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NECESSITY IN A CONSTITUTIONAL CRISIS

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THE MANITOBA LANGUAGE RIGHTS REFERENCE

The Situation in Manitoba

In *Re Manitoba Language Rights* (1985),[1] the Supreme Court of Canada held that nearly all of the laws of the province of Manitoba were unconstitutional. There was no plausible way of escaping from this alarming conclusion. Section 23 of the *Manitoba Act*, 1870, which is the constitution of the province of Manitoba,[2] provided that Manitoba statutes were to be enacted in both the English and the French languages. In 1890, Manitoba enacted the *Official Language Act*, which provided that Manitoba statutes need only be enacted in the English language. In effect, this Act was an attempt to repeal a constitutional requirement. Not surprisingly, the Act was held to be invalid by county courts in 1892 and 1909, but these decisions were not appealed, were not reported, and were completely disregarded by the authorities in Manitoba. It was not until 1979 that a case in which the *Official Language Act* was challenged reached the Supreme Court of Canada. In the *Forest* case (1979),[3] the Court held that the *Official Language Act* was invalid by reason of its conflict with s.23 of the *Manitoba Act*.

The decision in *Forest* meant that the Manitoba Legislature had to enact its statutes in both the English and the French languages. This requirement applied not only to statutes enacted after the *Forest* decision, but to statutes enacted before the decision as well. Manitoba's statutes had been enacted in English only ever since 1890, when the *Official Language Act* was passed. Moreover, Manitoba had not been preparing unofficial French translations of its statutes. Manitoba was therefore faced with a massive task of translation and re-enactment. It embarked on this task rather slowly. In 1984, five years after the *Forest* decision of 1979, the Legislature was still enacting some

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[1] [1985] 1 S.C.R. 721.

[2] The *Manitoba Act*, 1870 (Can.) created Manitoba out of a federal territory. Although a Canadian statute, it comprises part of the "Constitution of Canada" (defined in s.52 of the *Constitution Act*, 1982) and can be altered only by the appropriate amending procedures, which in the case of s.23 would require the assent of both the Parliament of Canada and the Legislature of Manitoba (as stipulated by s.43 of the *Constitution Act*, 1982).

[3] *A.-G. Man.* v. *Forest* [1979] 2 S.C.R. 1032.

current statutes in English only, and none of the body of statutes enacted before 1979 had been re-enacted in the required bilingual format.

The Holding of Invalidity

The *Forest* case had not had to rule on the legal status of the large body of statutes that had been enacted in English only. This issue arose when a motorist named Bilodeau, who was charged with the offence of speeding, defended the charge on the ground that Manitoba's highway speed limits had been imposed by a statute that was invalid, because the statute had been enacted in English only. The Manitoba courts managed to reject this defence,[4] and Bilodeau appealed the case into the Supreme Court of Canada. For reasons that will be explained later in this article,[5] Bilodeau's conviction was eventually affirmed by the Supreme Court of Canada.[6] But Bilodeau was indirectly successful, in substance, in securing the legal ruling that he sought.

When the *Bilodeau* appeal reached the Supreme Court of Canada, the federal government (which assumes a protective role towards French-speaking minorities in the English-speaking provinces) became concerned that an appeal involving only two statutes might not yield a comprehensive ruling on the validity of Manitoba's statutes. The federal government accordingly directed a "reference" to the Supreme Court of Canada for an advisory opinion as to the validity of all of Manitoba's statutes that had been enacted in English only. (The reference is a procedure available to all Canadian governments to obtain an advisory opinion from the courts.)[7] In *Re Manitoba Language Rights* (1985),[8] the Supreme Court of Canada, rejecting the argument advanced by the government of Manitoba that the constitutional requirement of bilingual enactment was "directory" only,[9] held that the consequence of failure to comply with the constitutional requirement was invalidity. It followed that all of Manitoba's past and present statute law, except for those statutes enacted in both languages (all pre-1890 statutes and some post-1979 statutes), was invalid.

[4] In *Bilodeau* v. *A.-G. Man.* [1981] 5 W.W.R. 393 (Man. C.A.), the Manitoba Court of Appeal upheld Bilodeau's conviction. Two of the three judges held that the requirement of bilingual enactment in s.23 of the *Manitoba Act*, 1870 was "directory" only, so that its breach did not result in the invalidity of the unilingual statutes. The third judge disagreed with this reasoning, holding that the requirement was "mandatory", but he agreed with the result, because he held that the laws enacted prior to the *Forest* decision were saved from invalidity by the principle of necessity.

[5] Text accompanying note 29, infra.

[6] *Bilodeau* v. *A.-G. Man.* [1986] 1 S.C.R. 449.

[7] The reference procedure, and the decisions upholding its constitutionality, are described in P. W. Hogg, *Constitutional Law of Canada* (2nd edn, Toronto, Carswell, 1985), 177-183.

[8] [1985] 1 S.C.R. 721. I disclose that I was one of the counsel for the Attorney General of Canada.

[9] This was the argument that had persuaded a majority of the Manitoba Court of Appeal: note 4, supra.

The Resulting Vacuum of Law

If the Supreme Court of Canada in the *Manitoba Language Rights Reference* had stopped at the point of its holding of general invalidity, the consequence would have been a vacuum of law in Manitoba. Under Canada's federal constitution, the provinces have responsibility for most of the private law, including contracts, torts, property, commercial law, succession, labour relations, industrial regulation and consumer protection. In Manitoba, the laws on all these topics, and many others, if enacted since 1890 in English only, would be invalid. The provinces also have responsibility for the courts, municipal institutions, school boards and many other regulatory or public bodies. In Manitoba, all these bodies, to the extent that they derived their existence or powers from laws enacted in English only, would be acting without legal authority.

The Legislature of Manitoba would also be an invalid body. Although the Legislature was established by the *Manitoba Act*, 1870 (the constitution), the structure of the legislative assembly had been radically changed by laws passed since 1890 in English only: the size of the assembly had been increased from 24 to 57 members, women had been granted the right to vote and sit in the assembly, and persons aged 18 to 20 had also been granted the right to vote. It the laws pertaining to the franchise and the Legislature were invalid, then Manitoba would lack a Legislature. If this were so, the vacuum of law could never be filled. Past laws could not be re-enacted in both languages. Future laws could not be enacted, even in both languages. Even a remedial constitutional amendment seemed to be unavailable, because the Constitution of Canada stipulates that an amendment affecting only one province must be agreed to by "resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.[10] If Manitoba lacked a lawful legislative assembly, it could not pass the requisite resolution.

There were some common law doctrines that could provide some relief from the consequences of the invalidity of Manitoba's laws. The *de facto* doctrine would sometimes give validity to the acts of a public official with ostensible (but not legal) authority to perform his duties.[11] The *res judicata* doctrine would preclude the re-opening of cases decided by the courts on the basis of invalid laws.[12] The mistake of law doctrine might preclude the recovery by taxpayers of taxes paid under an invalid law.[13] The trouble with these three doctrines is that each is quite limited in its scope or (in the case of the *de facto* doctrine especially) quite uncertain in its scope; and, as the Court

[10] *Constitution Act*, 1982, s.43; cf. note 2, supra.

[11] See C. L. Pannam, "Unconstitutional Statutes and De Facto Officers" (1966) 2 *F. L. Rev.* 37; see also the Court's discussion in [1985] 1 S.C.R. 721, 755-757.

[12] See G. Spencer Bower and A. K. Turner, *Res Judicata* (2nd Edn., London, Butterworths, 1969).

[13] See J. D. McCamus, "Restitutionary Recovery of Monies Paid to a Public Authority under a Mistake of Law" (1983) 17 *U.B.C.L. Rev.* 233; P. W. Hogg, *Liability of the Crown* (Carswell, 2nd edn, Toronto, 1989), 181-186.

acknowledged,[14] the doctrines would not cover all of the situations that could be questioned.

The Supreme Court of Canada's Solution

The Supreme Court of Canada in the *Manitoba Language Rights Reference* faced an awkward dilemma. On the one hand, the integrity of Canada's constitution, with its protections for the French-speaking minority, required the Court to hold that Manitoba statutes enacted only in English were invalid. On the other hand, the Court could not thrust upon the people of Manitoba the chaos and disorder that seemed inevitable if the Court were to deny the efficacy of the legal system that was in fact in place. The solution devised by the Court was to hold that the Acts of the Legislature that were enacted only in English were invalid, but to hold as well that the Acts were to be "deemed to have temporary force and effect for the minimum period . . . necessary for their translation, re-enactment, printing and publication".[15] The latter holding protected the existing body of Manitoba laws, and all things done on the basis of past laws. Future laws, that is, the laws enacted after the date of the Court's opinion (June 13, 1985), had to comply with the constitutional requirements and did not benefit from the period of temporary validity.[16]

The Court's holding of temporary validity entailed a ruling as to the duration of the minimum period necessary for the translation and re-enactment of Manitoba's unilingual laws. On this point, although some evidence had been adduced as to the scope of the task and the resources available to accomplish it, the Court held that the evidence was insufficient, and that the Court was incapable of determining the duration of the period of temporary validity; this issue was accordingly remitted to a special hearing of the Court to be convened later.[17]

The special hearing for the determination of the period of temporary validity was held five months later (on November 4, 1985) at which the Court, by consent of the parties,[18] fixed December 31, 1988 as the date by which Manitoba's consolidated statutes and regulations and rules of court were to be translated and re-enacted, and December 31, 1990 as the date by which all other laws were to be translated and re-enacted.[19] Generally speaking, the effect of this order was to allow (1) a period of just over three years for the translation and re-enactment of all of the important current laws, and (2) a period of just over five years for the translation and re-enactment of less important current laws (private laws and unconsolidated public laws) and repealed or spent laws (some at least of which were to be translated and re-enacted to preclude the re-opening of transactions dependent upon their

[14] [1985] 1 S.C.R. 721, 757.
[15] Id. 782.
[16] Id. 768.
[17] Id. 769.
[18] The Court's order was made with the consent of Manitoba, Canada (the government which had directed the reference), Quebec (which had intervened in the reference), Mr. Bilodeau (another intervenant) and three organizations of French-speakers (also intervenants).
[19] *Re Manitoba Language Rights: Order* [1985] 2 S.C.R. 347.

validity).[20] In the result, therefore, for several years the people of Manitoba will be bound by laws that were never constitutionally enacted. The laws derive their force exclusively from the order of the Supreme Court of Canada.

The Court's Reliance on the Rule of Law

What is the justification for this radical exercise of power by the Supreme Court of Canada? The reason offered by the Court for the temporary validation of Manitoba's unilingual statutes was that a legal vacuum in the province would "undermine the principle of the rule of law".[21] According to the Court, there were two aspects to the rule of law. First, the rule of law required that the law be supreme over officials of the government as well as private individuals.[22] This aspect of the rule of law is of course basic to constitutionalism, justifying courts in restraining arbitrary power by insisting upon fidelity to the constitution and other laws. The second aspect of the rule of law, which was even more basic than the first, required simply that a community be governed by law.[23] In this sense, the rule of law recognized that "[l]aw and order are indispensable elements of civilized life".[24]

In the Manitoba situation, the two requirements of the rule of law contradicted each other. The first requirement — the supremacy of the law over the organs of government — entailed that Manitoba's unilingual laws, since they had not been enacted in compliance with the law of the constitution, be held invalid. But the effect of such a holding was to deny to Manitoba an operating legal system in violation of the second reqirement of the rule of law. The Court's resolution of this conflict was to accord temporary force to the existing body of Manitoba laws until such time as the Manitoba Legislature could comply with the law of the Constitution.

The Court's decision thus made the concept of the "rule of law", which is usually a mere rhetorical flourish, the central justification for its preservation of Manitoba's de facto legal system. The Court claimed that the rule of law had "constitutional status", because it was referred to in the preamble to one of the instruments comprising the Constitution of Canada,[25] and because it was "implicit in the very nature of a Constitution".[26]

The Court did not directly rely upon a doctrine of "necessity", although courts in various parts of the common-law world had invoked such a doctrine to justify departures from constitutional legality. The Court referred to these

[20] Manitoba proposed to translate all repealed and spent laws back to and including the 1970 revision of the Manitoba Statutes. Perfect safety required the province to go all the way back to 1890, but such a task was impossible.
[21] [1985] 1 S.C.R. 721, 748.
[22] Ibid.
[23] Id. 749.
[24] Ibid.
[25] The preamble to the *Constitution Act*, 1982 states: "Whereas Canada is founded on principles that recognize the supremacy of God and the rule of law:"
[26] [1985] 1 S.C.R. 721, 750.

cases, but treated them as supplying only "analogous support" for its order.[27] These cases are the subject of a later section of this article.

The Bilodeau Case

An ironic consequence of the Supreme Court of Canada's ruling in the *Manitoba Language Rights Reference* was that it entailed the conviction of Mr. Bilodeau, the man whose determination and courage[28] had brought the issue to the Court. He had been vindicated in his contention that the English-language statute under which he had been convicted was invalid. But, by virtue of the *Manitoba Language Rights Reference*, the statute was deemed to have been in force when Bilodeau committed his offence; therefore, he was properly convicted under the Act. The Supreme Court of Canada was accordingly obliged to affirm his conviction, and, after a long delay which was perhaps intended to signal the Court's discomfort, the Court did affirm his conviction.[29]

The Mercure Case

One could be forgiven for assuming that the situation in Manitoba was unique. But it turned out that a similar vacuum of law existed in Saskatchewan as well. The province of Saskatchewan had been created by federal statute in 1905.[30] It had been carved out of the North-West Territories, which were federal territories governed by the federal parliament and government. In 1877, when the small population of the Territories was half French-speaking, the federal Parliament enacted a law, similar to s.23 of the *Manitoba Act*, 1870, that required the ordinances of the Legislative Assembly of the Territories to be enacted in both the English and the French languages. By the time Saskatchewan was created in 1905, the wave of immigration to the prairies had greatly increased the population, and reduced the proportion of French-speakers to less than five per cent of the population. (It is about two per cent today.) The 1877 language law was apparently assumed to be inapplicable in the new province, and from the beginning the Legislature enacted statutes in English only.

It was not until the 1980s that anyone brought a legal challenge to the Saskatchewan Legislature's practice of English-only enactment. In *R.* v. *Mercure* (1988),[31] a French-speaking resident of Saskatchewan defended a charge of speeding on the ground that Saskatchewan's highway legislation had been invalidly enacted. The case rose to the Supreme Court of Canada, where a majority held that the 1877 language law was still part of the law of Sas-

[27] Id. 758.

[28] Bilodeau's position in the litigation was exceedingly unpopular in Manitoba, and he received much abuse.

[29] *Bilodeau* v. *A.-G. Man.* [1986] 1 S.C.R. 449. The appeal had been argued at the same time as the reference (June 1984), but the decison on the appeal was handed down eleven months after the decision on the reference.

[30] *Saskatchewan Act*, 1905 (Can.). The federal Parliament's power to create new provinces out of federal territories was conferred by the *Constitution Act*, 1871 (Imp.), s.4.

[31] [1988] 1 S.C.R. 234.

katchewan, and that it prescribed the manner and form of enactment of statutes by the Legislature. Since all Saskatchewan statutes had been enacted in English only, which was the wrong manner and form, they were all invalid. However, the principle of the *Manitoba Language Rights Reference* applied here too "to keep the existing laws temporarily in effect for the minimum period of time necessary for the statutes to be translated, re-enacted, printed and published in French".[32]

Mercure thus decided that in Saskatchewan, as in Manitoba, the statute books were full of invalid statutes. However, the Court noted an important difference between the two provinces. In the case of Manitoba, the language requirement was an entrenched part of the constitution of the province, requiring a constitutional amendment for its repeal or alteration.[33] In the case of Saskatchewan, however, the language requirement was not part of the constitution. As a pre-confederation law, received at the creation of the province, it could be repealed or amended by the Saskatchewan Legislature — acting in the correct manner and form, needless to say. The Court actually suggested this solution in its reasons for judgment: "the legislature may resort to the obvious, if ironic, expedient of enacting a bilingual statute removing the restrictions imposed on it by [the 1877 language law] and then declaring all existing provincial statutes valid notwithstanding that they were enacted, printed and published in English only".[34] To the distress of its French-speaking minority, the government of Saskatchewan took up this suggestion, and secured the enactment by the Legislature, in both English and French, of a statute that repealed the two-language requirement for the future and validated all the statutes invalidly enacted in the past.[35]

The province of Alberta was established at the same time as the province of Saskatchewan,[36] and was carved out of the same federal territories. Since Alberta, like Saskatchewan, had never repealed or amended the 1877 language law, it was clear that the *Mercure* ruling must apply to Alberta as well. Therefore, Alberta was also faced with a wholly invalid body of statutes, although no doubt the statutes were temporarily in effect for the time needed to translate and re-enact them. Alberta, like Saskatchewan, took the easy route of enacting, in both languages, a curative statute.[37]

THE DOCTRINE OF NECESSITY

The American Civil War Cases

In the United States, during the civil war, the Confederate states organized governments that did not conform to the requirements of the Constitution of the United States, and of course they waged war against the United States.

[32] Id. 280.
[33] Note 2, supra.
[34] [1988] 1 S.C.R. 234, 280-281.
[35] The *Language Act*, Stats. Sask. 1988, c. L-6.1.
[36] *Alberta Act*, 1905 (Can.).
[37] *Languages Act*, Stats. Alta. 1988, c. L-7.5.

After the war came to an end in 1865, the question arose whether the laws and acts of the Confederate state legislatures and governments were legally effective. The Supreme Court of the United States held that the doctrine of necessity sustained these laws and acts, except those that were directed to the prosecution of the war against the United States. On this basis, the Court upheld a law incorporating an insurance company and a law authorizing trustees to invest in confederate bonds.[38] In comparing these cases with the *Manitoba Language Rights Reference*, it is interesting to notice that the Supreme Court of the United States did not give merely temporary effect to the Confederate laws, but accepted them as wholly valid.

The Pakistan Case

The doctrine of necessity was next applied in Pakistan. The *Indian Independence Act*, 1947 (U.K.) partitioned the Indian subcontinent and created the new Dominions of India and Pakistan. This Act was the original constitution of both countries, but the Act provided for a Constituent Assembly in each country, with power to enact new constitutional laws that would replace the provisions of the Act. In Pakistan, the Constituent Assembly met for seven years, during which time it enacted forty-four constitutional laws. However, because the Constituent Assembly wanted the new constitution to be "autochthonous", the Assembly deliberately omitted one of the formalities stipulated by the *Indian Independence Act* for the passage of constitutional laws, namely, the assent of the Governor General of Pakistan.[39] Unfortunately for autochthony, the Federal Court of Pakistan held that the assent of the Governor General was an essential requirement, and that its absence rendered void all of the constitutional laws enacted by the Constituent Assembly.[40] The Court also held that the omission could not now be repaired by the Governor General: an attempt by the Governor General to confer his assent retroactively on the laws enacted over the seven-year period was held to be legally ineffective.[41]

The invalidity of the constituent process in Pakistan meant that not only were the forty-four constitutional laws invalid, but a great many laws and institutions that had been enacted or established under the invalid constitutional laws were also invalid. Faced with this situation, the Governor General issued a proclamation temporarily validating the forty-four invalid constitutional laws and everything done under those laws. This proclamation was to

[38] The leading cases are *Texas* v. *White* 74 U.S. 700 (1868) (Texas law facilitating bond transfer invalid, because purpose to raise funds for war against U.S.); *Horn* v. *Lockhart* 84 U.S. 570 (1873) (Alabama probate court decree directing investment of estate funds in state bonds invalid, because bonds issued to raise funds for war against U.S.); *United States* v. *Home and Southern Insurance Companies* 89 U.S. 99 (1875) (Georgia laws incorporating insurance companies upheld); *Baldy* v. *Hunter* 171 U.S. 388 (1898) (Georgia law authorizing trustees to invest estate funds in state bonds upheld).

[39] Autochthony requires that a constitution be indigenous. The idea was that, by omitting one of the formalities stipulated by the *Indian Independence Act*, the Constituent Assembly's work would not derive its authority from the former colonial power, but from events solely within Pakistan.

[40] *Federation of Pakistan* v. *Tamizuddin Khan*, P.L.R. 1956 W.P. 306.

[41] *Usif Patel* v. *The Crown*, P.L.R. 1956 W.P. 576.

remain in force only until the laws had been re-enacted or replaced by a new Constituent Assembly (which would include the assent of the Governor General). The Governor General's proclamation was not authorized by the express terms of the *Indian Independence Act*. Nevertheless, in *Special Reference No. 1 of 1955* (1956),[42] the proclamation was upheld by a majority of the Federal Court of Pakistan, relying on the doctrine of necessity. This case is unlike both the Manitoba case and the American civil war cases in that the Pakistan Court did not have to fashion a remedy of its own, but simply rule on the efficacy of the remedy fashioned and applied by the Governor General.

The Cyprus Case

The doctrine of necessity was next applied in Cyprus. The Constitution of Cyprus, which dated from 1960, when Cyprus achieved independence from the United Kingdom, established a diarchical form of government, with elaborate provisions for the sharing of power between the Greek majority and the Turkish minority. In particular, the constitution made provision for "mixed" courts (with judges from both communities) to try certain criminal cases, for a Supreme Constitutional Court (also with judges from both communities) to decide constitutional questions, and for the enactment of laws in both languages. These "basic articles" of the constitution were expressly declared to be unalterable by any means whatever.

In 1963, there was an armed insurgency by Turkish Cypriots, who secured control over those parts of Cyprus occupied by the Turkish community, and who stopped the participation by Turkish Cypriots in the mixed courts, the Supreme Constitutional Court and the Parliament and government. The Parliament of Cyprus (without its Turkish Cypriot members) purported to enact a law, in the Greek language only, that (1) abolished the constitutional requirements of mixed courts for the duration of the emergency; and (2) conferred on the Court of Appeal the jurisdiction vested by the constitution in the Supreme Constitutional Court.

In *Attorney General of Cyprus* v. *Mustafa Ibrahim* (1964),[43] the Court of Appeal of Cyprus upheld the emergency law on the basis of the doctrine of necessity: in time of emergency, the express terms of the constitution could be overridden to secure the continued functioning of the courts. Of the three opinions written in the Court of Appeal, Josephides J. provided the clearest statement of the doctrine of necessity. He said that the doctrine was an "implied exception" to the express terms of the constitution, and that its purpose was "to ensure the very existence of the State".[44] It became applicable when the following prerequisites were satisfied:

"(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

[42] P.L.R. 1956 W.P. 598.
[43] [1964] Cyprus L.R. 195.
[44] Id. 265.

(d) it must be of a temporary character limited to the duration of the exceptional circumstances."[45]

When these prerequisites were satisfied, the doctrine of necessity authorized the Parliament "to deviate from the letter of the constitution, which had been rendered inoperative by the force of events."[46]

The Cyprus case is like the Pakistan case, and unlike the Manitoba case and the American civil war cases, in that the Cypriot Court was not the author of the measures necessary to preserve the legal order. The Court's role was confined to upholding a measure promulgated by another institution of government, in this case, the Parliament of Cyprus.

The Southern Rhodesia Case

The remaining precedent for the existence of a doctrine of necessity arose out of Southern Rhodesia. In *Madzimbamuto* v. *Lardner-Burke* (1969),[47] an appeal to the Privy Council from Southern Rhodesia, the question arose whether a person had been validly detained under legislation purportedly enacted by the legislature of Southern Rhodesia after the white minority government's "unilateral declaration of independence" from Britain in 1965. The Privy Council held unanimously that the breakaway government had not become the lawful government of Southern Rhodesia (as would be the case after a successful rebellion),[48] because Britain was still claiming to be the lawful government and was taking steps to retain control. The question then arose whether a law of the unconstitutional legislature could nevertheless be treated as effective under the doctrine of necessity. On this point, the Privy Council divided. Lord Reid for the majority refused to uphold the detention law under the doctrine of necessity. He pointed out that the Parliament of the United Kingdom had enacted laws for Southern Rhodesia after the unilateral declaration of independence, and he concluded that "there is no legal vacuum in Southern Rhodesia".[49] Lord Pearce for the minority would have upheld the detention law on the basis of necessity. He pointed out that the lawful government, the government of the United Kingdom, while it was asserting its authority from afar, was not actually collecting taxes, operating the police, the courts, or municipal institutions or attending to any of the day-to-day requirements of government. In his view, the principle of necessity required that the acts of the illegal government be held effective in order to avoid "a vacuum and chaos".[50]

In *Madzimbamuto*, the doctrine of necessity was not applied, because of Lord Reid's majority view that there was no vacuum of law in Southern Rhodesia after the unilateral declaration of independence. But the avail-

[45] Ibid.
[46] Id. 267.
[47] [1969] 1 A.C. 645.
[48] See S. A. de Smith, *Constitutional and Administrative Law* (4th edn, Penguin, 1981), 74-78.
[49] [1969] 1 A.C. 645, 729.
[50] Id. 740.

ability of the doctrine to fill a vacuum of law was assumed by Lord Reid for the majority as well as by Lord Pearce for the minority.

NECESSITY AND THE RULE OF LAW

In the *Manitoba Language Rights Reference*, the Court referred to the necessity cases that have just been described, but the Court did not directly rely upon them, treating them as providing "analogous support" for the Court's rule-of-law reasoning.[51] It seems obvious that the decision could as easily have been framed in terms of necessity as of rule of law. Indeed, at one point the Court said that "the Province of Manitoba is in a state of emergency"[52] — language of a kind to be found in the necessity cases.

The Manitoba case, the civil war cases, the Pakistan case, the Cyprus case and the Southern Rhodesia case each arose out of a unique circumstance. The cases differ in the conditions that gave rise to the breach of the constitution. In two of the cases — Manitoba and Pakistan — the breach of the constitution was a more or less deliberate act (or omission) in peacetime, while in the other three situations the breach was caused by conditions of insurgency (falling short of a successful revolution). The cases also differ in the degree to which institutions other than the courts had attempted to repair the breach. In Pakistan, the Governor General had acted to preserve the invalid laws. In Cyprus, the legislature had acted. In those cases, the courts were essentially invited to ratify remedial measures designed by other organs of government. In the other cases, no steps had been taken to repair the constitutional breach, and the courts were invited to fashion directly a remedial measure, namely, a declaration that the de facto legal order was effective.

Despite the factual differences, there is a common element in all these cases: a constitutional breach has occurred (for whatever reason) that cannot be quickly repaired and that is so radical that, if not condoned, it would cause a breakdown in the legal order. The doctrine of necessity, or (according to the Canadian Court) the rule of law, provides relief against the breakdown of the legal order, at least until such time as the constitutional breach can be properly repaired.[53]

What the Supreme Court of Canada did in the *Manitoba Language Rights Reference* was an extraordinary exercise of the judicial power: a large body of law, all enacted in breach of the constitution, was maintained in force on terms stipulated by the Court. It is appropriate to note, however, that the Court, like its counterparts in the United States, Pakistan and Cyprus did not have much choice. The alternative was (in the words of Josephides J. in the Cyprus case)[54] "to cross its arms and do nothing" and witness "the paralysis" of the legal order. No other authority appeared to have any power to remedy

[51] [1985] 1 S.C.R. 721, 758.
[52] Id. 766.
[53] The Supreme Court of the United States in the American civil war cases did not make its ruling temporary so as to require the lawful post-civil-war legislatures to ratify (or repudiate) the things done by the unlawful legislatures and governments.
[54] [1964] Cyprus L. R. 195, 267-268.

the situation in Manitoba, and if some other means was attempted, perhaps through federal legislation, the other solution would inevitably wind up in front of the Court for a ruling as to its validity. The Court no doubt considered that it might as well decide the issue immediately, and the only conceivable disposition involved the preservation of Manitoba's legal order. By making the preservation order temporary, the Court affirmed an ultimate duty of fidelity to the letter of the constitution, and vindicated the rights of Manitoba's French-speaking minority.