

BOOK REVIEWS

CONSTITUTIONAL LEGITIMACY: A STUDY OF THE DOCTRINE OF NECESSITY. By LESLIE WOLF-PHILLIPS. [London: Third World Foundation Monograph 6, Third World Foundation, New Zealand House, 80 Haymarket SW1Y 4TS. N.d. 79 pp. 75p.]

To witness the breakdown of a constitution is a melancholy experience for the lawyer. So many hopes dashed! Walking the nervously-populated streets, observing the tanks marshalled at the House of the People's Representatives, he will ask himself what went wrong: was the constitution inadequate, or were those who presented themselves as the delegates of the people incompetent to fulfil the trust of the people? What has happened? After all, a constitution, like many another law, is based on the behaviour of the reasonably honest man. What it will certainly break down under is the weight of corruption.

So the contemporary political scene is littered with the wreckage of constitutions conceived in hope, born in optimism, and destroyed in despair. There is a surge of reform: admirable principles, borrowing beautiful language, embodying wonderful ideals, are cast into the mould of a new constitution; the nation waits for a constituent assembly to announce its coming into force; elections, free, democratic, sometimes, even, honest, are held; a mass of the people's delegates sweeps into office with promises of change, reform, prosperity. And then the intrigues set in; a licence to operate a taxi acquires a cash value, a permit to put up a new hotel becomes a source of capital, a timber concession is converted into cash overseas, a Swiss bank account, wealth beyond the salary of any minister. Corruption sets in, seeps through the whole of the civil service; the electorate is disillusioned; and at last the only relatively corruption-free element in the public service—the armed forces—is forced to take action, assume power. There is even a handbook on the subject, Luttwak's *Coup d'Etat*.

Once in power, the man on the tank is bombarded with criticism, smeared with contumely. Organizations outside his country, ignorant of his problems but professing an interest in human rights, civil liberties and the like, will conduct a campaign against him and his administration. And, since he is, after all, a military man and not a politician, he will endeavour to replant the fragile seedling of democracy: knowing that if he does not do so, the armed forces will go the way of the rest of the public service. A constituent assembly will once more be established in order to devise a new constitution; and the whole extraordinary process will begin all over again.

In the face of such confusion, the lawyer walks the streets. He is a man who, by reason of his calling, is in love with the concept of law itself. He seeks a legal foundation for the principles of govern-

ment, and is determined to find that foundation in any precedent, any decision, indeed in any authority thought to be invested with the especial magic he seeks. What is the legal position when a constitution breaks down, when, say, the electoral process is so corrupted, the judiciary so inefficient, that no salvage of the constitution is possible? For see, here come the tanks! And the tank commander asks him, Tell me, O lawyer, what semblance of legality can be contrived to justify the action I and my colleagues have taken?

To such a request, this little booklet, consisting of almost forty pages of text and forty pages of appendices, offers an answer. Students of comparative constitutional law will, alas, be all too familiar with the Pakistan cases of *Dosso* (1958) (“nothing succeeds like success”, says the author); *Asma Jilani* (1972) (“usurpers, beware!”: *ibid.*) and *The Begum Nusrat Bhutto* (1977) (“constitutional deviation dictated by necessity”: *ibid.*, again). Also, they will find here comments on the case of *Mustafa Ibrahim* (Cyprus 1974) and be enlightened by the African cases of *Matovu* (Uganda 1966-7), *Sallah* (Ghana 1970), *Lakanmi* (Nigeria 1970) and — of course — *Madzimbamuto* (Rhodesia 1966-8). They will find a summary of the role of the military in Central and South America (“what the constitution says and what the soldiers do”). They will be invited to consider whether the courts should be “guardians of the Constitution” — a weighty question this, indeed.

Most important, perhaps, readers will learn something of the legal doctrine which struggles to confer legitimacy on a usurping authority. In the realm of this doctrine Chitty, Dicey and the ubiquitous Kelsen are to be observed, their doctrines in varying degrees understood and misunderstood. The ghosts of the *Grundnorm* walk. Ah, with zest, I suspect, did Josephides J. (Cyprus 1964) cite Raymond Odent’s *Contentieux Administratif* (Paris 1961) when he outlined, as the author puts it, “the prerequisites for the application of the doctrine of necessity:

- a) an imperative and inevitable necessity or exceptional circumstances;
- b) no other remedy to apply;
- c) the measure taken must be proportionate to the necessity; and
- d) it must be of a temporary character limited to the duration of the exceptional circumstances.”

Here is, according to a Chief Justice of Pakistan, “the true essence of the doctrine”. Well, he should know.

The author raises a question which he develops with an appendix of useful references, *viz.* “Should the Supreme Courts be asked to accept these kinds of onerous decisions; indeed, are they the right bodies to undertake them?” Here is the stuff of learned argument, and this reader perused it with a sense of disbelieving wonder. Yet it is stimulating material, useful for a seminar on constitutional law. The essential merit of the booklet lies, however, in its collection and analysis of all these fascinating modern cases and materials, and it is likely to enlighten and stimulate anyone interested in contemporary constitutional government: at a guess, a reader of this review.

In all, then, this is a useful and inexpensive publication, working out at a cost of a penny a page: a small price to pay, in order to learn why Treason doth never prosper. The author and publishers are to be congratulated on tackling a subject of such sensitivity, and making available so much relevant information, at so modest a price, in so concise a compass.

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