Unrecognised governments in the conflict of laws: Lord Denning's contribution[1]

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Lord Denning's views on this subject are to be found in his judgments in the cases *In re James (an insolvent) (Attorney-General intervening)*[2] (1976), and *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd*[3] (1977), but first their general context must be established.

Before the *Carl Zeiss* case[4] came to the House of Lords in 1966, the judicial attitude in England to the legislation and the acts of officials of a government not recognised by the United Kingdom government was that they had no legal effect even in the field of private law and even where the unrecognised government was not party to the dispute.[5] Among the writers this, the orthodox view, was supported by Lauterpacht[6] though there were dissenters.[7] However, in this case, the argument, as the United Kingdom government had not recognised the East German government the latter's acts could not be enforced, was rejected by the House of Lords. It was held that, although the United Kingdom recognised the Soviet Union and not the East German government as the governing authority in East Germany, the acts of this latter government would be given effect in the United Kingdom ". . . because they are acts done by a subordinate body which

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[1]The author has discussed the earlier cases in an article "Non-Recognition of Governments and the Conflict of Laws: The Rhodesian Situation" published in 1974 *JR* 127. The first part of this article contains material from its predecessor and I am grateful to W Green & Son Ltd of Edinburgh, the publishers of the *Juridical Review*, for permission to use this material here.

[2][1977] Ch 41 (CA).

[3][1978] 1 QB 205.

[4]*Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL).

[5]See, for example, *Luther v Sagor* [1921] 3 KB 532 and *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1965] Ch 596 (CA).

[6]See text accompanying n 37 *infra*.

[7]For example, AE Anton *Private International Law* (1967) 82–85 and K Lipstein "Recognition of Government and the application of Foreign Laws" (1950) 35 *Tr Grotius Soc* 157. On Anton's views see n 57 *infra* and, on Lipstein's, see n 47 *infra*.

the U.S.S.R. set up to act on its behalf".[8]

It was appreciated that where this particular way out was not available, the application of the accepted rule could create a very unsatisfactory situation; all legislation and all executive and judicial acts done by persons appointed by the unrecognised government would have to be disregarded. Thus the incorporation of companies, marriages and divorces and all other judgments whether relating to family or commercial matters, so tainted, would have to be treated as void. Obviously the general approach required some modification and a doctrine (called the doctrine of necessity) developed by the United States courts could perhaps provide the answer, though it was not necessary for the decision in this case to reach a conclusion in this regard.[9]

Lord Wilberforce made this point as follows:

> "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."[10]
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> "In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary 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 . . . and have been developed and reformulated, . . . , in later cases."[11]

Only a few years were to pass before this question of whether and to what extent the doctrine of necessity could be used in this type of situation came up for decision in the courts. Indeed, even before the House of Lords decision in the *Carl Zeiss* case, an event had occurred that was to lead to a number of important judgments on this topic. This was the unilateral declaration of independence by the Smith government in Southern Rhodesia, now Zimbabwe, on 11 November 1965. The cases that followed illustrated very clearly the limitations of the traditional approach to recognised governments and resulted in some significant development of the rules by the courts and, in so far as Southern Rhodesia was concerned, their amendment by legislation.

I have discussed these cases in some detail elsewhere;[12] here I will

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[8]Lord Reid at 907. On this issue of the legality of East German legislation all the other judges in the House of Lords agreed with the views of Lord Reid or adopted a similar approach.

[9]Lord Reid at 907–908; Lord Wilberforce at 953–954.

[10]At 954.

[11]At 954. Lord Wilberforce conceded that no trace of this doctrine was to be found in English law but suggested that there was nothing in the relevant cases that would prevent its adoption. It was not then necessary to decide the point but he was of the view that whether and to what extent the doctrine could be invoked remained an open question. See 954.

[12]In the article referred to in footnote 1. The most important cases are: *Madzimbamuto v Lardner-Burke* 1968 2 SA 284 (RAD) and [1969] 1 AC 645; *Adams v Adams* (*Attorney-General intervening*) [1971] P 188; *Bilang v Rigg* [1972] NZLR 954.

merely summarize their effect. As regards the private international law aspect, it is clear that the approach considered the correct one in these cases was: When a court refers a matter under its choice of law rules to the law of another country, the reference is to the laws of the recognised government of that country. Those laws may allow effect to be given to the laws and acts of officials of an illegal government, or to some of them, but this is a matter for the laws of the recognised government to determine. The doctrine of necessity is part of English law, but it is not part of English private international law; it is an internal doctrine. Whether, in any situation, the laws of an unrecognised government can be given effect in an English court is a matter referred to the laws of the recognised government: it may have a doctrine like that of necessity or it may not – it is a matter of the content of the law of that government. One's own government, however, has ultimate control, it can always extend recognition to the revolutionary government or deal with unsatisfactory aspects of the situation by legislation.

Where English law is the constitutional law of a country which now has an unrecognised government, the laws and acts of officials of that government may be recognised if the requirements of the doctrine of necessity are met. This doctrine, in essence, is to the effect that ". . . when a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effect to commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilised society."[13] The doctrine is based on implied mandate from the lawful government "which recognises the need to preserve law and order in territory controlled by a usurper"[14] and cannot be applied where to do so would run contrary to the clear wishes of the lawful sovereign.

In this regard different interpretations of the attitude of the British government to Southern Rhodesia caused some disagreement as to whether or to what extent the doctrine could be applied to the situation in that territory. Some factors, like the passing of the Southern Rhodesia Constitutional Order of 1965[15] which, *inter alia*, denied legislative competence to the legislature of Southern Rhodesia or any other legislature set up in the territory unless this was done by parliament, legislation from such a source being void and of no effect, could be interpreted as evidence rebutting or strictly limiting any such mandate. On the other hand, factors such as the statement by the lawful governor that it was the duty of all in the country including the judiciary, the armed services, the police and the public services to maintain law and order and to carry out their normal tasks,[16] and the fact that in 1967 when the Chief Justice was to be absent from the country, the lawful government appointed an acting Chief Justice,[17] supported the presumption in favour of this mandate. In *Madzimbamuto*, the Privy Council, Lord Pearce dissenting, overruled the Appellate Division of the High Court

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[13]Lord Reid in *Madzimbamuto* at 726.
[14]Lord Reid in *Madzimbamuto* at 729.
[15]SI 1965/1952.
[16]See *Madzimbamuto* (PC) at 714–715 and 738, and *Adams* at 204–205.
[17]*Madzimbamuto* (PC) at 737.

of Rhodesia and decided that the legislation under which Mr Madzimbamuto was detained could not be given effect under the doctrine of necessity. Then, in *Adams*,[18] a divorce obtained in Southern Rhodesia that was defective solely in that it was granted by a judge appointed after UDI was denied recognition by Sir Jocelyn Simon, the doctrine of necessity being viewed as inapplicable in the circumstances. However, in *Bilang v Rigg*[19] Mr Justice Henry in the Supreme Court of New Zealand recognised a grant of letters of administration made by an official of the High Court of Rhodesia appointed after UDI. He applied the doctrine of necessity. He did not consider that his decision conflicted with that of the Privy Council in *Madzimbamuto* though it was perhaps, he thought, inconsistent with *Adams*. It is interesting to note that although the South African government did not recognise the Smith government, in practice the latter's legislation and administrative and judicial acts were treated as valid in South Africa.[20]

It emerged from these cases that the doctrine of necessity based on implied mandate can be relevant in three very different situations where a court has to decide whether to give effect to the laws and administrative and judicial acts of a revolutionary government:

- where the court is operating in an area under the control of the revolutionary government and it is not yet clear that the revolution will succeed (*Madzimbamuto*);
- where the court is operating in an area under the control of the lawful government (*Adams*);
- where the court is operating in a neutral area the government of which recognises the previous, not the revolutionary, government (*Bilang*).

Only the last of these is a conflict of laws situation but, strangely, none of these cases suggests that the doctrine of necessity is not the same in all these three rather different situations.

The position that no recognition was given by the United Kingdom courts to the laws and administrative and judicial acts of the Smith government did not prove wholly acceptable to the British government and legislation followed on the matter. This does not mean that the approach of the courts was wrong – it could be viewed as a situation properly left, by the courts, to be dealt with by the government by legislation if this was thought appropriate. The relevant provisions were contained in two Orders in

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[18][1971] P 188. See too *McGill v Robson* (1971) 116 *Sol Jo* 37. It is submitted that Sir Jocelyn Simon's approach to necessity based on implied mandate in *Adams* was incorrect in some respects. The question is: Does the lawful government wish its subject in the rebel territory to obey the laws of the rebels in so far as this is necessary to preserve law and order and the fabric of society? There was a tendency for Sir Jocelyn Simon in this case to move towards another test and to ask: Does the lawful government wish external recognition given to rebel laws or does it wish a "legal blockade"? His view that judgments pronounced after UDI by judges appointed before UDI were valid was rejected by all three judges in the Court of Appeal in the case *In re James* at 65–66, 72 and 77–78.

[19][1972] NZLR 954.

[20]The matter never came directly before the courts in South Africa. There is one case of slight relevance – *S v Oosthuizen* 1977 1 SA 823 (N). For discussion of this case see Dugard (1977) 94 *SALJ* 127 and Rudolph (1977) 94 *SALJ* 131.

Council. The earlier, that of late 1970[21] gave the appropriate courts in England and Wales and Scotland jurisdiction to hear divorce and nullity proceedings in certain circumstances where either spouse was domiciled or resident in Southern Rhodesia.

The other order, that of late 1972,[22] was substantially more extensive in its provisions. It validated Rhodesian marriages and divorce, nullity of marriage and certain other status decrees of Rhodesian courts which would otherwise have been void because of UDI. Courts outside the United Kingdom adopting the English approach to the recognition of legislation and acts of unrecognised governments could, after the passing of this order, give effect to the laws and acts of the Smith government to the extent that these were recognised in the order. This would have been on the basis that these laws and acts had been recognised as valid by the lawful government. Now that UDI is over, such courts outside the United Kingdom can rely on the general indemnifying provisions of the Zimbabwe Act 1979,[23] to give recognition to the laws and acts of officials of the Smith government.

This then is the background: we can now turn to the views of Lord Denning MR, on this matter of unrecognised governments.

The first relevant case is *In re James (an insolvent) (Attorney-General intervening)*[24] heard in 1976. A debtor was sequestrated by the High Court of Rhodesia and the Chief Justice of that court issued letters of request to the bankruptcy court of the English High Court, invoking s 122 of the Bankruptcy Act 1914, asking the English High Court to assist in collecting the debtor's English assets. This assistance in terms of s 122 could only lawfully be given if the High Court of Rhodesia was a "British Court". The majority (Scarman and Geoffrey Lane, LJJ) ruled that, even if the High Court of

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[21]SI 1970/1540, repealed by the Zimbabwe Act 1979 s 6(3) Schedule 3.

[22]SI 1972/1718, repealed by the Zimbabwe Act 1979 s 6(3) Schedule 3.

[23]Zimbabwe Act 1979 s 3.

[24][1977] Ch 41 (CA). The background to the case, and I borrow here from Lord Denning, was that the debtor, a lawyer in Zambia, made off with some £160 000 belonging to his firm or its clients. His partners caught up with him in Southern Rhodesia and obtained judgment against him there. It was not satisfied and he was made insolvent in Southern Rhodesia. It was thought that he had salted away a substantial amount of the money in England and thus letters of request were directed to the English court. The English Registrar in Bankruptcy acted on these letters by appointing an English receiver. The latter needed to obtain information about the insolvent's assets in England and, to this end, summoned the insolvent's brother who lived in Bromley to appear before him. The brother objected claiming that the Rhodesian High Court was not a "British Court" and was thus not entitled to the assistance it was receiving. His objection was overruled by the Registrar in Bankruptcy and he then appealed to the court. Before the matter was heard, the Attorney-General applied to be made a party to the appeal and this was allowed. "At the hearing it was the Attorney-General, through his counsel, Mr Blom-Cooper, who launched the main attack on the Rhodesian courts. It was he who asked us to give no recognition whatever to what the Rhodesian courts had done. He said that we should give no help whatever to get in the money or property of David James – so as to restore it to the rightful owners. It was, he said in the interests of high policy. All I would say about his argument is this. If it be in the interests of high policy, it is not in the interests of justice. I see no justice whatever in letting David James get away with his ill-gotten gains and letting the rightful owners go away empty-handed" – Lord Denning MR at 59–60.

Rhodesia could be viewed as a court functioning in a British territory, it was, nonetheless, not a "British Court".[25]

Lord Denning MR, in his dissenting judgment held that the High Court of Rhodesia was a "British Court" for the purposes of s 122 of the Bankruptcy Act 1914. He reviewed the relevant facts and concluded that:

> ". . . during the interregnum the courts of justice in Southern Rhodesia were lawfully exercising jurisdiction over matters coming before them – under a mandate, implied in that behalf, from the lawful sovereign – provided always that they applied to those matters the laws as they existed on November 11, 1965, the date of U.D.I. and not on the laws passed by the unlawful regime".[26]

The exercise of jurisdiction in insolvency in this case by the Rhodesian court met this test; this was a lawful exercise of jurisdiction. There remained, however, the question: the High Court of Rhodesia was clearly a court but was it a "British Court"? Lord Denning's answer was:

> "To my mind the decisive factor is that they are courts sitting in a British colony. They are administering the laws of insolvency as enacted in the days of the lawful sovereign and still in force with the authority of the lawful sovereign. When properly administering those laws, they may properly be described as 'British courts'."[27]

This judgment is interesting and the basic argument is again a tenable one. However, the judgment has some defects.

It has been held that whether or not a rebellion has ended is relevant to the possible application of the doctrine of necessity.[28] Throughout his judgment, given in October 1976, Lord Denning speaks as if the rebellion in Southern Rhodesia should be treated, for practical purposes, as already over,[29] though this was not to be the position for a further three years. If the "legal blockade" was required by public policy as a companion to the economic one, then it was clearly still then too early to dismantle it.

There are other minor criticisms – for example, Lord Denning has misunderstood what was decided in *Ndhlovu*,[30] and, more serious, the effect of his holding that the doctrine of necessity is applicable in the Rhodesian situation is considerably restricted by his imposition of the limitation that the doctrine does not apply where the law concerned was enacted in Rhodesia after UDI. The reason for imposing this limitation is the imperative

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[25]*In re James* at 70–72 and 77–78.

[26]At 63.

[27]At 63.

[28]See *Adams* at 210–211.

[29]See, for example, 61 and 67.

[30]*Ndhlovu v The Queen* 1968 4 SA 515 (RAD). Lord Denning (at 65) considered that the finding in *Ndhlovu* that the Smith government was then the *de iure* government of Rhodesia was wrong and inconsistent with the judgment in *Madzimbamuto*. This is not so. In *Madzimbamuto* it was held that where a revolution has clearly succeeded courts in that country must enforce the laws of the new government but that the success of the revolution in Southern Rhodesia was not then assured. In *Ndhlovu* this approach to the law was followed but a different conclusion was reached on the facts at this later date, that is, it was held that the revolution should then be viewed as successful in the sense that the British government would not succeed in regaining control of the government of Southern Rhodesia.

nature of the provisions of the Southern Rhodesia Constitution Order 1965[31] which, as we have seen, rendered enactments of the Rhodesian legislature void and of no effect. Support for such a limitation is to be found in both *Madzimbamuto*[32] and *Adams*,[33] but Lord Pearce in *Madzimbamuto* argued that this limitation did not flow from the order and Lord Denning does not even mention, let alone discuss and specifically reject, this argument. Lord Pearce's conclusion on this point was as follows:

> ". . . for the present argument it makes no difference if an Order in Council expressly made acts illegal and void, so that instead of being plainly illegal and void as contrary to the lawful Constitution and lawful Government of Rhodesia they also become illegal and void as contrary to an Order in Council. They were still subject to the principle of necessity or implied mandate and still within the margin of tolerance laid down in the Governor's directive. There is no indication in the Order in Council that it is intended to exclude the doctrine of necessity or implied mandate by enjoining (inconsistently with the Governor's directive) continuing disobedience to every act or command which had not the backing of lawful authority. Even had it done so, I feel some doubt as to how far this is a possible conception when over a prolonged period no steps are taken by the Sovereign himself to do any acts of government and the result would produce a pure and continuous chaos or vacuum. And even apart from the Governor's directive I would certainly not be prepared to infer such an intention where it was not expressly stated."[34]

So far Lord Denning in his approach to unrecognised governments has adopted what can be described as the orthodox view, but now we turn to his approach in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] 1 QB 205 (CA).[35] The unrecognised government in question is that of the North of Cyprus, the only government of Cyprus recognised by the British government is that set up for the whole of Cyprus by the 1960 Act of the United Kingdom parliament.[36] Lord Denning considered that there were two views on the correct approach in law to the laws and acts of unrecognised governments. The one is that, as stated by Lauterpacht in a work published in 1948, ". . . no juridical existence can be attributed to an un-

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[31] *In re James* at 62 and 63. These provisions are summarized *supra*: text accompanying n 15.

[32] For example, see Lord Reid at 729.

[33] For example, see Sir Jocelyn Simon at 210.

[34] *Madzimbamuto* at 745.

[35] The basic facts, taken from the headnote of the case, were as follows: "Two companies registered under the law of the Republic of Cyprus [the recognised government] owned Greek Cypriot Hotels in Kyrenia when it was occupied by troops from Turkey invading the north of the island in 1974. They issued a writ in 1977 against an English travel company and an individual purported to represent in London the "Turkish Federated State of Cyprus" the unrecognised government, claiming damages and an injunction to restrain the defendants from conspiring to procure, encourage, or assist trespass to the hotels by circulating brochures and by inviting tourists to book holidays in the hotels. They also moved the judge in chambers for an interim injunction in terms of the writ. May J, . . . granted an interim injunction . . . The individual defendant appealed."
This case subsequently came before the House of Lords – see [1978] 2 All ER 1168 (HL (E)). The House of Lords did not go into the question of laws and acts of unrecognised governments which was dealt with by Lord Denning in the Court of Appeal. It was held, however, that the ruling that the court had no jurisdiction in the matter, which was based on the rule in the *Mocambique* case, did not apply to the claim for conspiracy to effect trespasses to the contents of the hotels and that the action could proceed in this respect.

[36] *Hesperides Hotels* at 276.

recognised government and . . . no legal consequences of its purported factual existence can be admitted . . . The correct and reasonable rule is that both the unrecognised government and its acts are a nullity."[37] The other view, to which Lord Denning himself subscribes,[38] is that

> ". . . the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government *de jure* or *de facto*: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth: and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not."[39]

Lord Denning's approach then is not that which has emerged as the correct one from the cases considering the Southern Rhodesian situation. As we have seen these cases suggest that the correct approach to the laws and acts of officials of an unrecognised government is only to give effect to these if this is possible under the legal system of the lawful government. As regards the doctrine of necessity, this can only be applied where the legal system of the lawful government contains this concept; this doctrine is not part of English private international law. Lord Denning here seems to be adopting a very different approach. He seems to be saying that the laws and acts of officials of an unrecognised government will be given effect if two requirements are present. First, that the rebel government is in control of the territory in question, and, secondly, that the relevant laws or acts are necessary for the maintenance of law and order within that territory. In applying these two tests he would not seem to consider the attitude of the recognised government to the laws and acts of officials of the unlawful government to be in any way relevant. Then, it would seem that, to him, implied mandate is, in this context, a pure fiction; it is here better described

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[37] *Recognition in International Law* (1948) 145 *et seq* quoted in *Hesperides Hotels* at 217.

[38] Although Lord Denning prefaces his remarks quoted here with the introductory qualification, "If it were necessary to make a choice between these two conflicting doctrines, I would unhesitatingly hold that . . .", it is clear from his judgment that he is in fact, applying the approach which he believes to be the correct one.

[39] At 218. It is surprising that this can be put forward as a tenable view in the current state of the law, but not as surprising as the opinion of Roskill LJ in *Hesperides Hotels* that there has been no further development in this field since *Carl Zeiss*. He says, at 228, ". . . having regard to the observations of their Lordships in the House of Lords in the *Carl Zeiss* case [1967] 1 AC 853, and in particular to those of Lord Reid and Lord Wilberforce, it is clear that at some future date difficult questions may well arise as to the extent to which, notwithstanding the absence of recognition, the English courts will or may recognise and give effect to the laws or acts of a body which is in effective control of a particular area or place." It seems that he has, perhaps, been misled in this respect by the passage he quotes from 560 of the then current edition (9th 1973) of Dicey and Morris which is to the following effect: "However there is high authority for regarding as open the question whether the courts can recognise the laws or acts of a body which although it does not satisfy either of the foregoing tests (those tests being concerned with recognition) is nonetheless in effective control of the place in question." The only judicial authority given in Dicey and Morris for this proposition is the *dicta* of Lords Reid and Wilberforce in *Carl Zeis* quoted in the early pages of this chapter. Both the passage and footnote appear in the previous 1967 edition and these have received no revision in the 1973 edition despite the fact that *Madzimbamuto*, *Adams* and *Bilang* have all been decided in the intervening years.

as "irrebuttably presumed mandate".

This approach of Lord Denning's raises a number of points. The first I wish to make is that, though his views in this regard are part of his *ratio*, there is no support for this approach in the *rationes* of the other two judges of the court, Roskill and Scarman, LJJ. Roskill LJ in the *dictum* quoted earlier in this chapter[40] clearly rejects what may be called the Lauterpacht view, but that does not mean that he supports Lord Denning's view on the current law on this matter. It is, indeed, strange that Lord Denning nowhere considers the approach adopted in the cases on the Southern Rhodesian position as being a rival approach to his. He obviously does not consider these cases irrelevant because he quotes[41] from his own remarks in *James*[42] on the subject of unrecognised governments. Surely it is the view put forward in these cases on Southern Rhodesia that is the rival to his views rather than the Lauterpacht view which predates the decision of the House of Lords in *Carl Zeiss*? It may, technically, be possible to distinguish the English cases on the Southern Rhodesian situation from the position in *Hesperides Hotels* on the grounds that what was being considered in the first group of cases was the approach that should be adopted by the courts in the lawful government's territory to the laws of the rebel government, while in *Hesperides Hotels* the forum was neither that of the lawful government nor that of the rebel government but that of another state. However, Lord Denning does not draw this distinction in *Hesperides Hotels* – indeed as already noted, he quotes from *In re James*, and, in any case, it is not clear that this distinction is valid. Again *Bilang* cannot be distinguished on this ground as this is a New Zealand case, but there is no mention of it in *Hesperides Hotels*.

There is little support for Lord Denning's approach in the authority he cites as favouring his view of the law.[43] The first of these, which he states to be the most authoritative, is that of Lord Wilberforce in *Carl Zeiss* to the following effect:

> ". . . where private rights or acts of everyday occurrence, or perfunctory acts of administration are concerned . . . the courts may, in the interests of justice and common sense, 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."

This excerpt, as quoted in *Hesperides Hotels*, is misleading. If the fuller quotation of the relevant passage, set out earlier in this article (at 3) is read, it will be observed that the reference is to American law not English law as Lord Denning's extract suggests. It is true, however, that Lord Wilberforce thought it might be necessary for the English courts to adopt the American approach if the appropriate situation arose though he did not decide the point as it was not then relevant. Similar *obiter* remarks were also made by Lord Reid[44] in *Carl Zeiss* but these are not referred to by Lord Denning.

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[40]See n 39.
[41]*Hesperides Hotels* at 218.
[42]*In re James* [1977] Ch 44 at 62.
[43]He sets out these authorities on 218.
[44]*Carl Zeiss* at 907–908.

Although these *dicta* by Lords Reid and Wilberforce are critical of the Lauterpacht approach, it is doubtful whether any real authority for Lord Denning's particular approach, as opposed to the approach in the cases on Southern Rhodesia, can be found in these very cautious and rather general remarks clearly designated as *obiter* by their authors. Certainly Lord Denning's apparent abandonment of the view that the existence of the implied mandate required for necessity can be disproved, runs contrary to Lord Reid's approach to this matter in *Madzimbamuto*.[45]

The second authority cited by Lord Denning[46] in support of his version of the law is an article by Professor Lipstein published in 1950[47] and cited in Dicey and Morris.[48] Apart from claiming that the article supports his view, he makes no further reference to it save for quoting its concluding sentence, which is, in fact the tenth and last of Lipstein's conclusions. It reads:

> "The regulations of foreign authorities which have not been recognised may be applied as the law of the foreign country if they are in fact enforced in that country, notwithstanding that the authorities have not been recognised by Great Britain."[49]

This valuable, if now dated, article dealt with many other matters than that directly in point here[50] – it has already been pointed out that the above quotation from Lipstein is the tenth and last of his listed conclusions. This last rule of his, despite its positive form is, in fact, a statement of what he thinks, or perhaps, thought, the law on this topic should be. In view of this and the developments in this field since he wrote, little support for Lord Denning's views in *Hesperides Hotels* can be found in this article.

The third authority cited is Lord Denning himself, or, more accurately, part of his judgment in the case *In re James*. This reads:

> "When a lawful sovereign is ousted for the time being by a usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he can no longer do it himself he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy: . . ."[51]

If this judgment is read in its context, that of the Southern Rhodesian situation, and if this excerpt is read in the context of the whole judgment, there is nothing in either that deviates from the generally accepted approach in the cases about Southern Rhodesia. Indeed, the quotation is preceded by a long discussion of whether or not it is implicit in the conduct of the lawful government of Southern Rhodesia, the British Government, that they wish the courts in that colony to continue to apply the law – the conclusion is that it was.

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[45] *Madzimbamuto* at 726–731. Lord Reid's opinion was that of the majority of the Board including Lord Wilferforce.

[46] At 218.

[47] The title and reference of this article may be found in n 7.

[48] At 560 (9 ed 1973).

[49] Lipstein at 188.

[50] The article commences at 157 but the portion of relevance here is 183–8.

[51] *In re James* at 62, quoted in *Hesperides Hotels* at 218.

Lord Denning cannot suggest, with any justification, that his new approach in *Hesperides Hotels* was in any way foreshadowed in his judgment in *James* and his fourth and final authority, the general approval of his observations on necessity in *James* by Scarman LJ,[52] in that same case and the remark by Scarman LJ, that:

> "I do think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government."[53]

cannot be construed as providing any support for Lord Denning's new approach in *Hesperides Hotels*. That there has been a fundamental change in Lord Denning's views of the law on this matter is well illustrated in the change in his approach to the relevance of the attitude of the lawful government to the laws and acts of officials of the unrecognised government. In *James* he considers this matter at length and is clearly of the view that in the Southern Rhodesian situation there is positive evidence of the mandate required for the operation of the doctrine of necessity. He, however, goes on to say that even if the evidence does not support express mandate, the required mandate is to be implied, presumably in the absence of sufficient evidence to the contrary.[54] However, his investigations in his judgment in *Hesperides Hotels* into the current situation as regards the government of Cyprus[55] is not directed at ascertaining the attitude of the recognised government to the unrecognised government but is undertaken, it would seem, for the purpose of ascertaining whether the government of the North "is in effective control or not"[56] – the attitude of the lawful government has become irrelevant.

Although this judgment of Lord Denning's is disappointing, the approach which he adopts has much to commend it. The other approach in its primitive form, or in the more sophisticated form it has taken in the cases on Southern Rhodesia, gives precedence to state interests over the interests of the individuals concerned. This has been criticised as being inappropriate in cases involving private international law, a branch of private law.[57] Lord Denning made this point in *Hesperides Hotels* taking as his starting point the

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[52]At 70.

[53]*In re James* at 70, quoted in *Hesperides Hotels* at 218.

[54]At 62.

[55]At 218 *et seq.*

[56]Lord Denning in *Hesperides Hotels* at 218.

[57]For instance, Anton (*Private International Law* (1967) 82–85) criticises the Lauterpacht approach. He submits that the main reason for applying foreign law is to do justice to the individuals concerned – it is not because comity between nations requires it. The factors relevant to the granting of political recognition of states for public international law purposes and those concerned with recognition for private international law purposes are different, therefore there is no valid reason why political non-recognition should be accompanied by non-recognition for private international law purposes where the rights of private individuals are concerned.

> "If our courts gave effect in matters of private right to the law of Germany while in a state of war with Britain, why should it not give effect to the legislation in matters of private right of countries whose governments are not recognised by the United Kingdom?"

Enemy aliens, of course, cannot sue in our courts.

often expressed view that the executive and the courts should speak with one voice on this matter of recognition. He said:

> "But there are those who do not subscribe to this view. They say that there is no need for the executive and the judiciary to speak in unison. The executive is concerned with the *external* consequences of recognition, *vis-à-vis* other states. The courts are concerned with the *internal* consequences of it, *vis-à-vis* private individuals."[58]

The approach adopted in the cases on Southern Rhodesia, perhaps we may call it the sophisticated comity approach, means that no recognition can be given to the laws and acts of an unrecognised government unless this is possible under the laws of the recognised government. In some cases it will be possible to give effect to such laws and acts and we have noted three situations where this is possible: where the recognised government has set up the unrecognised government; where the recognised government has provided by legislation for effect to be given to the laws and acts of the unrecognised government; and where the doctrine of necessity is part of the legal system of the recognised government. However, cases will still arise where the application of this sophisticated comity approach will not enable the laws of an unrecognised government to be applied in circumstances where the court feels that they should be applied. Unless the court solves this problem by using the public policy doctrine, what is it to do?[59] On the other hand Lord Denning's approach, although safeguarding the interests of the individuals concerned, takes no account whatever of the state or international interests involved in the matter. The point surely is that, in this field of the enforcement of the laws of unrecognised governments, state and international interests legitimately intrude, even where the matter in issue involves private rights. Both the Denning approach and the sophisticated sovereignty approach err in that they take extreme positions; what is needed is a flexible approach that allows the due weight, appropriate in the particular case in question, to be given to both state and private interests. This could also perhaps be realised by subdividing the field, that is, by adopting different approaches to different situations falling within the general field. The three categories set out earlier in this article (at 7) could be relevant in this regard. Then, again, the two approaches could be combined. My conclusion then is that here, as in several other fields of conflict of laws, notably contract and delict, the traditional approach has been defective in that the rules have been too inflexible and the juridical categories too broad.

I would suggest that where a court is continuing to operate in territory under the effective control of a rebel government then it must apply the laws of that government. Where the rebellion has not yet succeeded, the court should, if this is a practical proposition, only apply such laws as are necessary to the maintenance of law and order – a cynic may view this as an "investment" lest the revolution fail. This is basically the approach set out

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[58]At 217. The approach in *Carl Zeiss* is not wholly consistent with the "one voice" approach.

[59]See the penultimate line of the quotation from the judgment of Lord Pearce in *Madzimbamuto*, text accompanying n 34 *supra*.

in *Madzimbamuto* though here, I would suggest, the application of rebel laws should not necessarily be dependent on the implied mandate of the lawful sovereign, although, if the decision to apply rebel laws can be based on implied mandate, this further safeguards the judge should the rebellion ultimately fail.

Where the court is operating not in rebel territory but in the territory of the lawful government then, I would suggest, it should only give such recognition to the laws and administrative acts of the rebel government as its own government considers appropriate. Where the lawful government has legislated specifically on the matter, then there is no problem, provided the case in question falls within the field of the legislation. Where the legal system of the lawful government recognises some doctrine like that of implied mandate, then that too can be applied. If this leads to results that the lawful government does not like, either because rebels' laws are being enforced or because they are not, it can always deal with the matter by legislation. In this context, that is, where the court in question is that of the lawful government, it would seem inappropriate for the court to adopt a Denning-type approach in which the attitude of the lawful government is considered irrelevant.

In the third situation, the position where there is a real conflict of laws problem, Lord Denning's approach is more relevant. Here the court in question operates not within the rebel territory nor within that, if any, controlled by the previous government, but within the territory of another state which recognises this latter government. This is the situation that existed in *Bilang* and also in *Hesperides Hotels*. In this situation the approach of Lord Denning in *Hesperides Hotels* may be thought appropriate. Here the lawful government is not that of the country of the court so there is not this compelling reason to allow enforcement of rebel laws only insofar as they are enforceable under the system of the lawful government. But some concession is made in this approach to the fact that the rebel government is not recognised for only its laws essential to the maintenance of law and order or to the continuance of ordered living are to be applied. The question arises: does this approach give sufficient weight to state interests? What if the recognised government wishes to impose a legal as well as an economic blockade and the government of the country of the forum is sympathetic to this? The answer may be that, in these circumstances, the government should act by passing appropriate legislation. This seems a more viable proposition than the alternative of the courts' adopting the sophisticated comity approach and the government legislating where this creates undesirable results. One reason for this is that the government is unlikely to promote legislation unless the matter is of substantial national importance and the fact that a small number of foreigners are not getting justice in our courts because a rebel governments' laws cannot be enforced is probably not likely to produce corrective legislation. It is true that such legislation, if rather narrow in its sphere of application, has been passed in relation to Southern Rhodesia, but the circumstances there were unusual in that one of the United Kingdom's own colonies was involved.

In conclusion I would like to mention, very shortly, another recent development in this field. Since 1976 the South African government claims

to have given independence to three areas within its territory. These are Transkei (1976), Bophuthatswana (1977) and Venda (1979). However, no member of the United Nations save South Africa has recognised these new states. The United Kingdom considers these territories still to be part of South Africa and thus falling under the authority of the South African government. Here we would again appear to have the kind of situation that arose in the *Carl Zeiss* case. There it will be remembered, it was argued that, as the United Kingdom government had not recognised the East German government, the latter's acts could not be enforced. This argument was rejected, it being held that although the United Kingdom recognised the Soviet Union and not the East German government as the governing authority in East Germany, the acts of this latter government would be given effect in the United Kingdom ". . . because they are acts done by a subordinate body which the USSR set up to act on its behalf."[60]

This, presumably, is the appropriate approach for the British courts to adopt in respect of Transkei and the other two similar territories, although there has been no case, as yet, on the point to my knowledge. The enactments of their legislatures and the acts of their officials, such as the judgments of their judicial officers, will be recognised by the British courts as being instances of the exercise of authority delegated by the recognised government, that is, that of the Republic of South Africa.

I presume, however, that the British courts will only recognise such exercises of authority by these governments and their officials as are consistent with their basis in delegated authority: acts that involve express or implied claims of independent sovereignty for these governments will not be recognised. This seems a necessary limitation in the case of an unrecognised government set up by a recognised government within part of its territory, although I have not found any authority in the cases to support it. Some confirmation that there is this limitation is, however, to be found in the fact that the United Kingdom immigration authorities do not accept travel documents issued by the governments of Transkei, Bophuthatswana and Venda.

[60]See n 8 *supra*.