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THE VALIDITY OF THE ACTS OF THE DE FACTO GOVERNMENT OF THE COOK ISLANDS WHICH WAS UNSEATED AS A RESULT OF THE COOK ISLANDS ELECTION PETITIONS OF 1978

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The judgments delivered by Donne C.J. in the High Court of the Cook Islands on 24 July 1978 in the Cook Islands election petition cases[1] had an unprecedented impact: a government was unseated. Sir Albert Henry's Cook Islands Party Government lost nine of the fifteen seats it had held on election night, 30 March 1978. Eight of the nine seats were awarded to the opposition Democratic Party led by Dr T.R.A.H. Davis. In the other constitutency a by-election was ordered.[2]

This article deals with the status of the government of the Cook Islands between 30 March 1978, the date of the general election, and 24 July 1978 when the government was displaced as a result of the judgment of Donne C.J. What was the nature of that government, and what implications arise concerning the validity of its acts?

I. CONSTITUTIONAL BACKGROUND

The Cook Islands are a self-governing territory.[3] New Zealand, however, retains responsibility for external affairs and defence[4] and can therefore legislate for these matters after consultation between the New Zealand Prime Minister and the Premier of the Cook Islands.[5] With this exception, the Cook Islands after the passage of the Cook Islands Constitution Act 1964 by the New Zealand Parliament are in an analogous constitutional position vis a vis New Zealand as New Zealand is vis a vis the United Kingdom following the adoption of the Statute of Westminster.[6] Because of this exception for external affairs and defence, the constitutional status of the Cook Islands more closely compares with that of Jamaica or other former British colonies in the Caribbean. These West Indian nations are internally self-governing, but not independent, and are known as Associated States. The United Kingdom Parliament will not legislate for these states without the request and consent of the legislature of the state itself, except in matters of defence and external affairs. However, to most practical intents, the Cook Islands can be regarded as independent and possessing responsible government.

The Cook Islands have as the basis of their law a constitution, which is declared to be the supreme law of the Cook Islands.[7] The Constitution, which is appended as a schedule to a piece of New Zealand legislation,

the Cook Islands Constitution Act 1964, came into force on 4 August 1965.[8]

The Constitution provides for the introduction of responsible government. Kilbride[9] describes this as the Constitution's "most important aspect". A Legislative Assembly is established consisting of twenty-two members[10] elected from twelve constituencies by secret ballot under a system of universal suffrage.[11] Six of the constituencies return more than one Member of the Legislative Assembly. This is a novel feature in a "first past the post" electoral system. The Legislative Assembly elects the Premier, who will be the leader of the party that commands the support of a majority of the Assembly. He or she then selects a Cabinet of not fewer than three nor more than five other members of the Assembly.[12] Cabinet has the general direction and control of the Government. Each Minister is responsible for the portfolios assigned to him or her, and the Cabinet is collectively responsible to the Legislative Assembly for its administration of the Government. The Head of State is the High Commissioner, who as representative of Her Majesty the Queen fulfils the same role as the Governor-General of New Zealand. The Constitution expressly provides, thus formalising what is convention in New Zealand and the United Kingdom, that the High Commissioner shall act on the advice of Cabinet, the Premier or the appropriate Minister.[13] In fact, Article 5(2) further provides that if the High Commissioner does not accept the advice tendered to him or her within fourteen days, the advice is deemed to have been accepted. Provision is also made for the appointment of the Chief Judge of the High Court of the Cook Islands as Deputy High Commissioner in the event of a vacancy in the office of High Commissioner, or if the High Commissioner is absent from the Cook Islands.[14] In fact, Donne C.J. was acting in this capacity at the time of the election petition cases and immediately after giving his determinations had to revoke Sir Albert Henry's warrant as Premier, and swear in Dr Davis, as he then was, in his place.

Provision is made for an Executive Council which comprises the Cabinet with the addition of the High Commissioner. Its function and

role are analogous to those of the New Zealand Executive Council.[15] The Executive Council may refer matters back to Cabinet for its reconsideration, but without the concurrence of Cabinet has no power to vary or negative any Cabinet decision.[16]

The legislature is unicameral. Although there is what appears to be a second chamber, the House of Arikis fills only an advisory function, and has no power to affect legislation. The Legislative Assembly has a maximum life of three years,[17] and is given power to make laws for the peace, order and good government of the Cook Islands.[18] These laws may have extra-territorial effect[19] notwithstanding that matters of defence and external affairs remain the responsibility of New Zealand. The Legislative Assembly is expressly given the authority to amend or repeal any law in force in the Cook Islands insofar as it affects the Cook Islands.[20] This means that New Zealand law which was in force prior to the adoption of the Constitution is to be treated as part of the municipal law of the Cook Islands and may be dealt with without reference to the body which enacted it, ie. either the New Zealand or the United Kingdom Parliament.[21]

Article 41 establishes the means for constitutional amendment. With the exception of provisions which are doubly entrenched,[22] the Constitution may be amended or repealed, expressly, or impliedly by the passage of inconsistent provisions, only if a two-thirds majority of the Legislative Assembly vote twice, with an interval of not less than ninety days between the two votes, for an amending Bill. There must be presented to the High Commissioner at the time that the Bill is offered for the Royal Assent a certificate from the Speaker that this procedure has been followed. In the case of the doubly entrenched provisions, the Bill must, in addition, be put before the electors at a referendum and obtain the support of two-thirds of the valid votes cast.[23]

Legislative autonomy is further ensured by the provision of a "request and consent" section similar to, but in greater detail than, section 4 of the Statute of Westminster 1931 (U.K.). Article 46 provides that no enactment of the New Zealand Parliament after the adoption by the Cook Islands of the Constitution shall extend to the Cook Islands unless the Cook Islands Government has expressly requested and consented to its passage. It must be expressly declared in any such enactment that such request and consent has been given.

Article 77 made the transition from dependent to self-governing status by providing that "the existing law shall, until repealed, and subject to any amendment thereof, continue in force on and after Constitution Day" (ie. the day, 4 August 1965, on which the Constitution came into effect.) That existing law had its basis in the Cook Islands Act 1915 (N.Z.) which provided that the law of England as of 14 January 1840[24] should apply mutatis mutandis to the Cook Islands. Acts of the British Parliament applied only so far as they were in force in New Zealand at the coming into operation of the Cook Islands Act 1915. That Act defined the Cook Islands as part of New Zealand, but the residents could not vote in New Zealand elections, paid no New Zealand taxes and derived no benefits from social security legislation. They were, however, New Zealand citizens (and still are) with unrestricted rights of entry to New Zealand. New Zealand statutes only applied to the Cook Islands when expressly indicated.[25] Thus the law in force in the Cook Islands comprises:

a) "pre-1965" law which includes

1) as much of the English common and statute law in force as of 14 January 1840 as has not subsequently been repealed or amended by the New Zealand Parliament in any legislation between 1915 and 4 August 1965 that expressly applied to the Cook Islands;[26]

2) any legislation of the New Zealand Parliament between 1915 and 4 August 1965 that expressly applied to the Cook Islands;

3) any legislation of the United Kingdom Parliament after the Statute of Westminster Adoption Act 1947 (N.Z.) expressly requested and consented to by the New Zealand Parliament and expressly declared to apply to the Cook Islands. Examples of this would be rare;

as far as any of it has not been subsequently amended or repealed by the Legislative Assembly of the Cook Islands; and

b) "post-1965" law which includes

1) legislation of the Cook Islands Legislative Assembly after 4 August 1965;

2) any New Zealand legislation after 4 August 1965 expressly requested and consented to by the Cook Islands Government. This could include any legislation of the United Kingdom Parliament requested and consented to by the New Zealand Parliament and also requested and consented to by the Cook Islands Government. This source of law is more potential than real and would probably only affect matters pertaining to the succession of the Crown.

II. THE CASES

Fifteen election petitions were filed after the General Election in the Cook Islands on 30 March 1978. They fell into two groups: those challenging the return of the Cook Islands Party candidate for Mitiaro, David Tetava, on the grounds of bribery and treating which are offences under the Electoral Act 1966 (Cook Islands),[27] and those challenging the elections of eight of the nine successful candidates in the constituencies of Te-Au-O-Tonga, Takitimu and Puaikura,[28] in the well-known "fly-in" voter arrangement.

A hurricane caused damage on the island of Mitiaro prior to the election, and the Premier, Sir Albert Henry (as he then was) ordered relief supplies to be sent. Instead of being sent as government-provided assistance, the supplies, valued at over $1000, were announced as assistance from the Cook Islands Party, although they had been paid for with government finance. The candidate Tetava distributed the supplies, and even announced that the Premier and his wife had donated $300 towards the cost of the food. This was completely untrue. Donne C.J. found that the motive of the Cook Islands Party in distributing the supplies was predominantly to pursue political popularity.[29] His Honour found that the offence of treating, whereby any candidate at an election who by himself or his agent[30]

> corruptly gives or provides any meat, drink, entertainment, or other provision to or for any person for the purpose of procuring his own election...or for any other purpose calculated to influence the vote of that person

was made out, and that the election of Tetava was void. Because it was

not possible to determine the quantifiable effect of the treating in terms of the votes cast for each candidate, Donne C.J. ordered a by-election.

In the other petitions concerning the three electorates on the island of Rarotonga, the petitioners alleged bribery principally in the provision by the Cook Islands Party of free or heavily subsidised air travel for voters to return to the Cook Islands to vote in the General Election. There is no provision under Cook Islands electoral law for voters to cast votes outside the Cook Islands. Both the Cook Islands Party and the Democratic Party organised charter flights to transport voters from New Zealand to the polls. The Democratic Party provided its flights to voters at cost. The Cook Islands Party charged only $20 for each voter selected by its officials to travel. Finance for this venture was arranged by the Premier. Sir Albert received an advance against the revenues due to the government from the Cook Islands Philatelic and Numismatic Bureau, a joint venture with an American financier, Mr Finbar Kenny. A cheque for $337,000 was given to the Premier, and after a complicated series of transactions,[31] the fee for the charter flights ($A290,000) was lodged in an account for Ansett Airlines Australia. Donne C.J. found that the Cook Islands Party respondents had by the provision of charter flights for $20 as an inducement to vote for the Cook Islands Party, given valuable consideration to voters with the corrupt intention of inducing the voters to vote for the respondents. The consideration had been given with the express or implied condition that the voter would vote for the respondent candidates, and therefore it amounted to bribery under section 69 of the Electoral Act 1966.[32]

Donne C.J. ordered a scrutiny of the votes of the "flying voters", which revealed that had it not been for the votes of voters flown in by the Cook Islands Party, the Democratic Party would have won the eight seats on the island of Rarotonga which were the subjects of the challenge. Accordingly, His Honour declared the elections of the respondent candidates void. He held:[33]

> the proper course is to disallow all of the Ansett "fly-in" votes and to thereupon ascertain which candidates

> had the majority of lawful votes in each constituency and then determine such candidates to have been duly elected.

Consequently, Donne C.J. held that the respondents "were not duly elected",[34] and substituted the Democratic Party candidates in their places. The net result of the two actions was that nine Cook Islands Party candidates had their elections avoided, eight Democratic Party candidates were declared elected instead, one by-election was ordered, the Cook Islands Party lost its majority in the Legislative Assembly, and a Democratic Party Government was formed by Dr Davis.

III. THE STATUS OF THE GOVERNMENT OF THE COOK ISLANDS FROM 30 MARCH 1978 to 24 JULY 1978 AND THE VALIDITY OF ITS ACTS.

Questions must arise concerning the status of the government of Sir Albert Henry that ruled, or purported to rule, the Cook Islands between the date of the election and the date of the declaration by the Chief Judge that nine of its members had been elected unlawfully. The declaration was given in terms of section 79 of the Electoral Act 1966 (Cook Islands) which provides:

> Result of inquiry -
>
> 1) The Judge shall determine whether by reason of some irregularity that in his opinion materially affected the result of the election, the election is void; or whether the candidate whose election is complained of, or any and what other candidate, was duly elected.
>
> 2) The Judge shall cause any determination under this section to be transmitted to the Chief Electoral Officer, who shall forthwith -
>
> (a) Publicly notify any such determination:
>
> (b) Where any election is determined to be void, declare the seat vacant pursuant to section 7 hereof:
>
> (c) Where any other candidate is determined to be elected, declare that candidate to be elected pursuant to section 59 hereof, and revoke any warrant previously issued by him pursuant to that section which is not consistent with the determination.

In the Mitiaro petition, Donne C.J. held[35]

> that the first respondent [the Cook Islands Party candidate] was not duly elected and that his election is void and the election itself is void.

The practical consequence of this declaration was that the seat was immediately vacated. In the Rarotonga petitions, the respondents were similarly declared not have been duly elected and their elections void.[36] It must be noted that the whole electoral process was not declared void, only the elections of the candidates in question. Thus, Donne C.J. could hold[37]

> It having been shown that the [Democratic Party] candidates have obtained the majority of lawful votes I determine that they should have been duly elected and I now declare them to be duly elected.

Again the respondents immediately vacated their seats. His Honour does not discuss what implications, if any, arise from his declaration that nine elections were held to be void. It is not clear whether this declaration means that the elections of the candidates were void ab initio or only void ex post facto the judgment i.e. prospectively void. In practical terms the transition to the Democratic Party Government occurred after the judgment. It clearly could not occur before, and the warrants issued to Dr Davis's Ministry were not retrospectively dated, or were those of Sir Albert's government retrospectively cancelled.

However, an inference may be drawn that the elections of the nine candidates who lost their seats were void ab initio. This is supported by an argument that an election is a fixed event in time, not a continuing state of affairs. If an election is declared void, it means, it is submitted, that either the complete electoral process or ballot, or the return of a particular candidate, is of no validity. In these cases, Donne C.J. found the whole ballot in Mitiaro void, and in the Rarotonga petitions, the elections of the respondent candidates to be void. The void ab initio doctrine is like a declaration that a statute is unconstitutional. The statute is regarded as always having been a complete nullity and of no effect whatsoever. This can lead to some quite severe retroactive consequences. The nature of a finding that a statute is unconstitutional (something more familiar in the United States legal system than in the New Zealand one, but possible in the Cook Islands[38]) is that if a statute is discovered to have no legal foundation, it can therefore never have had any legal foundation. Pannam[39] says this is the "old declaratory theory of the common law in another guise". This theory holds that the function of judges is to discover what the law is. An overruling decision merely corrects a wrongly-held view of what the law was. Pannam cites Blackstone:[40]

> For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a decision was <u>bad law</u>, but that it was <u>not law</u>...

Applying this theory to the present situation, the election results were corrected by Donne C.J. His Honour was finding what the true position was, and should have been had there not been electoral malpractices of sufficient seriousness to avoid the elections of the nine candidates. The consequences of this finding are drastic. The candidates' elections are held to be void ab initio. Therefore everything they have done since their elections as Members of the Legislative Assembly is of no validity as no legal foundation exists to give authority to their acts.

All votes by them in the Legislative Assembly would be void, and if so, the government that depended on these votes would retrospectively be declared to have lost them. The government would not, therefore, have been able to win the divisions it did, or enact legislation not supported by opposition parties. Its contracts, appointments and other executive decisions would also want for legal authority, resting as they do on the government's now apparent inability to command a majority in the Legislative Assembly. These retroactive consequences would indeed be severe and cause potential confusion and uncertainty. Is there any basis to mount a challenge against the validity of the acts of the government on the grounds that the elections of nine of its members have been declared void? Is there any difference between the validity that should be accorded to executive as opposed to legisative acts? Does the avoidance of nine Cook Islands Party candidates irredeemably colour all acts of the government between 30 March 1978 and 24 July 1978, or only some of them? Or are all acts valid?

A. <u>The Nine Unseated Candidates and the De Facto Officer Doctrine</u>

Before the question of whether the acts of the Henry government were void or valid can be answered, the logically prior question of what consequences flow from the avoidance of nine candidates' elections must be considered. This question comes first because any doubt concerning the validity of the acts of the government only arises because the elections of sufficient of its members were avoided to deny the government its majority.

The prospective consequences of nine elections being declared void are straightforward. They lost their seats and could not purport any longer to exercise any of the rights and privileges of Members of the Legislative Assembly.

Retrospective considerations are more problematic. By the void ab initio doctrine the candidates were never lawfully elected. But the discovery of this state of affairs awaited the determination of the Court. During the period in question, as a matter of fact, the nine candidates purported to be Members of the Legislative Assembly. They certainly appeared to hold office, but as was subsequently held by the Court, there was no basis in law for their tenure of office. Were they, therefore, de facto Members of the Legislative Assembly? Lord Ellenborough described a de facto officer as[41]

> one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.

The concept of a de facto officer has long been known to the common law, although its application of recent times has not been frequent. It is designed to provide a pragmatic stepping stone out of the mire that engulfs the strict application of the void ab initio doctrine, which would declare that the validity of acts officially done is dependent upon the legality of the title to the office that the officer purported to fill. However, the common law has not adopted this clear approach, but has said that in some circumstances the acts of a person apparently in lawful authority but who, in point of fact, is not, will be valid. This is known as the de facto officer doctrine, but as Pannam notes,[42] it seems to have been "almost forgotten" by Australian and English lawyers for the last century. The doctrine is old[43] and flexible. It is subject to many limitations, which arise primarily because the doctrine is based on considerations of public policy.

Its modern application owes more to United States law. The classic statement of what constitutes a de facto officer is to be found in State v. Carroll.[44] An officer de facto was one[45]

> whose acts, although not those of a lawful officer [are those] where the duties are exercised -
>
> > first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be;

> second, under colour of a known and valid appointment or election, but where the officer has failed to conform to some precedent, requirement or condition, as to take an oath, give a bond, or the like;
>
> third, under colour of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public;
>
> fourth, under colour of an election or appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.

This definition was cited with approval by Richmond J. in the New Zealand case of Re Aldridge,[46] an action for habeas corpus brought by a prisoner on the grounds that he had been imprisoned by a judge whose appointment was later held to be invalid. The judge in question was Worley Bassett Edwards who was appointed a judge of the Supreme Court by the Atkinson Government in 1890. His appointment was challenged by the Attorney-General of the succeeding Liberal Government, on the grounds that there was no provision for a fifth puisne judge and that no appropriation for Edwards's salary had been made. The Privy Council held in the Attorney-General's favour and Edwards's commission was cancelled.[47] The Court of Appeal in Aldridge's case unanimously held that for the two years that Edwards sat on the bench, he had been a judge de facto sed non de jure.

Strong underlying reasons of practicality and convenience drove the court to this conclusion. Prendergast C.J.[48] found Edwards to have been a de facto judge because a duly appointed session of the court had been held at which the prisoner had been convicted, no de jure judge had been present, all persons present treated Edwards as a judge and he had peformed judicial acts under a bona fide pretence or colour of being a judge.

In Re Aldridge the de facto officer doctrine was applied to validate

Edwards's acts as a judge. Richmond J.[49] said:

> The strong reasons of public convenience which have compelled the recognition of the validity of the judicial acts of kings de facto[50] extend to the acts of judges appointed by them, who, equally with the usurping king himself, are judges de facto only.

This retrospective validation occurs because the officer concerned is subsequently found to have a de facto status. It does not, however, flow from a finding of de facto status that validation must occur in every circumstance. A contrary inference, may, however, be drawn from remarks of Denniston J. who, in citing the American authority of Norton v. Shelby County,[51] said that[52]

> where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned.

The distinction that was being drawn in this case was between invalid appointments to validly created offices, and valid appointments to invalidly created offices. This distinction, it is submitted, is more apparent than real, because the effect in both cases under the void ab initio doctrine is that the appointment is void. The de facto officer doctrine by its nature seeks to mitigate the effects of the void ab initio doctrine by importing validity to acts of officers with defective titles. This ameliorating doctrine can therefore be applied in either situation.

More recent authorities acknowledge the existence of the de facto officer doctrine and re-establish its usefulness. In Adams v. Adams,[53] Sir Jocelyn Simon P. declared that he was "satisfied that the concept is part of English law" and that he could "conceive of circumstances where the doctrine... would be useful."[54] This case concerned the validity of a decree of divorce granted by a judge who had been appointed by the unrecognized government of Rhodesia after the Unilateral Declaration of Independence. The judge was held to be a de facto judge because he had failed to take the oaths of office set out in the 1961 constitution, and because he had been appointed under what the British courts regarded as invalid legislation. Sir Jocelyn Simon P. held that it would be anomalous

to validate the acts of a judge as those of a de facto officer while the executive acts of those appointing him were refused recognition de facto by the United Kingdom Government.[55]

The New Zealand case of Bilang v. Rigg[56] found that the acts of a judicial officer appointed under valid legislation by a de facto Minister of Justice in Rhodesia were valid. Henry J., although distinguishing Adams v. Adams, cited as apposite comments made by Sir Jocelyn Simon P. concerning the existence of the de facto officer doctrine.[57]

It would seem to be clear that the de facto officer doctrine exists in modern Commonwealth law. The definition of a de facto officer in State v. Carroll[58] was applied in Adams v. Adams and can therefore be considered the appropriate test. Do the unseated Cook Islands Party candidates come within this definition? If so, then subject to the limitations on the doctrine, some of their acts will be validated. The third limb of the definition seems to apply most closely. That provides that an officer de facto was one who exercised his or her duties[59]

> under colour of a known election, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public...

The elections of the unseated candidates were held void "because of some defect or irregularity" in the exercise by the electorate of its power of election. This defect was the casting of unlawful votes. Not until the declaration by Donne C.J. can the defect be said to be definitively known to the public. It could be argued, therefore, that although such a defect or irregularity might be a matter of supposition or speculation by the public before or during the hearing of the petitions, it was not a matter of public knowledge until the date of the declaration, 24 July 1978. The unseated Cook Islands Party candidates could therefore be deemed to have been de facto Members of the Legislative Assembly.

If this is the case are their acts validated by the de facto officer doctrine? Certainly not all acts would be validated, only those as far as the general public or third persons were concerned. This arises from the very essence of the doctrine. As Pannam[60] says

> ...the de facto doctrine was designed to deal with effects and not causes. It does not look at the nature of the defect in the officer's title but rather at whether members of the public were justified in supposing him to be a properly authorised officer. This was the precise basis of the judgment of Butler C.J. in State v. Carroll and is the rationale of the whole doctrine.
>
> No protection is given to the officer who abuses his office.[61]

It may be argued that because the Cook Islands Party had consciously formulated a detailed plan to fly voters to the Cook Islands in a manner which party officials knew was contrary to the Electoral Act 1966, the acts of the elected candidates in office also constituted a wilful abuse, and would thus be void. However, it might be shown that although the attainment of office was by improper means, the exercise of office need not necessarily have been so. It would in any instance be difficult to prove, and would depend on the law governing the exercise of executive powers.

A second major limitation on the operation of the doctrine is that it will not apply if strong statutory policy reasons require otherwise, even if the interests of third persons are prejudiced. Pannam[62] gives the example of the Test Act 1672 which required all officials holding offices under the Crown to take oaths of Supremacy and Allegiance and forswear any faith in Roman Catholicism. A person who failed to meet these obligations was incapable of holding any office, and was liable to huge fines.[63] Because of the strength of its anti-Catholic objectives, the de facto officer doctrine was held not to be applicable.[64] Are there similar strong statutory policy objectives in the Cook Island Electoral Act? The objectives of the Act can be summarised as to promote the conduct of free and fair elections. Penalties are provided for breaches. "Sufficient effect is given to the statute by considering [it] as penal upon the party acting."[65] Is the objective more greatly promoted by invalidating all acts done by a person improperly elected? It is submitted that it is not, because

of the need for reliance by the general public on the authority of Members of the Legislative Assembly, and the greater confusion that would be caused by making such a strict rule.

A thread of necessity runs through other exceptions to the doctrine. The exception relating to de facto mayors most closely approximates the present situation. As Pannam[66] notes,

> a distinction is drawn between "such acts as are necessary for the good of the body which comprehend judicial and ministerial acts, and such as are arbitrary and voluntary."[67] On this basis a de facto mayor can swear in a successor,[68] or other persons who have a right to their positions,[69] but cannot appoint a friend as a burgess.[70]

By analogy, a de facto Member of the Legislative Assembly would have any acts validated that pertained to the functions he or she was obliged to perform, but not those of a voluntary nature, such as the award of patronage. This would be of greater significance in the case of those candidates who were members of the Cabinet,[71] where the opportunities for executive acts are much greater than for ordinary Members.

Even if the acts in question fell within the above limitations, it is difficult to determine whether the doctrine will necessarily be applied. It is more likely to be applied if a long period of time has elapsed before a legal challenge has been raised.[72] If the nature of the defect in the official's appointment or election is of a technical nature which could be corrected by the legislature, then the doctrine is more likely to be used.[73] The nature of the particular act would probably be considered. If it related to a private matter between individuals such as marriage or divorce, or a contract for the supply of goods, then the doctrine would probably be applied. But if the matter involved the deprivation of an individual's property by government action, the doctrine would less likely be applied.[74]

It must be noted that "de facto" is not a term of art, and does not carry with it certain, specified, necessary consequences. It is a term used to characterize certain situations from which various consequences may flow. These consequences will vary according to the criteria above. The

de facto officer doctrine is essentially a salvage operation which will retrospectively validate some acts of officials whose title is defective.

B. The Government and Application of the De Facto Officer Doctrine

The discussion above concentrates on the validity of acts done by the nine unseated candidates. Can the doctrine be applied to the larger collective entity, the government, which comprised both validly and invalidly elected members, the acts of which are of much greater import than those of the nine de facto Members severally?

Hodge[75] refers to the government during the period in question as a "de facto government". This is presumably because the government depended on the nine members, whose elections were later avoided, for its majority in the Legislative Assembly. Because of the uniqueness of the situation, and because also, as noted above, the expression "de facto" does not import necessary consequences, there is only a limited value in considering other governments which have been held to be de facto. Ordinarily, as Lord Reid said in Madzimbamuto v. Lardner-Burke[76]

> de facto and de jure governments...are conceptions of international law...

Lord Reid offered an explanation of the differences between a de jure and a de facto government in Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd[77]. His Lordship held that a

> de facto government [must have] effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new regime as the de jure government of a state are that the new regime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established.

Clearly these definitions relate to the maturation of a new state after some revolutionary displacement of the existing regime. Even if one attempts to apply them to the novel situation of the Henry government,[78] they are of little assistance. The Henry government would easily meet the

criteria for both a de jure and a de facto regime. However, it clearly suffered from a significant legal defect: nine of its members were not lawfully elected, and thus to refer to it as "de jure" would seem to strain the definition.

Because of the defect in the election of nine Cook Islands Party candidates, the government must be considered de facto. In a government comprised of lawfully elected members, there is the legal authority of lawful election underpinning all acts lawfully done by the government. Because of a break in this chain from the lawful authority to the lawful act, there must be some doubt as to the validity of the acts of the de facto government of Sir Albert Henry. The essential question is: what were the powers of the government considering its origins? Either it had all the powers possessed by a lawfully elected government in which case all its acts would be valid, or it had some but not all those powers, or, thirdly, it had none of the powers in which instance all acts done would be invalid. Two courses are indicated. Firstly, the void ab initio doctrine applies in all its severity. The argument for its justification would be as follows: the government depended for its existence on the support of nine candidates whose elections were held to be void. The government itself must be declared to be lacking full lawful authority. The validity of acts done depends on the lawful authority possessed by the actor. The government had no such lawful authority and its acts are therefore invalid. Secondly, and alternatively, no necessary connection is made between the validity of acts and the lawful authority possessed by the actor. This argument means that an act can be valid despite the lack of lawful authority in the person who peformed it.

The law has long since rejected the view that the validity of official action depended upon the legality of the officer's appointment.[79] But although situations are recognised where the law will retrospectively validate the acts of an official who possesses only apparent not actual legal authority, there are obvious difficulties in the extension of the de facto officer doctrine to cover the acts of a collective body, a government. Firstly, the doctrine has predominantly dealt with the acts of individuals not groups. Two arguments can be mounted in response to this. In the first place, authority exists that a challenge against the acts of a group of judicial officers can be met by the doctrine.[80]

Secondly, a government can be considered as a corporate entity. This is supported by the doctrine of collective ministerial responsibility. Thus it has the status of an independent legal person. By way of possible explanation for the predominance of cases against individuals, the majority of executive actions are performed in the name of the governing body by particular officers. Acts are ordinarily attributable directly to these people.

Secondly, and of greater weight, a de facto government although a corporate entity, is of a mixed character. It comprises both lawfully and unlawfully elected members. It is only the elections of the unlawfully elected members that contain the irregularity or defect required under the State v. Carroll definition. The impact on the government is thus one step removed from that on the de facto members. However, the fundamental rationale behind the de facto officer doctrine is not, as noted previously, the nature of the defect in the officer's title, but whether members of the public are justified in regarding the officer as properly authorised. Furthermore, the chain-like impact of the defect on the nature of the government can usefully be compared with a sequence of events one of which suffers a de jure lack of qualification. An example can be found in the case of Bilang v. Rigg[87] where there was a valid executive act (a grant of administration) made under a valid statute by an official appointed in the proper manner by a minister who lacked a de jure qualification. There it was held that although the appointment of the official might be successfully attacked,[82] the validity of his bona fide acts was a separate question.

If the objections are soundly countered, and a government can be regarded as a corporate entity capable of falling within the definition in State v. Carroll, then the way is open for the application of the de facto officer doctrine in the present case of a de facto government. The limitations and exceptions noted in the earlier discussion would, of course, have to be considered in any particular instance.

The denial of the operation of the doctrine on the grounds that the object of the statute under consideration is of such significance is likely to be the single most important objection raised.

Legislation, being in reality an act of government,[83] could be challenged.

C. The Validity of Legislation

The Cook Islands Legislative Assembly enacted only the Law Practitioners Act 1978 between March and July 1978. Article 36 of the Constitution of the Cook Islands provides:

1) The validity of any proceedings in the Legislative Assembly or in any committee thereof shall not be questioned in any court.

Article 36(6) provides:

(6) The Legislative Assembly shall not be disqualified for the transaction of business by reason of any vacancy among its members, including any vacancy not filled at a general election, and any proceedings therein shall be valid notwithstanding that some person who was not entitled to do sat or voted in the Assembly or otherwise took part in the proceedings.

It seems on the face of these articles that a challenge to the validity of the Law Practitioners Act could not be mounted on the grounds that the Legislative Assembly which considered and passed the Bill was not in fact the lawfully elected Legislative Assembly, and that its acts were therefore void. In Harris v. Donges,[84] where it was held that a statute not passed by a two-thirds majority of both Houes of the South African Parliament sitting unicamerally in accordance with Section 35 of the South Africa Act was invalid, Centilivres C.J. held that "Parliament means Parliament functioning in accordance with the South Africa Act." Similar examples requiring the manner and form of enactment to be observed by the legislature exist, notably in jurisdictions with a written constitution. The wellknown cases of the Bribery Commissioner v. Ranasinghe[85] and the Attorney-General for New South Wales v. Trethowan[86] are good instances where enactments have been held void for want of form. By implication, therefore the Cook Islands Legislative Assembly is required to function in accordance with the Constitution. Article 28(3) provides:

> the mode of electing members of the Legislative Assembly, and the terms and conditions of the membership, shall be as prescribed by law.

That law is the Electoral Act 1966, and the common law as far as it applies. As Donne C.J. found that the election of nine members of the Assembly was unlawful, it could be argued that the Legislative Assembly which enacted the Law Practitioners Act was not the Legislative Assembly functioning in accordance with the provisions of the Constitution. However, articles 36(1) and 34(6) cited above would seem to prevent the raising of such a challenge in court.[87] In particular, article 36(1) places what seems to be an absolute prohibition on any judicial review.

This seems anomalous in the light of the careful provision for the manner in which the Constitution is to be amended or repealed. Article 41 states that no amendment shall be valid unless a two-thirds majority of the Assembly supports the Bill on two occasions separated by not less than ninety days, and a certificate from the Speaker to the effect that this procedure has been followed has been presented to the High Commissioner along with the Bill. The High Commissioner must then in accordance with Article 5 act on the advice of the Premier to assent to the Bill. Further, Article 44, which provides that no Bill shall become law until it receives the assent of the High Commissioner, gives only a limited discretion for the assent to be withheld. The High Commissioner may summon a meeting of the Executive Council within fourteen days[88]

> to consider amendments to the Bill proposed by him or to consider whether he should refuse his assent to the Bill.

By Article 44(4), if the Executive Council decides that assent should not be refused, the High Commissioner shall declare that he assents to the Bill. In addition, if he does not act on this advice to assent within fourteen days, he shall be deemed to have accepted it[89]

> and an instrument under the hand of the Secretary of the Cabinet acting on the instruction of the Premier, to that effect shall operate as to the performance of the function concerned in accordance with that advice.

A sequence of events could be envisaged whereby a government intent on amending or repealing the Constitution presented a Bill not in accordance with Article 41 for assent, and under Articles 44 and 5 requires the assent to be effected. There would seem to be no recourse

to the High Court because of Article 36(1) and the legislation would have to be treated as properly enacted, or at least as not open to judicial review.

There is no express provision in the Constitution concerning the interpretation.[90] Article 47(2) provides:

> Except as provided in this Constitution or by law, the High Court shall exercise all such jurisidction (both civil and criminal) as may be necessary to administer the law in force in the Cook Islands.

It would thus seem by implication that matters of interpretation would fall to the High Court. The Court would have to determine which branch of the Constitution should be preferred in the hypothetical situation outlined.

Article 34(6) provides a similar bar to that in Article 36(1). If the High Court found it had jurisidction to hear an action alleging the invalidity of the Law Practitioners Act 1978, it would then be its task to determine whether such a challenge was met by Article 34(6). The defence to such an action would be that Article 36(1) is of superior legal status to the Electoral Act 1966,[91] the legislation which determines under Article 27(3) "the mode of electing members...and the terms and conditions of their membership." Section 4 of the Cook Islands Constitution Act 1964(N.Z.) which states that the Constitution shall be the "supreme law" supports this contention. However, Section 4 does not spell out the effects of declaring the Constitution to be the supreme law, and it is difficult to see what practical differences would arise where the claim of the plaintiffs is grounded in the Electoral Act 1966 which is pursuant to Article 27(3), and the defence relies on Article 36(1).

On its face, therefore, and deferring to Article 34(6), the Law Practitioners Act is valid. Its validity could only be tested if the High Court found firstly that it had jurisdiction to rule on the question. If the "manner and form" line of authority is followed, then the Act could be declared invalid as not being passed by the Legislative Assembly constituted according to law. Otherwise the "supremacy" of the Constitution,

especially with reference to Article 34(6), would operate to defeat such a challenge.

IV. CONCLUSION

The unprecedented event of a government being dismissed from office because of electoral malpractices raised questions concerning the validity of the acts of Government in the period between the General Election and the determination of the Electoral Court. Under the strict application of the void ab initio doctrine, all acts would be void. The effect of this harsh doctrine is mitigated by the application of the old common law doctrine of the de facto officer, which recent authority suggests is still in existence. It operates to validate acts of de facto officials affecting the public and third parties, subject to certain important limitations. Here it was found applicable to the acts of the nine unseated members, and then by extension to the de facto government itself. The doctrine will not automatically apply in all situations, but is more likely to be invoked where the validity of the acts of the de facto officer or government is unchallenged for a long time, or where the acts are in pursuance of the obligations of the office as compared with the voluntary or arbitrary granting of, for example, patronage. Strong statutory policy may militate against the doctrine's application. Legislation may be saved either by the application of this doctrine or because of the constitutional prohibitions on challenging the validity of acts done in the Legislative Assembly.

NOTES

1 Re Mitiaro Election Petition [1979] 1 N.Z.L.R. S1;
Re Te-Au-O-Tonga Election Petition [1979] 1 N.Z.L.R. S25.

2 For a description of the judgment, see M. Cooper "The Cook Islands Elections Petitions" (1978) 5 A.U.L.R. 325; W.C. Hodge "The Cook Islands Election Petition Cases" [1978] N.Z.L.J. 358.

3 Section 3, The Cook Islands Constitution Act 1964 (N.Z.).

4 Section 5, The Cook Islands Constitution Act 1964 (N.Z.).

5 Idem.

6 Statute of Westminster Adoption Act 1947 (N.Z.) and New Zealand Constitution (Request and Consent) Act 1947 (N.Z.), and New Zealand Constitution (Amendment) Act 1947 (U.K.).

7 Section 4, The Cook Islands Constitution Act 1964 (N.Z.).

8 Cook Islands Constitution Act Commencement Order 1965 (S.R.1965/128).

9 P.E. Kilbride "The Cook Islands Constitution" (1965) 1 N.Z.U.L.R 571, 573.

10 Constitution of the Cook Islands, art. 27(2).

11 Idem.

12 Constitution of the Cook Islands, art. 13.

13 Constitution of the Cook Islands, art. 5.

14 Constitution of the Cook Islands, art. 7.

15 Constitution of the Cook Islands, art. 22.

16 Constitution of the Cook Islands, art. 25.

17 Constitution of the Cook Islands, art. 37(3).

18 Constitution of the Cook Islands, art. 39(1).

19 Constitution of the Cook Islands, art. 39(2).

20 Constitution of the Cook Islands, art. 39(3).

21 See Tangata v. Speaker of the Cook Islands Legislative Assembly [1979] 2 N.Z.L.R. 182,185 for an example, and comment on the manner in which the change was effected.

22 I.e. ss. 2, 3, 4, 5 and 6 of the Cook Islands Constitution Act 1964 (N.Z.), arts. 2 and 41 of the Constitution. These provisions collate to the enactment of the Constitution and its application, the position of the Head of State, and the manner and form in which the Constitution may be amended or repealed.

23 Constitution of the Cook Islands, art. 41.

24 Cook Islands Act 1915 (N.Z.), s. 615.

25 Reports on the Cook, Niue and Tokelau Islands
New Zealand. Parliament. House of Representatives.
Appendix to the journals, Vol. 2, 1965 A. 3:14.

26 See e.g. Re Mitiaro Election Petition [1979] 1 N.Z.L.R. S1, S22 where Donne C.J. finds that the common law of elections is preserved by the operation of art. 77(1) of the Constitution and s 615 of the Cook Islands Act 1915 (N.Z.), except where the Electoral Act 1966 (C.I.) expressly or impliedly alters it.

27 Sections 69 and 70 respectively.

28 These elctorates return, respectively, four, three and two Members of the Legislative Assembly.

29 Re Mitiaro Election Petition [1979] 1 N.Z.L.R. S1, S12.

30 Electoral Act 1966, s.70

31 See Re Te-Au-O-Tonga Election Petition [1979] 1 N.Z.L.R. S26, S30-34 for details of the transactions.

32 Section 69(a) provides:

> Every person commits the offence of bribery who, in connection with any election -
>
> (a) Directly or indirectly gives or offers to any elector any money or valuable consideration or any office or employment in order to induce the voter to vote or refrain from voting.

33 Re Te-Au-O-Tonga Election Petition [1979] 1 N.Z.L.R. S26, S67.

34 Ibid. S68.

35 Re Mitiaro Election Petition [1979] 1 N.Z.L.R. S1, S24.

36 Re Te-Au-O-Tonga Election Petition [1979] 1 N.Z.L.R. S26, S68.

37 Ibid. S69.

38 Constitution of the Cook Islands, art. 39(4).

39 C.L. Pannam "Unconstitutional Statutes and De Facto Officers" (1966) 2 F.L.R. 36, 65.

40 Ibid. 66, citing Blackstone Commentaries (7th ed. 1775) vi, 70.

41 R v. Bedford Level (1805) 6 East 356, 368; 102 E.R. 1323, 1328

42 Pannam, op. cit. 38. New Zealand references are as infrequent as English and Australian ones.

43 Ibid. 39, n.15. Abbot of Fountaine's Case (1431) 7 B. 9 H. vi., f.32.

44 (1871) 9 Amer. Rep. 409.

45 (1871) 9 Amer. Rep 409, 427 per Butler C.J.

46 (1893) 15 NZLR 361, 376.

47 Buckley v. Edwards [1892] A.C. 387.

48 Re Aldridge (1893) 15 N.Z.L.R. 361, 366.

49 Ibid 370.

50 The judge had been discussing problems of validity that had arisen during the period of competition between the Lancastrians and the Yorkists.

51 (1886) 118 U.S. Rep. 425, 444.

52 Re Aldridge (1893) 15 N.Z.L.R. 361, 379-380.

53 [1971] P. 188, 211.

54 Ibid 212.

55 Ibid 214.

56 [1972] N.Z.L.R. 954.

57 Ibid 959.

58 Supra.

59 (1871) 9 Amer. Rep. 409, 427.

60 Pannam, op. cit. 55.

61 Gahan v. Lafite (1841) 3 Moo. P.C. 382; 13 E.R. 155.
An action was brought against illegally appointed judges for false imprisonment and trespass by one of the judges who had been improperly dismissed. The Privy Council held that the de facto judges were not protected by the doctrine for this abuse of office, but that other proceedings and acts of the Court were valid.

62 Pannam, op. cit. 43-44.

63 £500.

64 Hipsley v. Tucke (1674) 3 Keble 606; 84 ER 905. See Pannam, op. cit. 43, n.40 for its other citations.

65 Margate Pier v. Hannam (1829) 3 B & Ald. 266, 271; 106 E.R. 661, 663. There the statute required Justices of the Peace to take an oath.

66 Pannam, op. cit. 45.

67 R v. Lisle (1738) And. 163; 173; 95 E.R. 345, 349.

68 R v. Castle (1737) And. 119; 95 E.R. 325.

69 R v. Pursehouse (1733) 2 Barn. KB 264; 94 E.R. 490.

70 R v. Lisle (1738) And. 163; 95 E.R. 345.

71 E.g. Sir Albert Henry himself.

72 Pannam, op. cit. 59. He cites in support Waterside Workers Federation of Australia v. J.W. Alexander Ltd (1918) 25 C.L.R. 434.

73 An example of this could be found in Ministry of Transport v. Smiley Ualesi (unreported, District Court, Wellington 1979) where the defence raised unsuccessfully the argument that a ministerial decision was invalid because the minister had received his warrant

before the return of the writ of his election to Parliament.

74 Pannam discusses these criteria, op. cit. 59-63, but notes the difficulty in determining with any certitude what such criteria are.

75 Hodge, op. cit. 364

76 [1969] 1 A. C. 645, 723.

77 [1966] 2 All E.R. 356, 548.

78 As Beadle C.J. attempted to do in the case of the regime in Southern Rhodesia. Madzimbamuto v Lardner-Burke [1968] (2) S.A. 284, 314 (Appellate Division).

79 See discussion supra concerning the existence of the de facto officer doctrine.

80 Gahan v Lafite (1841) 3 Moo. P.C. 382; 13 ER 155. See also n.61 supra.

81 [1972] N.Z.L.R. 954.

82 Ibid. 958.

83 I.e. the government is responsible for the passage of legislation through the Legislative Assembly, despite the formal recognition that the legislature enacts statutes.

84 [1952] T.L.R. 1245, 1259.

85 [1965] A.C. 172.

86 (1931) 44 C.L.R. 394.

87 Of course, a succeeding government would be free to repeal or amend the legislation.

88 Constitution of the Cook Islands, art. 44(2).

89 Constitution of the Cook Islands, art. 5(2).

90 With the exception of article 1.

91 Section 4, Cook Islands Constitution Act 1964 (N.Z.).

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