself in the customary seats of power, exercises all the functions of legislation and administration. Mention has been made of a "vacuum in the law", but the "vacuum" exists even more fully and completely in the legislative, executive and administrative sphere. I need only refer again to those concerned with the exercise of administrative powers. The Chairman of the Public Services Board, the Secretaries for Education, Agriculture, Defence, Health, Justice, Internal Affairs, Labour and Social Welfare, Law and Order, Mines and Lands, the Treasury, the Postmaster General, the Director of Water Development, the Governor of the Reserve Bank, the Attorney General, the Commissioner of Police, and others, all state that each of them, and all persons serving in their respective departments, accept the 1965 Constitution as being the only effective Constitution and the present Government as being the only Government, and that they accept and observe all legislation made under the said Constitution and the authority of persons holding office under the said Constitution.

There can be no doubt that, in these circumstances, the alternative before this court is either to cease to function or to give effect to all or to certain administrative and legislative measures performed by and emanating from the Government constituted under the 1965 Constitution. There is no substance in the submission that by refusing to give effect to measures of this government, those responsible for the 1965 Constitution and who hold office by virtue of that Constitution, would by order of court revert to what has been described as "constitutional Government". These persons undoubtedly know, and it was never contended by respondents to the contrary, that what is described as "the assumption of independence" had no basis of legality and those who "gave" the 1965 Constitution had no right or power at law to do so. Their conduct was based on decisions and circumstances which in their opinion provided economic or political justification despite the absence of legality. But whatever their motives, it would be completely unrealistic to even assume that the present situation can be altered by a decision of this court.

There are no authorities which clearly decide this issue. The court has to resort to general principles which are binding on us, and to such cases that have considered the problem, for assistance and guidance in the application of such established principles of law. But this is not at all an unusual situation because, as will be shown later, courts frequently have to decide problems upon the application of sound first principles in the absence of direct authority. We have been referred to cases decided in several countries, particularly in the United States of America. In those cases the courts were only concerned with the position which had arisen either after a successful revolution or where, as in the United States of America, the revolution against the Union had failed. Accordingly, the questions before those courts were decided with knowledge of the success or failure of the revolution and in the light of the legal consequences that follow such a result. But the decisions in the American cases are of assistance in this case, as will appear later. We have also been referred to various books by jurists, including Grotius, Van Bynkershoek, Samuel Pupendorf and Franciscus Suarez, who stated and enunciated, as I will consider later, principles to guide citizens and usurpers of power when the latter took over control of a State.

In my view, after careful consideration of the unprecedented situation in which this court finds itself, I am satisfied that the court can and should give effect to at least certain legislative measures, and administrative acts, performed by virtue of power exercised under the 1965 Constitution. I base my conclusion on the doctrine of public policy, the application of which is required, justified and rendered unavoidable in these circumstances, by necessity.

When absolute necessity requires the court to function, and it can only function by giving effect to the legislative and administrative acts referred to above, then this doctrine can and should be invoked. The courts have not hesitated to apply the doctrine of public policy whenever 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. (See *Naylor, Benzon & Co., Limited v. Krainische Industrie Gesellschaft* (1918) 1 K.B. 331 at p. 342, and *Davies v. Davies* 36 Ch.D. 359 at p. 364, Winfield 42 *Harvard Law Review* at pp. 93-96.)

The doctrine is based upon principles of Natural Law or the *jus gentium*, although its application depends on its own rules and is part and parcel of the common law itself. (Wessels, *History of the Roman Dutch Law*, pp. 291–93, *Gardiner v. Heading* (1928) 2 K.B. 284 at p. 290, *Valenti v. Carati* 24 Q.B.D. 166, Maine, *Ancient Law*, pp. 99–100, Bryce, *Studies in History Jurisprudence*, p. 171, Holland on *Juris-*

prudence, pp. 35–38, Pollock, *Essays in the Law* (1922), pp. 53–63. Paton's *A Textbook of Jurisprudence,* 3rd edn., states at p. 114:

> " . . English law was open to the same ethical influence as were those systems that relied on natural law; but, where the continental lawyer would flourish a philosophy, the English jurist pins his faith to common sense, natural justice, reason, convenience, practical considerations, public policy, or humanity. As Scrutton L.J. pithily observed: 'I am sure it is justice. It is probably the law for that reason'."

There is a great deal of authority relating to the application generally of the doctrine of public policy in the solution of legal problems. (See *Chesterfield v. Jansen,* 26 E.R. 191, *Egerton v. Brownlow* (1853) 4 H.L.C. 1 at p. 1016, *Rodrigues v. Speyer* (1919) A.C. 116, *Janson v. Driefontein Consolidated Mines Ltd.* (1902) A.C. 484, Broom's *Legal Maxims,* 6th edn. pp. 1–3, *Beresford v. Royal Insurance Co.* (1938) A.C. at p. 594, Friedmann on *Legal Theory,* 3rd edn. pp. 333–340, *Hurwitz v. Taylor* 1926 T.P.D. 91–3, *Sachs v. Minister of Justice* 1934 A.D. 11.)

In *Egerton v. Brownlow* 10 E.R. 359, the doctrine of public policy was also described as "the doctrine of the public good or the public safety" or the "good of the State" (at pp. 416–7). These words of LORD CHIEF BARON POLLOCK (at p. 419) would appear relevant:

> "My Lords, after all these authorities, am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office—I should shrink from the discharge of my duty? I think I am not permitted merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example. I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."

The application of the doctrine was also considered in the case of *Fender v. St. John-Mildmay* (1938) A.C. 1. LORD ATKIN said at pp. 11–12:

> "Lord Halsbury indeed appeared to decide that the categories of public policy are closed, and that the principle could not be invoked anew unless the case could be brought within some principle of public policy already recognized by the law. I do not find, however, that this view received the express assent of the other members of the House; and it seems to me, with respect, too rigid. On the other hand, it fortifies the serious warning illustrated by the passages cited above that the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable."

In the same case LORD THANKERTON said (at p. 23) that the courts are not precluded "from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy. Such a case may well arise in the case

of safety of the State". LORD ROCHE, at p. 54, in his speech, says at pp. 54–5:

> "Now to evolve new heads of public policy or to subtract from existing and recognized heads of public policy if permissible to the Courts at all, which is debatable, would in my judgment certainly only be permissible upon some occasion as to which the legislature was for some reason unable to speak and where there was substantial agreement within the judiciary and where circumstances had fundamentally changed.";

and at p. 56:

> "Public policy, it is true, has been said to be an unruly horse; but no one denies that it is given to the Courts to manage."

In *Law in the Making* (by Allen, 3rd Edn. p. 258), the learned author points out that there are a number of cases in which judges have to lay down a rule for the first time without any assistance from express enactment or previous decision, and that in certain circumstances "judges may at any moment be faced with quite unprecedented points of public policy and these they must sometimes decide . . . without express authority . . ."

As appears from the authorities referred to, in the absence of statutory or common law provisions, or even in interpreting and in applying such provisions when they exist, the courts have often had to rely upon "common sense", "natural justice", "practical considerations", or to discover wherein the interests of the community lie. These standards have to be adapted or modified to current views and changing conditions. Even the "reasonable man" by whose standard of behaviour the court often has to be guided, is not constant and unchanging in his conduct and outlook; so that the "reasonable man" of to-day is probably yesterday's scoundrel and tomorrow's fool. In the application of the doctrine of public policy, the court is often faced with a burden and with considerations which are normally outside its scope when a point is regulated by statute or by common law. But in discharging this difficult task the court is only performing its duty in applying a doctrine which is part and parcel of the common law itself. It is, for these reasons, that public policy can be described as "a principle of judicial legislation founded on the current needs of the community" (Winfield, 42 Harv. L.R. 76 at p. 92. See also Paton on *Law in the Making (supra)* p. 257; Friedmann, *Legal Theory*, 3rd Edn. pp. 340–2; Wille's *The Principles of South African Law*, 5th Edn. pp. 15–16).

The doctrine has been invoked as disabling rather than constructive in the sense that it prohibits rather than permits. (See *Rodriquez v. Speyer* (1919) A.C. 125 and *Fender v. St. John-Mildmay* (*supra*) at p. 38.) It has been said that "there cannot be public policy leading to one conclusion where there is a statute directing a precisely opposite conclusion" (Winfield 42 *Harv. L.R.* p. 98, *In re Houghton* (1915) 2 Ch.D. 173).

But the question whether the court should function, and in this manner, in the conditions which prevail, is not answered or dealt with by statute. As COZENS-HARDY, M.R., said in *Hall v. Knight and Baxter* (1914) P.1 at p. 5:

> "You do not look for public policy, in the sense in which the expression is used, in an Act of Parliament. It is something which is really part of the common law of the land and does not depend upon statute."

Support for the application of this doctrine in this manner and under these conditions can also be found in treatises by jurists and in the judgments of the courts in Holland, Switzerland and the United States of America. Hugo Grotius (1583–1645), who has been described as "one of the greatest lawyers of all time" (see Wille's *The Principles of South African Law*, 3rd Edn. pp. 23–35), in his work *"De Jure Belli ac Pacis"*, Book 1, Chapter IV, section XV (1646 edn. translated by F. W. Kellsley), says:

> "It remains to speak of the usurper of power, not after he has acquired a right through long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom the sovereignty actually belongs, whether people, or king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts."

Francisco de Vitoria in *"De Potestate Civili"* (translation by G. L. Williams), referred to in the side note in the above quotation from *"De Jure Belli ac Pacis"*, says:

> "Another question arises, namely: Whether the laws of tyrants are binding. It might seem that they are not binding, since tyrants have no power at all. Nevertheless, the contrary is true: For if the State is oppressed by a tyrant and is not *sui juris*; and if the tyrant has not the power to create laws, while at the same time it is impossible to put into execution the laws laid down before his time: then, unless obedience is rendered to the tyrant, the State must perish. It seems indeed that those laws which are acceptable to the State are binding, even when they have been created by a tyrant—not, to be sure, because he established them, but by the agreement of the State; for it is better to obey the laws created by a tyrant, than to obey no law at all. It is certain and obvious that the State would suffer injury if, owing to the fact that princes possessed of no just title have seized the country, there should be no provision for judicial trials, and no way in which to punish or restrain malefactors; for if the laws laid down by a tyrant are not binding, then he is not a legitimate judge."

In the report of the judgment of the Hooge Raad of Holland, dated the 22nd September, 1840, and published in the Weekblad Van Het Recht, No. 124 of the 15th October, 1840, the court gave this as a reason for giving effect to measures of an unlawfully constituted government:

"Taking into consideration that with all civilized nations it has been accepted as a principle of the law of nations, that the measures of internal government enacted by a usurping power, which has arrived at some degree of stability and permanency, during the intermediate situation of a *facto* dominated country, should be maintained also afterwards *ex utilitate publica*, in order to avoid the incalculable consequences and detriments, which necessarily would result from a contrary system; and that all dispositions and measures of internal government, taken meanwhile by the usurping power, will keep their force also after the end of the usurpation, as long as the legal government has not attended thereto." (Translation provided by counsel.)

In a judgment of the Swiss Bundesgericht, in the case of *Zieglersche Tonwarenfabrik von Gebrüder Ziegler ca. Kanton Schaffhausen*, delivered on the 5th October, 1905 (Zeitschrift Für Völkerrecht and Bundesstaatsrecht Band 1 (1907)), the court considered water rights acquired in respect of the River Rhine while that part of the river was *de facto* subject to the sovereignty of Zurich. The court discussed rights acquired under a government lacking "legitimacy", and decided that effect should be given to rights so acquired on the principle of necessity of continuity "of the legal order within the state"

We were referred to many cases decided in the United States. As I have said, all these cases were decided after the revolution had failed and the courts were therefore not faced with the problem with which I have to deal. I repeat again that the problem facing this court is whether it should continue to function, even if to do so involves giving effect to administrative decisions and legislative measures by persons who derive their authority from the 1965 Constitution. This problem did not arise for decision in the United States, where the courts were only concerned after the revolution with the enforcement of rights acquired during the revolution and mostly conferred by a legislature of a State which was constitutionally created to make the relevant laws. But the courts did consider whether effect could be given to laws which, because they were designed to aid, or had the effect of aiding, the revolution, were held to have been unlawfully enacted. Accordingly, the principles enunciated in those cases are relevant to this case, because the question whether effect can be given to measures not lawfully enacted was considered and decided. The reasons for and the basis upon which the laws were held to have been unlawfully enacted are not relevant to the principle, which was that effect could be given to them despite their unlawful origin.

In the leading case of *Texas v. White* 7 Wall. 200 19 L. Ed. 227 at 230:

"The acts of sovereignty done by the usurping government which will be recognized as obligatory by the restored government, are such only, therefore, as are necessary to protect the community from anarchy; and the recognition of these, even, is within the discretion of the restored government

de jure. For, as Grotius says, the usurping government does not act by virtue of right, for it has none: but by permission or sufferance of the lawful sovereign, whether it be King, People or Senate.";

and at p. 240:

"The Legislature of Texas, at the time of the repeal, constituted one of the departments of a State Government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful Legislature, or its Acts as lawful Acts. And yet it is an historical fact that the Government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existence as such, would be effectual and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary as to the United States.

It is not necessary to attempt any exact definitions, within which the Acts of such a State Government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void."

In *Horn v. Lockhart* 17 Wall. 570, 21 L. Ed. 657 at p. 660:

"The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one, that we are aware of, seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution."

In *Thomas v. City of Richmond* 20 L. Ed. 453 at p. 457, MR. JUSTICE BRADLEY, who delivered the opinion of the court, says:

"The fact thus found, that the laws referred to were passed in aid of the Rebellion, is conclusive on the subject. We have already decided, in *Texas* v. *White*, 7 Wall. 700 19 L. ed. 227, and just now in the case of *Hanauer v. Doane, ante,* 439, that a contract made in aid of the Rebellion is void, and cannot be enforced in the courts of this country. The same rule would apply, with equal force, to a law passed in aid of the Rebellion. Laws made for

the preservation of public order, and for the regulation of business transactions between man and man, and not to aid or promote the Rebellion, though made by a mere *de facto* government not recognized by the United States, would be so far recognized as to sustain the transactions which have taken place under them."

In *First National Bank of Washington v. State of Texas* 22 L. Ed. 295, MR. JUSTICE SWAYNE says at p. 298:

"The effort of Texas to leave the Union was revolutionary. All her legislative Acts for the accomplishment of that object were void. Her position has been aptly resembled to that of a county in rebellion against the State. *Hickman* v. *Jones* 9 Wall., 197, 19 L. ed., 551. While her enactments outside of the sphere of her normal authority were without validity, those within it, passed for the ordinary administration of her powers and duties as a State, had the same effect as if the rebellion had not occurred. The latter principle springs from an overruling necessity. A different rule would involve the dissolution of the social compact, and resolve society back into its original elements."

In *Keith v. Clark* 24 L. Ed. 1071 at 1079, MR. JUSTICE BRADLEY says:

"We have always held, it is true, that, in the interests of order and for the promotion of justice, the courts ought to regard as valid all those Acts of the State Governments which were received and observed as laws for the government of the people in their relations with each other, so far as it can be done without recognizing and confirming what was actually done in aid of the rebellion. This is required by every consideration of justice and propriety. But this is only what is always conceded to the Acts and laws of any actual government however invalid."

In considering what the English law should be in this type of situation, LORD WILBERFORCE said in *Carl-Zeiss-Stiftung v. Rayner* (1966) 2 A.E.R. 536 at p. 577:

"My lords, if the consequences of non-recognition of the East German 'government' were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. As Locke said: 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' and this must be true of a society—at least a civilised and organised society—such as we know to exist in East Germany. In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of every-day occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interest of justice and commonsense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. These ideas began to take shape on the termination of the Civil War (see *U.S.* v. *Home Insurance Co.* (110)), and have been developed and reformulated, admittedly as no more than dicta, but dicta by judges of high authority, in later cases.

I mention two of these: *Sokoloff* v. *National City Bank of New York* (111) and *Upright* v. *Mercury Business* (112), a case which was concerned with a corporate body under East German law. Other references can be found conveniently assembled in PROFESSOR O'CONNELL'S INTERNATIONAL LAW (1965) pp. 189 ff. No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total validity of all laws and acts flowing from unrecognised governments. In view of the conclusion which I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked.".

The cases and jurists all deal with a situation similar to the one facing this court, and the principle clearly emerges that effect must be given to legislative measures and administrative functions of this nature. It is necessary to do so for the court to continue to function and so that hardships, chaos and injustice which would otherwise follow are avoided. The views expressed in these authorities are based upon and justify the application of the doctrine of public policy, when necessity requires to give effect to powers exercised by persons whose authority is not derived from a lawful constitution, in circumstances where only such persons have effective control in and over the State. It may be relevant to refer in this respect to the fact that the Governor has called upon the judiciary as well as upon the armed services, the police and the public service to maintain law and order in the country and to carry on with their normal tasks. This approach is consistent with his request because, in complying with it, it is obvious that it becomes necessary to give effect, and it was envisaged that effect would have to be given, to acts done by persons under the 1965 Constitution.

The question remains, to which administrative acts or legislative measures does public policy justify and require effect should be given? Hugo Grotius and cases in the United States exclude those matters which "aid the rebellion". In the American cases, the type of act which should be treated as if it was valid upon this approach is confined to acts necessary for carrying on ordinary day-to-day life and exclude any measure if its purpose or its effect is in "support of the rebellion". In my view, it is not possible to give any exact definition as to what can be treated as valid or invalid. But I do not think the problem can be resolved by laying down as a principle that measures or the exercise of functions which "aid the rebellion" must not be given effect for that reason alone. The preservation of peace and order can be said to have that result. Similarly, the efficient conduct of hospitals and schools, the distribution of food or the organization and operation of an efficient civil service benefit and aid those who are in unlawful control. Public disturbance, disruption of the services provided by a state and chaotic economic con-

ditions could undoubtedly result in or contribute to the downfall of an unlawfully constituted government, as indeed also to that of a lawfully constituted government. But it is not the function of the court to bring about the end of revolution by failing to give effect to measures calculated to avoid and prevent such a state of affairs. In my view, the administrative and legislative measures required for the maintenance of peace and order must be treated as effective and enforceable, regardless as to whether in so doing the unlawfully constituted Government benefits or not. The same considerations apply to the measures concerned with the preservation and the function of all the usual departments of State such as health, education, transport and the economic welfare of the inhabitants generally.

It is therefore necessary to consider whether the legislative measures under which these persons are kept in detention should be given effect. The declaration of the state of emergency on the 4th February, 1966, and the Maintenance of Law and Order Regulations under that Declaration were made by persons exercising power under the 1965 Constitution, whether it be Parliament, the Minister of Law and Order or the Officer Administering the Government. Accordingly, the Declaration and the Regulations have not been lawfully made. Nevertheless, I have come to the conclusion that they must be given effect as if they were lawfully created, for the following reasons. Firstly, the exercise of such powers for the maintenance of law and order is provided by the Emergency Powers Act [*Chapter 33*]. This Act empowers the Governor to declare a state of emergency and to make regulations in the same circumstances in which this proclamation and regulations are alleged to have been made by the Officer Administering the Government. Secondly, the provisions contained in the Declaration of Rights under the 1961 Constitution, which are repeated in identical terms in the 1965 Constitution, have not been contravened and the Constitutional Council has not ruled or reported adversely concerning the Declaration of Emergency or the Regulations in question. Thirdly, measures of this nature have been taken for many years and have obviously been considered necessary for the maintenance of law and order in Rhodesia by those lawfully entrusted with the exercise of such power. There have been six Proclamations of Emergency within ten years, the longest continuous period being for nine months, having been extended twice. Only six days before the assumption of independence there had been such a Proclamation, the operation of which had by law to be limited to three months. Fourthly, in his reasons for the extension of the State of Emergency in his capacity as Minister of Justice and of Law and Order in the present Government, reliance was primarily placed for this action upon the need to preserve internal security, to prevent a breakdown of law and order and the nature of the threats to this state of affairs was

given. Reference was made, *inter alia*, to radio broadcasts from a neighbouring State, as follows:

> "I cannot minimise the effect these highly subversive broadcasts have had on our African population. There is no doubt that they have worked their evil spell, and a glance at the newspapers from just before Christmas up to the present day will show numerous court cases where accused persons have been convicted of crop-slashing, animal destruction, stoning vehicles, cutting telephone wires, incitement to strike, intimidation, etc., not to mention poisoning cattle and other malicious acts to property belonging, in the main, to European farmers."

There is no reason to doubt that the same conditions which justified the declaration of states of emergency before the 11th November, 1965, existed when the State of Emergency in question was declared as aforesaid.

For these reasons, I am of the view that the proclamation of a State of Emergency and the Emergency Regulations must be treated and given effect to as if they were valid, on the basis that they are measures which are required for the maintenance of peace. But it does not follow that the use of or any resort to these regulations for the purpose of preventing persons from enjoying rights constitutionally entrenched in the Declaration of Rights, or to deprive citizens of their liberty by detention without trial in order to silence lawful criticism or opposition to a political party or to persons in power, will be treated in this manner. In such circumstances, consideration of public policy would not justify the court to give effect to such conduct and the court would be failing in its duty if it did not forbid and prevent such encroachment on and abuse of the liberty of the subject. It is one of the pillars of liberty upon which our law is based that every imprisonment is *prima facie* unlawful and it is for a person directing imprisonment to justify his act. The only exception is imprisonment ordered by a judge (see *Liversidge v. Anderson (supra)* pp. 245–246, *Principal Immigration Officer v. Narayansamy* 1916 T.P.D. 274 at p. 276, *S.A. Law Journal* (1962) vol. 79 p. 283). Therefore, because powers conferred by such emergency regulations constitute a drastic invasion of the liberty of the subject, the court must in the circumstances that prevail ensure that it will give effect to the exercise of such powers only on the basis and upon the principles stated.

It was submitted, however, that even if the said measures under which these persons are held are found to be effective because they are necessary for the preservation of peace, the *onus* lies upon the Minister of Justice and of Law and Order (hereinafter referred to for convenience as the "first respondent") to satisfy the court that he exercised his powers to detain them for the purpose of preserving peace, and not in "aid of the revolution". In this respect, Mr. *May* submitted that the first respondent must show that the detention of any person under these

measures was what he described as "factually necessary". He went on to submit that "public policy demands, in case of legal officers of a legal government, that in certain circumstances there should be privilege from disclosure of the information on which they acted, or the reasons for which they acted, but there is no public policy which demands that the privilege should be extended to any of the respondents in these circumstances". On the contrary, Mr. *May* submitted, to use his own words again, "one must presume that a person who is in a state of rebellion would naturally tend to act in furtherance of that rebellion, and therefore the court would need to be satisfied that in any particular case that he was not acting in furtherance of that state of rebellion". On the other hand, Mr. *Smith* submitted on behalf of the first respondent "that privilege which attaches to a *de jure* Minister will also attach to a *de facto* Minister because the need for the preservation of peace and good government is just as important, whether the Minister is a *de jure* Minister or *de facto* Minister"

Section 21 of the Emergency Powers (Maintenance of Law and Order) Regulations of 1966, in so far as it is relevant to this issue, reads:

> "21. (1) If it appears to the Minister that the detention of any person is expedient in the public interest, he may by order under his hand direct that such person be detained—
>
> (a) by being kept in such prison or other place; or
>
> (b) by being prohibited from absenting himself from such place;
>
> as the Minister may direct and in accordance with instructions issued by the Minister.
>
> (2) .....
>
> (3) .....
>
> (4) Every person detained in terms of an order made under subsection (1) shall be deemed to be in lawful custody.".

I have given my reasons for the view that these regulations are effective and must be treated as if they were validly promulgated. It follows that the production of an order of detention by first respondent *ex facie* regular, such as exists in the cases before us, constitutes a *prima facie* defence to any action for the release of a person so detained. There is no *onus* on first respondent to justify the detention as submitted by Mr. *May*. These measures have been held to be effective because they are required for the preservation of peace and law and order. There is accordingly no reason why every detention should be treated as wrongful under regulations which have to be treated as if they were valid. Moreover, it cannot be said that a person detained under regulations which came into effect in this manner should be given any wider protection than if he had been detained under lawfully promulgated regulations which contained identical provisions. But it is also correct to say that a person detained under these regulations should not find himself at a disadvantage, and that the protection afforded him should

not be curtailed, compared with the safeguards that he would have enjoyed if these powers had been created and administered under lawful authority. In other words, just as it was necessary to consider whether these measures should be treated as valid, so it is necessary to consider whether their mode of enforcement should be treated as valid upon the application of the same tests.

The court must ascertain and ensure that powers acquired in this manner are only used for the purpose for which these measures were intended and held to be enforceable. Section 21 does not give the first respondent unconditional authority to detain but confines his right to do so if it appears to him to be expedient "in the public interest". The reasons for giving these regulations the force of law are based on the necessity to do so for the preservation of peace, and the meaning of "public interest" in this context is confined to that which is necessary for the preservation of peace.

A real danger exists, however, that the first respondent may *bona fide* consider it "expedient in the public interest" to detain persons for reasons unconnected with the said meaning of these words. It is necessary to bear in mind that he is probably imbued with the inevitable determination to ensure that "assumption" of independence in the manner described does not fail. In his affidavits, first respondent refers to the detention of applicants on the ground that it appeared to him to "be necessary and expedient in the public interest, including the preservation of peace and the maintenance of order in Rhodesia and for the good government thereof". It therefore appears that he does not consider the words "in the public interest" to be confined to, and as consisting exclusively of, that which is expedient for the preservation of peace and the maintenance of order and for good government.

The position therefore is, that while the first respondent will no doubt exercise these powers for the purpose to which the court will give effect, it can so happen that he may *bona fide* interpret the words "public interest" in a manner and for a purpose which the court will not enforce. In respect to the former, I agree with Mr. *Smith* that privilege which attaches to a Minister who derives his power from a lawful Constitution must also be accorded to the first respondent because of the need for the preservation of peace. But the same considerations do not apply in the latter type of case where the exercise of such powers would not be enforced by the court. The real difficulty arises as to how to determine which type of case is before the court, if the first respondent could always claim that as the matter is left to his discretion the court will not interfere with the result. I should perhaps repeat that I am now concerned with a discretion *bona fide* exercised, but for a purpose or in a manner which the court will not render enforceable in the circumstances described above. It is not necessary to consider the position which would arise if first respondent

acted *mala fide* or dishonestly. Clearly, the court would in such a case be entitled to inquire into the reasons for the Minister's decision irrespective of whether he holds office lawfully or not. (See *Ah Sing v. Minister of the Interior* 1919 T.P.D. 338 at p. 342. *Jeewa v. Dönges N.O. & Ors.* 1950 (3) S.A. at p. 423).

It follows from what has been said, the burden of establishing that an order of detention under these measures is invalid or unenforceable rests on the plaintiff or the applicant. It is for him to establish a *prima facie* case that his detention is unconnected with the maintenance of law and order, but is to be attributed to the first respondent exercising his powers for some reason or motive which would not render detention enforceable. An example of such an unenforceable order of detention would be if its object were to silence lawful criticism of or opposition to a political party or to any person at present in power. A mere allegation that that is the position would not be sufficient. But if there is *prima facie* evidence which would justify the court to hold that the order is not one it will enforce, then in the absence of an adequate explanation or of evidence to refute it, the court will not enforce it. In such a case the first respondent would not be entitled to meet such evidence by merely asserting that he has exercised his discretion and that the court will not interfere with the result, because the issue before the court would be whether he has in fact exercised his discretion on grounds which would justify giving legal effect to it. Difficulty could no doubt arise as to the nature of the evidence which would be required or expected from the first respondent to refute the *prima facie* case, and in particular concerning such questions as the confidential nature of the information at his disposal and which cannot in the public interest be disclosed. It is neither desirable nor necessary to consider this aspect in greater detail as it would be a question for decision in each case, depending upon the evidence adduced by an applicant in establishing a *prima facie* case for his release and the evidence as a whole.

Before considering the facts relating to each application, I should mention that I agree with what my Brother LEWIS has said concerning the applications to strike out allegations in respondents' affidavits on the ground that they are irrelevant or hearsay or based on hearsay.

The application alleging that Daniel Nyamayaro Madzimbamuto is being unlawfully deprived of his liberty is firstly based on the contention that section 21 of the Emergency Powers (Maintenance of Law and Order) Regulations is of no force or effect. For the reasons given, this contention is not sound. It is necessary, however, to consider whether the order for his detention is enforceable in the light of the views expressed above. My Brother LEWIS has set out the relevant facts and I agree with his reasons for dismissing this application. It is clear beyond doubt that this order for detention could not be related

to, or have any connexion with, the exercise of his discretion by first respondent for a purpose unconnected with the preservation of peace. The legal aspects relating to this application are the same as those which apply to Mr. Baron's application, which I will now consider.

I have dealt with Mr. Baron's contention that the regulations under which he is held are of no force or effect. He also alleges that he has never contemplated committing any act likely to endanger, disturb or interfere with public order, and that no facts have been put forward and no facts exist, to show that his detention is necessary for the preservation of peace. He admits that if he had been left at liberty he would have opposed "the alleged Ministry by every lawful means" at his disposal.

On the 28th May, 1965, in his capacity as Minister of Law and Order, the first respondent made an order against Mr. Baron, requiring him to remain in the area contained within a fifteen-mile radius from a certain place in Bulawayo for a period of twelve months. This order was issued in terms of section 50 of the Law and Order (Maintenance) Act [*Chapter 39*] on the ground that first respondent considered it desirable for the purpose of maintaining law and order. It is not possible to now hold that first respondent in his aforesaid capacity had no grounds for forming that opinion or that he acted *mala fide* or dishonestly. Secondly, on the 11th November "some little time before 12.20 p.m." and as the lawful Minister of Law and Order, the first respondent signed an order for the detention of the applicant on the ground that it was expedient to do so "in the public interest, including the preservation of peace and the maintenance of order in Rhodesia and for the good government thereof". Mr. Baron denies that this order or the order under which he is now detained was necessary for the said purposes but alleges that they were made "to maintain the alleged Ministry in power". This allegation by Mr. Baron is denied by first respondent.

The question therefore arises whether it is possible to say that the order for Mr. Baron's detention on the 11th November, 1965, was not made on the grounds alleged by first respondent and which are concerned with the preservation of peace. That order was made by a lawful Minister on lawful grounds, and at a time, even if such time was rapidly running out, when he was lawfully entitled to do so. Now, it is settled law that where a matter is left to the discretion or the determination of a public officer and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the court will not interfere with the result *(Shidiack v. Union Government* 1912 A.D. 642 at 651). It is also settled law that the Minister is under no obligation to state the reason for coming to his decision. (See *Ah Sing's* case *(supra)* at p. 342). The assertion that his detention "was wholly or alternatively partly for the purpose of aiding and furthering the aims of the rebellion" is

no more than a bare allegation that the Minister acted *mala fide* or dishonestly, and is not sufficient for the court to inquire into the reasons for the Minister's decision. (See *Jeewa v. Dönges (supra)* at p. 423).

In any event, no *prima facie* case of *mala fides* has been made. There appears to be no reason at all, on Mr. Baron's allegations, why the Minister should have even suspected Mr. Baron's enjoyment of his liberty to constitute a threat to the "assumption of independence". Mr. Baron alleges that he would have opposed this by every lawful means at his disposal. But he surely does not intend to convey that he was virtually the only person to do so. Because if he was, it is extremely unlikely that the only such opponent would be detained, and if he was one of many who were of the same opinion, there is no evidence that the others were also deprived of their liberty. There is also nothing to indicate the nature of "the lawful means" which he would or could have adopted to oppose what happened on the 11th November, or why his attitude should induce the Minister to use his powers dishonestly to silence him. It is not suggested, for example, that Mr. Baron was a politician or a person who enjoyed any following, so that his lawful opposition had to be rendered ineffective. There is certainly no basis on which to assume, and this is not even specifically alleged, that in the exercise of his profession as an attorney of this court he could have embarrassed or harassed the present Government. I am satisfied that I can take judicial notice of the fact that the attorneys of this country do undertake litigation desired by their clients, including such as may be considered as undesirable or embarrassing by the Government. A point was made of the fact that he was detained on the 11th November in order to connect his detention with the Declaration of Independence. But the emergency was only declared on the 5th November and I see no justification for drawing an adverse inference of *mala fides* because his detention occurred six days afterwards.

Accordingly, because he was lawfully the subject of the said restriction order and the allegation of *mala fides* concerning the original order of detention must fail, it follows that it cannot be said that the present order of detention was based on considerations which the court will not enforce. Having been considered before his detention to constitute a "risk" to the preservation of peace, there is no reason to suggest that different considerations induced the first respondent to issue the present order. It is perhaps necessary to stress that the question is not whether his restriction or original detention was in fact necessary for the maintenance of law and order. If, as I have no reason to doubt, the Minister honestly applied his mind to the question which was left at his discretion, it is even impossible for the court to substitute its conclusion for his own. (See *Shidiack's* case *(supra)* at p. 651).

I have had the advantage of reading the judgment prepared by my Brother LEWIS. I agree with the conclusions which he has reached,

and that the applications should be dismissed, but that there should be no order as to costs.

Messrs. Scanlen & Holderness, attorneys for the applicants in both cases.

Government Attorney, for the respondents in both cases.