Decisions of International and Foreign Tribunals

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RHODESIA

The irregular situation in Rhodesia has given rise to two interesting recent judgements, one by the Judicial Committee of the Privy Council in *Madzimbamuto v. Lardner-Burke*, and a later decision by the Appellate Division of the High Court of Rhodesia in *Ndhlovu v. The Queen.*

The *Madzibamuto* case involved the validity of the detention of the appellant's husband pursuant to an order made by the respondent Minister of Justice of Rhodesia in 1966. The majority judgement delivered by Lord Reid on July 23, 1968, summarized the history of British Rhodesia, pointing out that the territory was acquired by conquest by the British South Africa Company on behalf of the Crown; that in 1923 the territory was formally annexed to His Majesty's Dominions as the Colony of Southern Rhodesia, and a Legislative Assembly was established therein; that by 1961 it had become an established convention for the British Parliament not to legislate for Southern Rhodesia in matters within the competence of the Legislative Assembly except with the agreement of the Southern Rhodesia Government; that in 1961 Her Majesty granted to Southern Rhodesia, pursuant to Parliamentary authorization, a Constitutional vesting executive authority in the Crown to be exercised by a Governor and through a Prime Minister and other Ministers, all holding office at Her Majesty's pleasure; the Constitution contained a Declaration of Rights forbiding unlawful detentions, which is not subject to amendment by the Rhodesian Legislature; that on November 11, 1965, the Rhodesian Cabinet issued a unilateral Declaration of Independence of Southern Rhodesia, and a new Constitution, which was subsequently adopted by the Rhodesian Legislature and which the Governor, pursuant to British authorization, then removed the Rhodesian Cabinet Ministers from

office; that on November 16, 1965, the British Parliament passed the Southern Rhodesia Act 1965, which delcares that "Southern Rhodesia continues to be part of Her Majesty's dominions" and authorizes Her Majesty to make Orders in Council in relation to Southern Rhodesia; that pursuant to the Act, the Southern Rhodesia Constitution Order 1965 was made, declaring null the new Constitution adopted in Rhodesia and all official business thereafter transacted by the Rhodesian Legislature; that the Rhodesian Cabinet and Legislature ignored the latter order and the removal of the Cabinet Ministers; and that the 1966 order for detention of the appellant's husband was made pursuant to Emergency Regulations adopted by the Rhodesian Government pursuant to the 1965 Constitution.

The Rhodesian Court *a qua* held that the 1965 Constitution was invalid and the Rhodesian Government not a lawful government, but justified the Emergency Regulations on the basis of necessity, the Government being the only effective government of the country.

The appellant's appeal was denied by the Appellate Division of the High Court of Rhodesia, on the ground that the government, being the only effective one, was a *de facto*, and perhaps an "internal *de jure*" government whose acts should be given legal effect, at least to the extent that they do not infringe the 1961 Constitution.

Being of the opinion that the Privy Council has no further jurisdiction over appeals from the High Court of Rhodesia, the Rhodesian Government was unrepresented in the appellant's appeal to the Privy Council. It is understood that an *amicus curiae* participate to present considerations favoring the Government's views.

The Privy Council first determined that the question of British sovereignty in Rhodesia had to be decided on principles of English constitutional law, not Roman Dutch Law internally applicable in Rhodesia.

On the merits, their Lordships were of the opinion that, Southern Rhodesia being a British colony, the sovereignty of the United Kingdom Parliament therein was supreme and undiminished by the limited grant of self-government; that the convention of non-legislation by the United Kingdom Parliament on matters within the competence of the Legislative Assembly without the consent of the Rhodesian Government "had no legal effect in limiting the legal power of

Parliament"; that, while disregard of this convention might have been considered unconstitutional in the sense that it would have been improper for Parliament to do so, nevertheless the courts are concerned only with the legal power; and that in any event the unilateral Declaration of Independence could be considered as having released Parliament from any obligation to observe the convention.

Their Lordships felt that the distinction between *de jure* and *de facto* governments, while sometimes useful diplomatically, is inappropriate to a judicial decision as to the legal position of a usurper. The only question in such a case is whether the new regime has reached the stage of legitimacy, to be determined with reference to "the efficacy of the change"; and this cannot be said to have occured in Rhodesia, since the British Government is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed.

Referring to the Statute of 1495 exempting from penalty "persons . . . that attend upon the King and Sovereign lord of this land for the time being," their Lordships quoted Blackstone's explanation that the statute "does by no means *command* any opposition to a king *de jure*; but *excuses* the obedience paid to a king *de facto*," and held that it did not enact a general rule that a usurping government in control must be regarded as a lawful government.

Considering the argument of necessity, their Lordships referred to American decisions sustaining the validity of acts of the Confederate States during the Civil War; these were distinguished on the grounds that there is divided internal sovereignty in the United States, that the cases involved determination of private rights not the legality of governments, and that Congress had not enacted laws similar to the Southern Rhodesia Act and the Order in Council of 1965 setting forth the legal position in the Confederate States during the war.

Their Lordships recognized that in a legal vacuum, the acts of sovereignty of a usurper might be accorded the recognition required for preservation of law and order, but pointed out that no such situation existed in Rhodesia, in light of the 1965 Act, and Orders made pursuant thereto, as well as pre-existing legislation not impaired thereby.

Lord Pearce handed down a dissenting judgement based on the doctrine of necessity. He cited the American Civil-War decisions holding that the acts of the Confederate State Governments were valid so long

as they were not in furtherance or support of the rebellion against, or hostile to the authority of, the Federal Government and did not impair rights under the Federal Constitution. He also referred to two directives issued by the Governor of Southern Rhodesia after the unilateral Declaration of Independence, calling on the people, expressly including the judiciary, "to maintain law and order in this country and to carry on with their normal tasks"; and pointed out that, absent any other effective governmental authority, the judiciary had no choice but to act under the authority of the existing Rhodesian Government. He stated his view that the action of a *de facto* government could not be considered to impair a citizen's constitutional rights unless the *same* action by lawful authorities would be so considered. [1963] 3 All E.R. 561.

In the *Ndhlovu* case, decided on September 13, 1968, the Appellate Division of the High Court of Rhodesia reached a conclusion directly contrary to that of the Privy Council. The appellants were charged with violating a Rhodesian statute enacted in 1967. They excepted to the indictment of the contention that under the 1965 Order in Council the legislature of Rhodesia was unable to enact valid laws thereafter. The Appellate Division dismissed their appeal from the trial judge's action in overruling the exception.

Chief Justice Beadle adopted the position that it is now "certain" (in the sense of "proof sufficient to carry conviction to a reasonable mind") that the British Government will not succeed in regaining control of the Government of Rhodesia, and that under the accepted test of whether a *de facto* government has, following its abolition of a prior constitution, become *de jure* – "the efficacy of the change" – the present Government of Rhodesia is *de jure* and the 1961 Constitution has been abolished by the unilateral Declaration of Independence.

The Chief Justice based his conclusion on the facts that the present government has been firmly in control for over three years, that the effectiveness of its control is evidenced by its repeal last April of the censorship regulations imposed after the Declaration of Independence, that the government is maintaining a balanced budget without increasing taxation, that no candidates opposing independence have contested recent by-elections, and that while existing economic sanctions are having an adverse effect on the country's economy, there is no reason to suppose that they will induce such an economic collapse

as could cause the Government to capitulate or the people to rise against it.

The Chief Justice recognized the anomalous position in which he and his colleagues found themselves, as judges appointed under a constitution which they held to have been abolished. His conclusion was that in such a situation, judges legally may and ethically should continue to sit, but under the authority of the superseding regime.

Justice Quenet, in his opinion, pointed out that the Privy Council was bound, in deciding the *Madzimbamuto* case, by the decision of its own Government as to the status of Rhodesia, whereas the Rhodesian court had to make its own independent determination of the question. He concurred with the Chief Justice that the present Rhodesian government has achieved "internal *de jure* status."

Justice Macdonald began his aggressive opinion with a reference to assurances made by the British Government in 1962 that they could not revoke or amend the 1961 Constitution. He pointed out that the Privy Council, as part of the British constitutional system, may not, without precipitating a major constitutional crisis, declare an Act of Parliament invalid, and was therefore bound to give effect to the 1965 Order in Council. Justice Macdonald went on to say that while in abstract legal theory, Parliament has power to annul the constitutions of former British colonies or dominions, such power does not exist as a matter of constitutional reality, and that the Privy Council had itself said as much with reference to Canada in *British Coal Corporation v. the King*, [1935] AC 500.

Justice Macdonald stated that, when faced with the unilateral Declaration of Independence by the Rhodesian Cabinet, the British Government could constitutionally have appointed cabinet ministers in place of those thereupon dismissed by the Governor; but that, not having taken this step, the British Government could not rightly expect the Rhodesian people to acquiesce in the unconstitutional step of annulment of the 1961 Constitution.

Justice Macdonald took the position that since 1965 the British Government has in effect been waging economic war against Rhodesia instead of trying to govern it, thereby penalizing the entire Rhodesian people for the action of the Cabinet, and that by this action and by its effective abdication to the United Nations of its responsibility for settling the matter, the British Government had forfeited "not only

respect and authority but also all claim to allegiance," citing Grotius *De Jure Belli et Pacis*, Book I, Cap. IV.

BRITISH HONDURAS MEDIATIONS

Ambassador Bethuel M. Webster's proposed treaty for settlement of the dispute between the United Kingdom and Guatemala over British Honduras has been rejected by the Governments of both the United Kingdom and British Honduras. The disputing governments had asked the United States to mediate the dispute as a prelude to independence of British Honduras in 1971. After more than two years of discussion and study, Ambassador Webster's proposal was submitted on April 18, 1968. 7 International Legal Materials 626.

Apparently the opposition National Independence Party in British Honduras took the occasion to stir up political unrest on the assertion that the proposed treaty involved an agreement by the Government People's United Party to subordinate British Honduras to Guatemala after independence. At all events, on Premier Price's motion, the draft treaty was rejected by the British Honduras House of Representatives on May 16, and perforce by the United Kingdom, which was committed not to accept a solution unacceptable to British Honduras. Guatemala had also indicated dissatisfaction with the proposal.

The draft treaty (prepared for execution by Guatemala and the United Kingdom with subsequent accession by independent British Honduras), while vesting full sovereignty in Belize (the new name of independent British Honduras) after independence, would have given Belize and Guatemala important reciprocal tax and duty-free transit rights in each other's territories and ports, would have established a right of unrestricted travel (and perhaps residence) by Belizeans and Guatemalans in the two countries without passports, visa or (apparently) quota or other restrictions, provided for construction of a road as an effective link between Belize and Honduras, and accorded educational degrees and governmental documents of each country the same recognition in the other.

The proposed treaty contemplated, without requiring, Belize's entry into the Central American Common Market (with phase-out of its Commonwealth tariff status) and other institutions and treaties of the Central American community.

Consultation and cooperation between Belize and Guatemala as to internal security and foreign policy were stipulated, as well as

conclusion of "arrangements concerning matters of external defense of mutual concern," including defense of the approaches to and the security of Belize and the use of Belizean ports by Guatemalan naval units when requested to assist Belize. On request, Guatemala was to handle all aspects of Belize's international relations.

The treaty provided for a Joint Consultative Committee to consider matters of external defense of mutual interest, as well as a seven-member Authority (three from each country and a seventh appointed by the other six or by the United States) to oversee implementation of the treaty.

It is understood that English and Belizean opponents of the treaty feared that it might provide a framework for *de facto* domination of Belize by its larger and more powerful neighbor.

INDIA

The Rann of Kutch boundary award between India and Pakistan was reported in the last issue of The International Lawyer. On May 14, 1968, the High Court of Delhi dismissed three Civil Writ Petitions filed to restrain implementation of the award. The petitioners argued that implementation of the award, by alignment of the boundary in question, would constitute a cession of Indian territory requiring an amendment to the constitution. Accepting the Government's positon, the court held that the award did not grant Indian territory to Pakistan but merely determined the boundary between the two countries, the determination entailing a decision as to ownership of the territory on either side of the boundary. 8 Indian Journal of International Law 267.