LAW, POLITICS AND THE LEGISLATION OF THE UNRECOGNIZED GOVERNMENT

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When on political grounds recognition is withheld from well-established states or governments courts in the state withholding recognition may find it difficult to reconcile conflict of laws application of the foreign law with executive foreign policy interests. In the light of a well-known line of United States cases the author examines how far a recent decision of the House of Lords represents a step toward a more realistic approach to this problem. He concludes that considerable further development is necessary if English law is to strike a proper balance between the interests of the executive and the private litigant.

I. INTRODUCTION

The problem of determining the relationship between the judiciary and the executive is nowhere more squarely presented than in cases touching in some way upon foreign policy. An important group of such cases concerns the effect to be given in the courts to an executive policy of non-recognition of a foreign government. The question may be stated simply. Should the fact that a foreign government [1] has not been recognized by the United Kingdom be a reason for an English court to refuse to apply its legislation under the normal conflict of law rules? In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [2] the House of Lords examined the question and went some way towards a solution, but the present law can hardly be considered satisfactory. Mention was made in the *Zeiss* case of certain American cases concerned with non-recognition which merit investigation here as illustrating alternative approaches to the problem. Since both the *Zeiss* case and the American decisions have already been subjected to exten-

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[1] The cases seem to draw no distinction between the unrecognized foreign government and the unrecognized foreign state.

[2] [1966] 3 W.L.R. 125, [1966] 2 All E.R. 536 (H.L.). The recognition issue was discussed only by Lord Reid (with whom Lords Guest, Hodson and Upjohn agreed), [1966] 3 W.L.R. at 130-38 and by Lord Wilberforce, [1966] 3 W.L.R. at 174-84.

sive examination elsewhere, [3] it is proposed to devote to these only such attention as is necessary to create a background for the contention that the problem is really one of allocating competence between the judiciary and the executive in matters touching on foreign affairs; that it is desirable that the judiciary should assume a greater share of this competence and that the failure to do so hitherto may be attributed to a failure to make either an examination of the issues involved in cases of non-recognition or a proper appraisal of the true scope of the judicial function.

Few problems would arise if recognition of a foreign government were always accorded as soon as that government had obtained effective control of the foreign state. If in such circumstances the acts of the unrecognized foreign government were denied effect, this would be justifiable, not so much on the ground that the foreign government was unrecognized, as that it lacked the necessary capacity to make law for the state. The problem arises because recognition may be withheld long after it is clear that the unrecognized government has established itself. From time to time, both the United States and the United Kingdom withhold recognition on political grounds, [4] and it is the problems arising from such political non-recognition that have occasioned the cases discussed below. Essentially, the dilemma of the court in the non-recognizing state is whether to apply the foreign legislation and thus contravene real or supposed executive policy interests, or to seek to satisfy those interests by refusing to apply the foreign law at the cost of the obvious inconvenience which may be occasioned by the courts treating as a nullity the acts of a well-established regime.

II. THE *ZEISS* CASE

The decision of Mr. Justice Roche in *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* [5] is commonly taken to have established the principle that the legislation of an unrecognized government will be denied any effect in an English court. [6] In the *Zeiss* case, the question was whether any effect could be given to the decrees of the East German government. The Foreign Office certificate stated that that government was not recognized by the United Kingdom. It was argued that, if the principle of *Luther v. Sagor* were to be applied, the effect of non-recognition was to oblige the

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[3] On the *Zeiss* case, *see* Greig, *The Carl-Zeiss Case and the Position of an Unrecognised Government in English Law*, 83 L.Q.R. 96 (1967); Bernstein, Comment, 65 MICH. L. REV. 924 (1967). On the whole question of the relationship between judiciary and executive in matters touching on foreign policy *see* Mann, *Judiciary and Executive in Foreign Affairs*, 29 GROTIUS SOC'Y TRANSACTIONS 143 (1944); on the American cases *see* Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962), with numerous citations.

[4] Greig, *supra* note 3, at 138.

[5] [1921] 1 K.B. 456 [hereinafter cited Luther v. Sagor], *reversed* following recognition of the Soviet government, [1921] 3 K.B. 532 (C.A.).

[6] On the question of how far this is a correct interpretation of *Luther v. Sagor* in the light of previous English cases *see* Greig, *supra* note 3, at 103-12.

English court to ignore the East German decrees. The House of Lords avoided this result by accepting that, as the East German government had been set up by the Soviet Union which was recognized by the United Kingdom as exercising de jure authority in the area, the East German government in promulgating its decrees must be taken to have acted as agent of the Soviet Union. Consequently the decrees, as acts of the agent of the recognized sovereign authority, could be applied by the English court. [7]

The agency argument was available only because of the unusual facts of the case. The typical problem arising out of denial of recognition on political grounds involves a situation where, as in *Luther v. Sagor*, the unrecognized government has not been set up by any recognized government, but is in its own capacity the only possible authority in the area. Thus the actual decision in the *Zeiss* case, though no doubt of the greatest importance for future cases involving East German legislation, cannot be of wide general application. The importance of the case lies rather in the judicial attitudes to the unrecognized government revealed in the judgments. How far the *Zeiss* case can be considered an advance on the existing law will be discussed after consideration of the American cases.

III. The American Cases

Apart from the latest decision concerned, like the *Zeiss* case with East Germany and meriting separate treatment, the cases may be divided into three groups arising out of the American Civil War, the Russian Revolution and the Soviet annexation of the Baltic states.

A. *The Civil War Cases*

In a number of nineteenth-century cases, the United States Supreme Court had to decide what legal consequences to attach to transactions which had taken place in areas of the United States under the unlawful control of a hostile government or foreign state. The Civil War gave rise to many such cases. [8] In some, it was sufficient for the Court to decide that the legal personality of each Confederate state as a member of the Union had survived the outbreak of the Civil War and to apply the principle that the rights and obligations of the state in question were not affected by changes in the state's government, even when, as happened when the Civil War broke out, the new government was unlawful. Thus in *Keith v. Clark* [9] the Court held that even during the Civil War notes could be drawn on the Bank of Tennessee and used for the payment of taxes: "[I]f the State of Tennessee has through

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[7] Bernstein criticizes the artificial nature of the agency argument and observes that though the *Zeiss* decision was greeted in West Germany with the headline "Bittere Pille für Bonn," "it might not be pure candy for the East German communists to be told that this is done merely because their state is a subordinate agency of the Soviet Union." *Supra* note 3, at 942 & n.74. *See also* Mann, *Germany's Present Legal Status Revisited*, 16 Int'l & Comp. L.Q. 760 (1967).

[8] Even before the Civil War difficult cases had arisen. *See* Lubman, *supra* note 3, at 293.

[9] 97 U.S. 1071 (1878).

all these transactions been the same State . . . the contract which she made in 1838 to take for her taxes all the issuts of the bank . . . was a contract which bound her during the rebellion . . . . " [10]

This approach was no answer to the question of what effect, if any, was to be given to the legislation of each confederate state enacted during the war. [11] It could be argued that the governments of such states, being unlawful, lacked all legislative competence. In *Texas v. White*, [12] however, Mr. Chief Justice Chase, speaking for the majority, rejected the argument that everything emanating from an unlawful government was utterly without effect. There was no doubt that the Texas government and its legislation were unlawful, [13] but this did not dispose of the issue, for: "[I]t is an historical fact that the Government of Texas, then in full control of the State, was its only actual government; . . . . " [14] What, then, was the test to be?

> It may be said perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded, in general, as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature must, in general, be regarded as invalid and void. [15]

The Court found that the legislation in question, an act rendering bonds alienable without the governor's endorsement, failed to pass the test.

United States v. The Home Insurance Co. [16] may be contrasted with *Texas v. White*. Here the same test served to uphold the ability of the Georgia legislature to create, during the war, companies with capacity to bring suit after the war. The argument that the creation of a company was the exercise of a special franchise rather than an act "necessary to peace and good order" was rejected. The Court said of the acts in question: "Neither in their apparent purpose nor in their operation were they hostile to the Union, or in conflict with the Constitution. They were mere ordinary legislation,

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[10] *Id.* at 1074.

[11] The legislation of the Confederacy itself was an even more difficult problem, sometimes treated by the Court as depending on the extent of belligerent rights, *e.g.*, Williams v. Bruffy, 96 U.S. 716 (1878).

[12] 74 U.S. 227 (1869).

[13] "The Legislature of Texas, at the time of the repeal, constituted one of the departments of a State Government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the Courts of the United States, as a lawful Legislature, or its Acts as lawful Acts." *Id.* at 240.

[14] *Id.*

[15] *Id.*

[16] 89 U.S. 816 (1875).

such as might have been had there been no war, or no attempted secession; such as is of yearly occurrence in all the States of the Union." [17]

Thus, fifty years before the cases arising from non-recognition of the Soviet Government, the Court had grappled with some of the problems involved. The reason the Court in the Civil War cases adopted the approach it did is clear enough. It would have been repugnant to give effect to legislation directed to the furtherance of the rebellion. The Confederacy had, after all, lost the war. As Mr. Justice Field forcefully said : "Its pretensions being resisted, they were submitted to the arbitrament of war. In that contest the Confederacy failed; and in its failure its pretensions were dissipated, its armies scattered, and the whole fabric of its government broken in pieces." [18] On the other hand, to deny all effect to all the legislation of what had been for some years effective governments would have been highly inconvenient and "would work great and unnecessary hardship upon the people of those [Confederate] States, without any corresponding benefit to the citizens of other States, and without any advantage to the National Government." [19]

B. *The Russian Cases*

These all arose from the long delay on the part of the United States in recognizing the government of the Soviet Union after the revolution of 1917. The cases in general indicate the readiness of the courts concerned to give effect to the unrecognized government's acts, provided a public policy test variously formulated was fulfilled. In *Sokoloff v. National City Bank* [20] the onus was put on the party urging the effectiveness of the acts to suggest reasons of public policy for doing so. Mr. Justice Cardozo, in the New York Court of Appeals, tentatively suggested the possibility "that a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done." [21]

On the facts of *Sokoloff* the foreign government's acts—decrees purporting to dissolve an American bank—were denied effect on the ground that no pressing policy considerations could be shown. It was questioned whether the decrees would have been given effect even if the Soviet government had been recognized, presumably on the ground that they were extra-territorial and confiscatory. However that may be, it seems that in some circumstances the court was prepared to contemplate, albeit tentatively, the

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[17] *Id.* at 818.

[18] *Supra* note 11, at 719.

[19] *Supra* note 16, at 818.

[20] 239 N.Y. 158, 145 N.E. 917 (1924).

[21] *Id.* at 166-67, 145 N.E. at 919.

putting into effect of the foreign government's acts where public policy was thought to require it.

In *Russian Reinsurance Co. v. Stoddard* [22] the test laid down in *Sokoloff* was found to be fulfilled. Hence, the New York Court of Appeals held that a Russian corporation purportedly dissolved by Russian decrees was for that reason unable to bring suit in the United States. The court's decision was based on the narrowest ground. Rather than enforcing Russian law, the court said it was merely recognizing the "actual effect" the decrees had obtained in Russia, an effect which, the court said, had altered "the rights and obligations of the parties in a manner we may not in justice disregard." Though the line of decisions was by no means consistent, [23] the next major step was *M. Salimoff & Co. v. Standard Oil Co.*, [24] where the same court upheld the defendant's title to oil purchased from the Russian Government which had obtained it by expropriation. Here again, the actual effect the legislation had acquired was an important factor. In a memorable passage Mr. Justice Pound said :

> As a juristic conception what is Soviet Russia? A band of robbers or a government? We all know that it is a government. The State Department knows it, the courts, the nation and the man in the street. If it is a government in fact, its decrees have force within its borders and over its nationals . . . . To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality they do not deserve. [25]

The court's willingness in this case to be so explicit about the actual state of affairs in the Soviet Union is not really surprising when two factors are remembered. First, at this time (1933) the recognition of the Soviet Union had been so long delayed that failure to give effect to Russian legislation of the kind here in question would have had a very detrimental effect on the trade which for several years had been conducted between the Soviet Union and the United States. Indeed, the transaction in question was a part of this trade. Second, it must be noted that the executive certificate in *Salimoff* was so explicit as to amount almost to a certificate of de facto recognition. [26] As Pound said : "The United States government recognizes that the Soviet government has functioned as a de facto or quasi government since 1917, ruling within its borders. It has recognized its existence as a fact, although

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[22] 240 N.Y. 149, 147 N.E. 703 (1925).

[23] *See* Lubman, *supra* note 3, at 281-88.

[24] 262 N.Y. 220, 186 N.E. 679 (1933).

[25] 186 N.E. 682.

[26] The certificate included the following:

2. The Department of State is cognizant of the fact that the Soviet régime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact.

3. The refusal of the Government of the United States to accord recognition to the Soviet régime is not based on the ground that that régime does not exercise control and authority in territory of the former Russian Empire, but on other facts.

Id. at 681.

it has refused diplomatic recognition as one might refuse to recognize an objectionable relative, although his actual existence could not be denied." [27]

C. *The Baltic Ships Cases*

The next important group of cases concerned the purported nationalization of ships owned by nationals of the Baltic states following the invasion of those states by the Soviet Union in 1940. [28] Were the United States courts to give any effect to such legislation emanating from the occupying state? In these cases the courts were informed by the State Department that the United States recognized neither the Soviet occupation of the Baltic states nor the validity of the decrees of nationalization. The courts felt themselves obliged to deny effect to the legislation. Their decision proceeded on two distinct grounds. First, the ships in question were situated extra-territorially. It was thus possible for the courts to deny effect to legislation purporting to effect their expropriation on the well-established principle of public policy that expropriation of property situated extra-territorially would be denied effect in American courts. On this basis, it was irrelevant whether the government whose decrees were in question was recognized or unrecognized. [29] Second, however, the non-recognition *of the decrees* was employed as a ground for the decision. These cases thus became an inverse of the *Salimoff* decision. Whereas, in that case, the executive statement deliberately distinguished non-recognition of the foreign government from acknowledgement of its existence and hence enforcement of its laws, in the *Baltic Ships* cases the executive statement explicitly indicated that there was recognition neither of the foreign government nor of its laws.

D. *The Upright Case*

The latest important case on this subject is the decision of the Appellate Division of the Supreme Court of New York in *Upright v. Mercury Business Machines Co.* [30] In this case, an East German state-controlled company assigned its rights under a contract with the defendants, a New York company, to the plaintiff, an American citizen and resident of New York. When the plaintiff sued the defendant to enforce the assigned rights, the defendant's argument was that the effect of the non-recognition of the German Democratic Republic by the United States was to disentitle the plaintiff from suing in the United States the German Democratic Republic itself, any company it controlled and anyone in the plaintiff's position of assignee from such a

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[27] *Id.* at 682.

[28] *See* The Maret, 145 F.2d 431, 12 I.L.R. 29 (3d Cir. 1944); *In re* Graud's Estate, 41 N.Y.S.2d 263 (Sur. Ct. N.Y. County 1943) (motion); 45 N.Y.S.2d 318 (Sur. Ct. N.Y. County 1943) (motion); 43 N.Y.S.2d 803, 12 I.L.R. 39 (Sur. Ct. N.Y. County 1943); A/S Merilaid v. Chase Nat'l Bank, 71 N.Y.S.2d 377 14 I.L.R. 15 (Sur. Ct. N.Y. County 1947); Latvian State Cargo & Passenger Steamship Line v. United States, 126 Ct. Cl. 1802, 116 F. Supp. 717, 20 I.L.R. 193 (1953).

[29] For failure to enforce the legislation of a recognized government on this ground *see* Vladikavkazsky Ry. v. New York Trust Co., 263 N.Y. 369 (1934).

[30] 213 N.Y.S.2d 417, 13 App. Div.2d 36 (1961).

company. The court rejected the argument, holding that though non-recognition would have barred any action by the German Democratic Republic itself, it was doubtful whether the company was so barred, and certainly the plaintiff-assignee was entitled to sue in the absence of any national or public policy vitiating either the assignment or the original transaction. No such policy had been pleaded, and it was doubtful whether any could have been shown.

> [I]n order to exculpate defendant from payment for the merchandise it has received, it would have to allege and prove that the sale upon which the trade acceptance was based, or that the negotiation of the trade acceptance itself, was in violation of public or national policy. Such a defense would constitute one in the nature of illegality and if established would, or at least might, render all that ensued from the infected transaction void and unenforceable. Defendant buyer cannot escape liability merely by alleging and proving that it dealt with a corporation created by and functioning as the arm of and instrumentality of an unrecognized government . . . . In order for such transaction or the assignment to violate national or public policy, it must be shown either to violate our laws or some definite policy. If the national government does not administratively forbid, or if it facilitates, the purchase and delivery into this country of East German typewriters, and no law forbids it, then defendant buyer will be hard put to show the "illegality" of the underlying transaction, or the assignment, and thereby avoid payment of the price for such merchandise . . . . The effect of non-recognition, used by defendant as some sort of umbrella to protect it from liability, is not the answer.[31]

The *Upright* case represents a further rejection of the arguments seeking to deny effect to the activities of unrecognized regimes. Though the case involved transactions of a private law nature, *i.e.*, a contract and an assignment, there were dicta to the effect that the same approach would be employed where the enforcement of foreign legislation was in issue. The decision is consistent with the *Baltic Ships* cases, since no doubt an executive statement of non-recognition of the transaction in question would have been regarded by the court as a sufficient indication of national policy to require non-enforcement of the transaction.

It is apparent from the foregoing brief account of some of the leading cases that the American courts have displayed a readiness in certain circumstances to give effect to the acts of the unrecognized government. The relatively mechanical test of enforcing acts of routine administration laid down in the Civil War cases was later generalized into a test resting on public policy. Sometimes the public policy element is expressed in terms of fairness to the parties, as in *Sokoloff*; always standing behind this, however, is public policy in its international aspect. This is seen very clearly in *Salimoff* and the *Baltic Ships* cases, where the executive interest in, respectively, enforcement and non-enforcement of the foreign legislation was implemented.

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[31] *Id.* at 422-24, 13 App. Div.2d at 41-42.

In contrast with the decision in *Sokoloff*, *Upright* suggests that the onus has shifted, with the result that it is now for the party denying that the foreign legislation should be enforced to show why this should be so.

IV. The English and American Approaches Contrasted

The effect in municipal law of non-recognition of the foreign government depends on how many of three distinct questions the court will regard the executive certificate as conclusively answering.

A. *Has the Foreign Government been Recognized?*

Both the English and the American cases treat the executive certificate as a conclusive answer to this question. It is not difficult to see why this is so. The executive is in the best position to know whether express recognition has been accorded and, if it should deny that express recognition has taken place, independent investigation by the court of allegations by one party that acts amounting to implied recognition had occurred would seem to constitute an unwarranted interference by the court in what is essentially a matter of foreign affairs. This is in fact the reason given by the courts in the cases for treating the executive certificate as conclusive on this point. It is, however, worth noting that cases have arisen in which the executive has been unable to take a definite position on the question of recognition and has left the court to interpret a studiously vague "temporizing" certificate. [32]

B. *Can the Existence of the Foreign State or Government be Acknowledged in any Way?*

Until the *Zeiss* case it could be argued that in English law the executive certificate was a conclusive answer to this question. The ability of American courts to avoid adopting this approach led in large part to their ability to evolve a better rule than their English counterparts. The words of Pound in *Salimoff* show that there need be no inconsistency in holding at one and the same time that a foreign state exists, yet is unrecognized. English practice was different, and two reasons for this difference may be discerned. Mr. Justice Roche in *White, Child & Beney v. Eagle Star*, [33] a case on an analogous point, indicated both reasons. In that case the question was whether the Russian revolutionary government had effective control of the country in 1917. If it had, recognition of that government by the United Kingdom in 1921 was retrospective to 1917, with the result that the plaintiff's claim fell outside the insurance policy on which he was suing. Despite a number of requests from the judge, the Foreign Office refused to answer this question but supplied instead a "Diary of Events in Russia" to help the court answer

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[32] *See* Lyons, *Judicial Application of International Law and the "Temporizing" Certificate of the Executive*, 29 Brit. Y.B. Int'l L. 227 (1953); *also* Lyons, Note, 32 Brit. Y.B. Int'l L. 288 (1957).

[33] 38 T.L.R. 367 (K.B. 1922); 127 L.T.R. (n.s.) 571, [1922] All E.R. Rep. 482 (C.A. 1922)

the question for itself. The judge clearly felt that more guidance was necessary: "I regret that I do not feel either qualified or entitled, still less bound, to answer the question for myself. I may perhaps usefully indicate only a few of the difficulties which would seem to preclude me from venturing away from the functions of judicial decision into the realm of conjecture in the political and international sphere." [34]

The difficulty experienced by Roche in this case appears to rest partly on the obscurity of the facts in dispute and partly on his fear of going beyond his judicial function and trespassing on the executive prerogative. The same motives appear in Roche's judgment in *Luther v. Sagor*. [35] How far are such reasons sound?

The difficulty of deciding the question of fact, if the executive certificate of non-recognition is not to be treated as conclusive, is hardly a sound reason. For such a reason goes both too far and not far enough. It goes too far in that it fails to suggest that any distinction can be drawn between cases where the facts are in dispute and cases where the facts are clear. Whatever the merits of treating as conclusive an executive certificate in a case like *Luther v. Sagor*, the obscurity of the facts can hardly be advanced in circumstances like those of the *Zeiss* case. At the same time, this justification does not go far enough since very many cases of difficulty will still remain and will have to be solved without conclusive executive guidance. Many of the cases of retroactivity of recognition are of this kind and seem to have been solved without such guidance. [36] There can, of course, be no objection to the court's attaching much importance to the executive statement where one is available and the facts are in genuine doubt. But there seems little reason to argue from this, either that the court should always expect such a certificate or that, in cases where the facts are ascertainable by other evidence, a certificate of recognition should be regarded as conclusive.

The fear of trespassing on the executive prerogative must likewise be discounted. It would be objectionable here to grant the executive the right to pronounce conclusively on questions of fact which the court is capable of investigating for itself, and there is no reason to believe that on the present

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[34] 38 T.L.R. at 374. The judge eventually decided in favour of the plaintiffs. This decision was reversed by the Court of Appeal, 38 T.L.R. 616, [1922] All E.R. 482 (C.A. 1922).

[35] *Supra* note 5, at 474: "[E]ven if I were entitled to look elsewhere for information I am certainly not bound to do so, and in this case I know of no other sources of information available to which I can safely or properly resort." For the conclusiveness of the executive certificate on "facts of State" in general, *see* Mann, *supra* note 3, at 148-55, where the views of Roche, J., on this question are seen to be by no means unique. It is interesting to note in passing that the same judge was involved in two cases applying the *Amphitrite* decision, [1921] 3 K.B. 500, upholding executive freedom to depart from contractual obligations. *See* Board of Trade v. Temperly Steam Shipping Co., 26 Lloyd's List L.R. 76 (K.B. 1926); Buttigieg v. Cross, in 3 CURRENT LEG. PROB. 209 (P.C. 1946).

[36] Lyons, Note, 33 BRIT. Y.B. INT'L L. 302, at 302-08 (1958), examines a number of cases in which the courts were able to give their decision without overmuch reliance on an executive certificate.

matter the executive has sought to make such pronouncements. Indeed, the judge's dilemma in the *White, Child & Beney* case arose precisely because the executive was not willing to make such a pronouncement. The executive certificate almost always states whether the particular foreign government has been recognized, not whether it exists, and it would thus seem open to the court to draw the distinction for itself. It might, of course be argued that the effect of non-recognition is to render any statement by the court that the foreign government exists an embarrassment to the executive. This view was firmly repudiated in the *Zeiss* case by Lord Wilberforce and implicitly by Lord Reid. Lord Wilberforce said :

> The principle is well established that the courts of Her Majesty do not speak with a different voice from that of Her Majesty's executive government . . . but we are not here under the risk of committing the courts to action of this kind . . . . I can see no inconsistency in (a) accepting the view of the executive that there is no recognized (that is, independent) government in the Eastern Zone apart from the de jure governing authority of the U.S.S.R. and (b) attributing legal validity, if no other legal obstacle exists, to a "law" or act of that "government" as a subordinate or dependent body.[37]

This is the step forward taken in the *Zeiss* case. Non-recognition henceforth does not necessarily entail non-existence in the view of the court. There is no doubt that this is an encouraging advance, but if a more realistic rule is to be evolved an essential further step remains.

C. *Has the Unrecognized Government Legislative Capacity in its Own Right?*

It has been argued above that the American cases demonstrate that the legislative capacity of the unrecognized government can be determined on public policy considerations. Non-recognition alone need not be a ground for denying legislative capacity. How far does the *Zeiss* case suggest the possibility of an English court adopting the same approach?

Neither Lord Reid nor Lord Wilberforce challenged the correctness of the decision in *Luther v. Sagor.* Lord Reid said : "At the time when the decision came before Roche J. is Majesty's Government had not recognized the U.S.S.R. and therefore Roche J. properly held that he could not give effect to that decree." [38] This was taken as an example of those cases "where laws have been made against the will of the sovereign by persons engaged in rebellion or revolution : then until such persons or the government they represent have been granted de facto recognition by the Government of this country, their laws cannot be recognized by the courts of this country." [39] Although Lord Reid left open the question of

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[37] [1966] 3 W.L.R. at 183-84. Lord Reid said the existence of the German Democratic Republic was "common knowledge." *Id.* at 131.

[38] *Id.* at 136.

[39] *Id.* at 132.

how far the solution adopted in the American cases could be adopted by an English court, it seems that on the above reasoning no such possibility exists. For if, as Lord Reid argues, the test of law making capacity is sovereignty, and this in turn rests on recognition, it is difficult to see how an unrecognized government (unless, as in the *Zeiss* case, it can be regarded as the agent of a recognized government) can possess legislative capacity.

Lord Wilberforce took a rather different line. While accepting that the Foreign Office certificate must be taken as conclusive on the question of sovereignty, he saw in the American cases a possible avenue of future development :

> In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question . . . . No trace of any such doctrine is yet to be found in English law, but equally in my opinion, there is nothing in those English decisions, in which recognition has been refused to *particular acts* of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total invalidity of all laws and acts flowing from unrecognized governments. [40]

In a subsequent passage Lord Wilberforce said : "Merely because in the class of case, of which *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* is an example, non-recognition of a 'government' entails non-recognition of its laws, *or some of them*, it does not follow that in a different situation this is so, nor that recognition of a law entails recognition of the law maker as a government with sovereign power." [41] Here, then, Lord Wilberforce contemplates giving some effect to the laws of the unrecognized government even when no agency argument is available. But two points are worth noticing. First, at one stage Lord Wilberforce seems to revert to Lord Reid's equation of law-making capacity with sovereignty and recognition. For he said of the Russian government in *Luther v. Sagor* : "If that government was not recognised, there was nothing which could give international validity to its laws. But the 'German Democratic Republic' is making laws in and as to a territory *where a recognised 'sovereign' exists.*" [42] But if this is really to be taken as the explanation of that case, it is difficult to see how any of the laws of an unrecognized government could be applied, lacking the essential "international validity" which only recognition is deemed to confer. Second, the approval of the decision in *Luther v. Sagor* indicates that the proposed new approach would be far removed from a general grant

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[40] *Id.* at 177-78. [Emphasis added.]

[41] *Id.* at 183. [Emphasis added.]

[42] *Id.* at 181. [Emphasis added.] *See also supra* note 37.

of law-making power to the unrecognized government. How far so limited an approach is desirable is considered below.

Thus *Zeiss*, while making available an agency argument in special situations like that in East Germany, is of only limited assistance on the question of the enforcement of the legislation of an unrecognized government which cannot be regarded as the agent of a recognized authority. Why is there such hesitation in according independent legislative capacity to the unrecognized government?

The reason is the judicial belief that the executive interest requires such a result, for the theme of avoiding any suggestion of a clash with the executive view is a recurrent one in cases thought to touch on foreign policy. The legitimacy of this wish and how far a rule may be evolved to take account of it will be considered below. Here it is necessary only to examine the view that to accord independent legislative competence to an unrecognized government exercising effective control would necessarily interfere with the conduct of foreign affairs and prejudice the interest of the executive. It is only necessary to consider some typical cases to see that this cannot be so. It is surely most unlikely that the application of, for example, the matrimonial law of an unrecognized government will be of the slightest concern to the Crown. [43] As Lord Wilberforce himself pointed out: "The primary effect and intention of non-recognition by the executive is that the non-recognised 'government' has no standing to represent the state concerned whether in public or private matters." [44] Yet the *Luther v. Sagor* rule can surely be justified only if an executive interest in the non-enforcement of the foreign legislation is assumed. Greig argues that, so far from this actually being the case, the executive interest in *Luther v. Sagor*, such as it was, lay in the application of the foreign law. Usually, no doubt, the executive will have no very strong interest one way or the other in the foreign law. [45] Yet, if this is so, can the mere desire to see the executive and the judiciary speak with one voice [46] on the question of sovereignty be a sufficient reason for denying effect to the legislation of the unrecognized government?

The ability of the American courts to look behind such empty formulae as the "one voice" theory has no doubt been assisted by "helpful" executive certificates, such as that in *Salimoff* which, by acknowledging the existence

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[43] East German divorce judgments are regarded as valid in the Federal Republic of Germany. *See* Frankfurter Allgemeine Zeitung, Feb. 20, 1967. *See also* Mann, *supra* note 7, at 792-93.

[44] [1966] 3 W.L.R. at 183.

[45] The argument that application of the foreign law would constitute implied recognition of the foreign government by the United Kingdom has no substance.

[46] On the judicial propensity for the "one voice" argument, *see* Mann, *supra* note 3, at 146-47. For judicial forebodings lest departure from the "one voice" theory should result in a *casus belli*, *see* the cases mentioned by Mann, *id.* at 170 & n.134. If the "one voice" argument were ever accepted in domestic matters it is difficult to see how the Crown could ever be an unsuccessful litigant. *But see* Lord Wilberforce's endorsement of the "one voice" theory in the passage quoted *supra* at p. 11.

of the unrecognized government, indicated that no executive policy would be infringed by enforcement of the legislation. The Foreign Office, as Greig points out, does not seem disposed to grant certificates in this form, and so it seems that the third essential step towards a more realistic rule must be taken wholly by the courts.

V. A New Rule for English Law

What rule could best take account of the interests involved in the problem of the unrecognized government? It has been suggested above that the executive certificate should be taken as conclusive on the question of whether the foreign government has been recognized but that, beyond this, the court should feel free, despite an executive certificate of non-recognition, to hold that a foreign government both exists and has legislative capacity in its own right. The absence of any reason for not making this change and the inconvenience in the *Luther v. Sagor*-type of case of not applying the foreign legislation [47] argue for taking this further step beyond the *Zeiss* case. If the certificate of recognition is to be conclusive in so limited an area, with the result that non-recognition is not to be a reason for denying the foreign government legislative capacity, what is the test of such capacity to be? Two approaches are possible.

Greig is surely correct in arguing that to try to make exceptions to a general rule of non-enforcement of the laws of the unrecognized government, in effect the approach suggested by Lord Wilberforce in the *Zeiss* case, is to court confusion. [48] It would in my submission be preferable to adopt instead what the court suggested in the *Upright* case, namely an overall conflict of laws approach to the problem, whereby the legislation of recognized and unrecognized governments can be assimilated. The next question is to what extent, if at all, such an approach can and should be modified by considerations of public policy.

It is well established in the conflict of laws that a foreign law will not be applied by an English court if to do so would violate domestic public policy. [49] For this purpose the heads of public policy are clearly laid down. Thus, for example, it is agreed that the enforcement of foreign revenue laws would violate domestic public policy. The application of this principle occasions little difficulty. There can be no doubt that the laws of the unrecognized government must be subject to public policy in this sense—the laws of an unrecognized government cannot after all be treated more favourably than those of a recognized government.

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[47] In the *Zeiss* case the inconvenience of ignoring the legislation of a well-established, though unrecognized, regime was emphasized. This inconvenience arises alike in the *Zeiss* and *Luther v. Sagor* situations, *i.e.*, whether or not any 'agency' argument is available.

[48] *See* Greig, *supra* note 3, at 145.

[49] A. Dicey & J. Morris, The Conflict of Laws at 72-77 (8th ed. 1967).

It has been suggested in some quarters that special additional considerations of public policy ought sometimes [50] to prevent the application of the laws of an unrecognized government. Public policy here is the interest which the executive will sometimes have in the court's denying effect to the laws of the unrecognized government. It is public policy in this sense which has prevented the application of the foreign law in some of the American cases, *e.g.*, those concerning the *Baltic Ships*, and which was regarded as a limitation in the *Upright* case. It is this sort of public policy by which Greig advocates the modification of an overall conflict of laws approach: "In so far as there might be on rare occasions, a conflict between giving effect to the foreign law and the executive's policy of non-recognition, the courts could exclude the application of the offending rule of foreign law on the grounds of public policy." [51] Should the overall conflict of laws approach be modified in this way? Such a modification clearly involves both the ascertainment and the application of the executive interest in non-enforcement.

A. *Ascertaining the Executive Interest*

No difficulty arises on this score when the executive attitude is made explicit. In some of the American cases such explicit statements occur and, as has been seen, are accorded great weight. However, the Foreign Office has never attempted to go beyond bare certificates of non-recognition by issuing policy indications corresponding to the State Department's indications in the *Baltic Ships* cases, suggesting that executive policy opposed recognition of the legislation of the unrecognized government. [52] The nearest the Foreign Office has come to a *Salimoff*-type of certificate, acknowledging, without recognizing, the foreign government, was the carefully oblique hint contained in the certificate in *Luther v. Sagor* [53] which, as we have seen, had no effect on the decision.

In the absence of explicit guidance the court is left to determine the question for itself. Bernstein is in no doubt that in the *Zeiss* case:

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[50] The assumption that public policy *always* requires non-enforcement of the legislation of the unrecognized government has been considered above.

[51] *See* Greig, *supra* note 3, at 145. Lord Wilberforce said that enforcement of the law of the unrecognized government "is a matter for the courts to pronounce on having due regard to the situation as regards sovereignty in the territory where the 'laws' are enacted and, no doubt, *to any relevant consideration of public policy.*" *Supra* note 2, at 184 (emphasis added). It is not clear how far, if at all, this was intended to go beyond traditional public policy considerations. *But see* Lord Wilberforce's previous reference to the public policy element in the American cases, *supra* note 40.

[52] More explicit certificates might be regarded by the courts as an interference with the judicial process. *See* the discussion of the *Slatford* case *infra* at p. 17.

[53] I am to inform you that for a certain limited purpose His Majesty's Government has regarded Monsieur Krassin as exempt from the process of the Courts, and also for the like limited purpose His Majesty's Government has assented to the claim that that which Monsieur Krassin represents in this country is a State Government of Russia, but that beyond these propositions the Foreign Office has not gone, nor moreover do these expressions of opinion purport to decide difficult and, it may be, very special questions of law, upon which it may become necessary for the courts to pronounce. I am to add that His Majesty's Government have never officially recognised the Soviet Government in any way.

> [T]he House of Lords should have analyzed the East German situation with a view to the interests underlying the western policy of non-recognition of the German Democratic Republic. It could have easily discovered that this policy is primarily designed to achieve two interrelated objectives. First it supports the West German government's claim to be
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> the only freely constituted representative of the German people. Second it buttresses the position that the Soviet Union has continuing responsibilities with respect to Germany as a result of the joint military occupation and the various agreements with the Western allies. The court then should have considered the adverse effects which each of the alternative holdings might have on the pursuit of these objectives. [54]

How far are municipal courts competent to undertake such investigations? It would appear from the American cases that, though confusion and mistakes are possible, [55] the right result may be reached, as in *Stoddard* and *Upright*, even when executive guidance is absent. In considering how far English courts could follow this example profitably, two points should be borne in mind. First, an important group of the American cases arose in circumstances which can hardly be regarded as typical, for the distinctive feature of the Civil War cases is that they concerned a state of affairs which lay in the past. This doubtless made the court's task of identifying the policies at stake a relatively simple one compared with the more usual circumstances where the court has to give its decision in the midst of a continuing situation of non-recognition when the executive interest in the outcome may be uncertain and subject to change.

Second, transference of legal rules between different systems requires a correspondence of judicial attitudes. On the present subject, it seems clear that no such correspondence exists. In contrast to the readiness of some American judges to investigate for themselves the foreign policy aspects of a particular problem, [56] English courts on the whole seem to have evolved

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[1921] 1 K.B. 456, at 460-61.

[54] Bernstein, *supra* note 3, at 941-42.

[55] Some of the early cases following the Russian Revolution discussed by Lubman illustrate this; as do the cases concerned with the capacity of the unrecognized government to sue or claim state immunity.

[56] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), is a prominent recent example of responsible judicial appraisal of foreign policy interests. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257 (1962), cites examples of less praiseworthy appraisals. In Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966), noted in 60 AM. J. INT'L L. 862, the court upheld Cuban assets control regulations observing:

> The world today is not the classical international law world of black squares and white squares, where everyone is either an enemy or a friend. We are not formally at war with Cuba but only in a technical sense are we at peace . . . . The founders could not have meant to tie one of the nations' hands behind its back by requiring it to treat as a friend a country which has launched a campaign of subversion throughout the Western Hemisphere . . . . Hard currency is a weapon in the struggle between the free and the Communist worlds; it would be a strange reading of the Constitution to regard it as demanding depletion of dollar resources for the benefit of a government seeking to create a base for activities inimical to our national welfare.

60 AM. J. INT'L L. at 863.

rules, both on recognition and related topics, which are designed to preclude, whenever possible, judicial investigation of executive policy.

In *Monkland v. Jack Barclay Ld.* [57] it was argued that a contract for sale of a car was void as contrary to public policy, on the ground that it failed to comply with a Motor Trade Association scheme which required a particular covenant to be inserted in all such contracts. [58] The relevance of the case in the present context stems from the following passage :

> It was suggested by Mr. Pritt that the Motor Trade Association's covenant scheme had the approval of the Government or government officials and that this was in some way relevant to the question whether a contract which departed from it was or was not contrary to public policy. It could only be so relevant if the Government's approval was some evidence that public policy called for the enforcement of the scheme.
>
> We think that this is an unfounded suggestion. What one Government approves, its predecessor or successor may condemn; and, if the suggestion were acted on, precisely the same contract might have to be held void when Government A was in power, and valid when Government B was in power. The distinction between political policy and public policy was firmly drawn in *Egerton v. Brownlow*, where Lord Truro said that public policy "has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states; with all which, as applied to the present subject, it has nothing to do."
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> For these reasons, in our view, the defendants' point on public policy is wholly unfounded; . . . .[59]

This distinction was transferred from the domestic to the international context in *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [60] where the question was whether the decrees of the Royal Netherlands Government in exile during the war were to be taken to have affected moveable property situated in London. Having decided that the general rule of private international law subjected such property to the *lex situs*, Mr. Justice Devlin rejected the argument that special considerations of public policy could displace the general rule. [61] He said of the *Monkland* case :

> The distinction that is there drawn between public policy and political policy seems to me to be equally applicable here. No doubt one could formulate a broad rule of public policy that allied governments should be assisted in time of war. But the extent to which a particular decree serves

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[57] [1951] 2 K.B. 252 (C.A.).

[58] Since the covenant in question was in fact one restricting resale it is not surprising that Asquith, L.J., for the court, said this argument "savours of paradox." *Id.* at 265.

[59] *Id.* at 265-66.

[60] [1953] 1 Q.B. 248.

[61] The contrary decision of Atkinson, J., in Lorentzen v. Lydden & Co., [1942] 2 K.B. 202, where Devlin, J., as counsel had been unsuccessful, was rejected as contrary to authority and undesirable in principle. Atkinson, J., had attached much importance to the policy reasons favouring enforcement of the decrees, relying significantly on the discussion of policy in the decision of Shientag, J., in Anderson v. N.V. Transandine Handelmaatschappij, 28 N.Y.S.2d 547, 263 App. Div. 705 (1941).

> that end seems to me to be entirely a matter for political decision by the Government of the day, which would have to consider whether all its provisions or some or none of them fitted in with their war policy. A power at war is not bound to regard everything that its allies do as politically desirable. [62]

These statements suggest that the distinction between political and public policy has been drawn by the courts for two reasons. The first is that it is undesirable in principle to have judicial decisions dependent on changing political views; this is an argument about the relevance of the executive interest which will be more fully considered later. The second is the difficulty the court would find in discovering such a policy, if it were desirable to do so. Thus Devlin pointed out: "If the approval and acquiescence of the British Government is relevant, I do not think that it is a matter to be inferred from their conduct. The only way for a court to ascertain such a matter, when it is relevant, is by making inquiry of the relevant Minister." [63]

Transferring these views to the recognition context, it would appear that, in the absence of an executive statement as to policy, the task of investigating the executive interest would be regarded as beyond the court's competence. If this is so, it would seem that, in the absence of executive indications of policy, to define the limits within which the legislation of the unrecognized government should be enforced, by reference to public policy considerations stemming from the possible detrimental effects of a judicial decision on foreign policy interests, would be regarded as an innovation presenting real difficulties to the English court faced with the task of ascertaining such policy. [64]

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[62] *Supra* note 60, at 265. *Cf.* Janson v. Driefontein Consolidated Mines, Ltd., [1902] A.C. 484, at 491, where Lord Halsbury approved the following words of Serjeant Marshall:

> To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of Justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjecture, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction.

[63] *Supra* note 60, at 266. *See also* Salmon, L.J., on the possibility of production of a document imperilling diplomatic relations: "These are topics about which the court can know little without evidence and the executive knows a great deal." *Re* Grosvenor Hotel, London (No. 2), [1964] 3 All E.R. 354, at 370 (C.A.). The question of executive withdrawal of passports raises similar problems. *See* the House of Commons discussions occasioned by the case of Sir Frederick Crawford, 764 PARL. DEB. H.C., 1041-1112 (U.K. 1968) and 766 PARL. DEB. H.C., 723-27 (U.K. 1968). Under the Parliamentary Commissioner Act, 1967, c. 13. sched. 3, § 1, the Parliamentary Commissioner may not investigate: "Action taken in matters certified by a Secretary of State or other Minister of the Crown to affect relations or dealings between the Government of the United Kingdom and any other Government or any international organisation of States or Governments."

[64] It can indeed be argued that the executive interest will in the long term be better served by the courts refraining from any attempt to assess the effect of a decision on foreign policy interests rather than by making (possibly erroneous) attempts to do so.

It is therefore suggested that, if executive policy is relevant here, only such policy as is indicated by executive statement should be taken into account by the English court. Supposing therefore that the Foreign Office adopted the practice of accompanying the certificate of recognition or non-recognition with, where appropriate, a statement of executive policy towards the foreign government in question, what should be the attitude of the courts?

B. *The Relevance of the Executive Interest*

Three approaches seem to be available. First, it might be argued that executive indications of policy should be ignored, this being necessary to maintain judicial independence and consistency of decision. This view, more fully considered below, has little to commend it. If an explicit executive interest is to be ignored totally, the resulting judicial decision fails to take any account of the public, as opposed to the private, interests at stake. The cases under discussion arise in an area where judicial decision and executive policy overlap. To demand, therefore, that judicial decisions should court to reach its decision in an artificial context. The depoliticization of the judicial process is a desirable objective in many areas but the present subject is not one of them. Therefore, in so far as cases like *Slatford* suggest that the political implications of a decision should always be regarded as irrelevant, they surely go too far.

Second, an executive indication of policy might be treated as relevant but not conclusive. This would mean that, in a case like *Zeiss*, the court would examine the certificate of recognition for indications of executive policy on the question of applying the foreign law. If no such policy appeared, it would be assumed that there was no executive objection to application of the foreign law. It would thus be incumbent on the executive to raise any objections based on policy for, as has been argued above, in the absence of specific indications of executive policy, it is not the court's function to undertake its own investigation. Indications of policy in the certificate would either favour giving effect to the legislation by, *e.g.*, acknowledging the existence of the unrecognized government, as in *Salimoff*, or disapproving it, as in the *Baltic Ships* cases. In the former situation, the legislation would of course be applied; in the latter, the court would weigh against the executive interest the effect on the private interests of giving effect to the executive policy and denying recognition to the laws of an established regime. Here, the nature of the legislation in question would be an important consideration, because stronger policy interests would have to be shown for, say, refusing to apply the matrimonial law of the unrecognized regime than for refusing to apply its confiscatory decrees. Usually, no doubt, the court would determine the issue in favour of the executive, but the court's independence would reside in its ability not to do so, if the balance of interest were found to operate against the executive.

Third, any indication of executive policy could be regarded as binding on the court. Thus, for example, an indicated executive policy hostile to application of the legislation of the unrecognized government would, as in the *Baltic Ships* cases, automatically have the effect of preventing the court from apply the foreign law. This is surely the best solution to the problem. It has been seen that the court does not seek to investigate matters of foreign affairs. If, as we have argued, the effect of this is to make it necessary to accept that only explicitly indicated policy interests should be taken into account by the court, it is surely also necessary to accept that a court incompetent to ascertain executive policy without guidance must also be unable to evaluate any policy indicated by the executive, since both ascertainment and evaluation demand a competence the court denies it possesses. [65]

The conclusion is, then, that in the recognition situation the best, as well as the most likely, [66] result would be for the courts to regard executive indications of policy as decisive on the question of whether or not to apply the legislation of an established, though unrecognized, government. Where the executive has been given the opportunity to intervene with decisive effect and no indication of executive policy is forthcoming, the court should be entitled to assume that no objections exist and should accordingly feel free to apply the legislation of the unrecognized government under normal conflict of laws rules. [67]

Three objections can be raised to this approach. First, it may be said that to rest judicial decision on changeable political considerations is to introduce too much uncertainty into the law. This was forcefully pointed out in the *Monkland* and *Slatford* cases. At least, it might seem to be desirable that the executive should provide in advance some indication of the general circumstances in which it would certify that the application by the court of the law of an unrecognized government would adversely effect foreign policy interests. Though to some extent surmounting the difficulty, this suggestion is not without difficulties of its own. The substitution of recognized rules for unfettered discretion could well be more apparent than real, since, so long as the executive statement purported to comply with the pre-established rules, it has to be accepted that the court should not regard it as part of its function to check whether the situation actually involved a policy interest of that kind. Moreover, it could plausibly be argued that

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[65] *Cf.* Conway v. Rimmer, [1968] 2 W.L.R. 998, at 1015 (H.L.), where Lord Reid said that when the Crown withholds documents for reasons "of a character which judicial experience is not competent to weight then the Minister's view must prevail," *i.e.*, in such cases there would be no attempt to evaluate the interests at stake.

[66] In view of the courts' tendency, already noticed, to give even bare certificates of non-recognition the wide effects supposedly required by the "one voice" theory.

[67] *Cf.* the Amendment (Sabbatino Amendment), 79 U.S. Stat. 653 (1965), to the Foreign Assistance Act of 1961, 75 U.S. Stat. 424, : United States courts must now test foreign acts of expropriation for conformity with international law unless the court is instructed that to do so would contravene executive policy.

foreign policy is composed of so many diverse elements, including the need for flexibility, that any advance statement of principles would be altogether impossible, or so generalized as to provide no real limitation. In this connection it is significant that in the United States, though the State Department announced by the Tate Letter of 1952 the principles upon which it would grant a certificate of state immunity, political exigencies have compelled it to depart from such principles. [68] It therefore seems necessary to accept that some uncertainty is the price which must be paid for decisions sensitive to all interests involved.

A further objection might be that the approach preferred here turns the court into an additional arm of an executive exercising legislative power. In the *Slatford* case, Devlin was fully alive to this danger. Pointing out that executive intervention in that case would be both wrong and unnecessary, he said: "It is wrong, because it would put it in the power of the Crown to legislate in a way which might affect the rights of British subjects—for example the creditors of a foreign national—without the authority of Parliament. It is unnecessary, because the Government could in time of war swiftly and easily obtain from Parliament, if it had not already got them, such powers as Parliament thought necessary . . . . " [69]

When examining the weight of this objection, it is at the outset worth remembering that in many other areas touching upon foreign policy, *e.g.*, the granting or withholding of state and diplomatic immunity, the executive already wields what is in effect a legislative power. But, in any case, the above strictures are of less weight when viewed in their context. Doubtless, on the question at issue in the *Slatford* case, legislation might have been expected. This will also be so in cases of non-recognition where some continuing executive policy of non-recognition of the laws is present—perhaps legislation might reasonably have been expected in the *Baltic Ships* cases. [70] However, is it really reasonable to expect all the complex and changing issues arising from political non-recognition to be dealt with by legislation?

One final objection is worth examining. It might be said that to put the onus on the executive to intervene is, even before any judicial decision is

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[68] *See* Chemical Natural Resources Inc. v. Venezuela, 420 Pa. 134, 215, A.2d 864, 60 AM. J. INT'L L. 838 (1966).

[69] *Supra* note 60, at 266.

[70] *Cf.* The Southern Rhodesia Constitution Order 1965, Stat. Inst. 1965, No. 1952 § 2(1): "It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia except as authorized by Act of Parliament is void and of no effect. S. 3(1) So long as this section is in operation—(a) no laws may be made by the Legislature of Southern Rhodesia . . . ."

given, to create a potentially embarrassing situation for the executive, [71] for both the use *and the non-use* of the opportunity to intervene are political acts. Thus, in a case like *Zeiss*, the executive decision on whether or not to intervene must involve the open adoption of a particular attitude to the government in question. It may be questioned whether the Foreign Office would really wish to be presented with a choice of this kind each time any piece of East German legislation comes before the courts. The fact that, on the question of recognition, "temporizing" certificates have on occasion been granted in order to avoid executive commitment lends some weight to this argument. While, however, it is true that a failure to intervene is in a sense a political act, it is at the same time a somewhat equivocal action which cannot really be considered to commit the executive to a particular position in the same way as either a positive statement of policy or a certificate of recognition or non-recognition. Since there should be no question of the court *demanding* a positive statement of executive policy, it can hardly be argued that the disadvantages of the approach advocated here are in any way comparable with the disadvantages of the two alternatives. To avoid even the "commitment" which may be thought to arise from abstention, the possibility of executive intervention would have to be eliminated by the adoption of a rule either that an executive interest in the non-enforcement of the legislation will always be assumed—the unsatisfactory rule in *Luther v. Sagor* rejected above—or that executive intervention will not be permitted, and an unmodified conflict of laws approach adopted. The latter alternative would have the somewhat paradoxical result of ignoring any executive interest in denying effect to the foreign legislation in the specific case in order to serve the executive interest in non-commitment in hypothetical future cases.

The argument for adopting a rule which would require the court to take account of executive policy must ultimately rest on the possibility of an inconvenient decision occasionally "embarrassing" the executive. The approach suggested here seeks to avoid such embarrassment without undue sacrifice of other interests. Where no executive indication of policy is given, the legislation of an established, though unrecognized, government is to be applied, any embarrassing clash with an inarticulate executive policy being a necessary price to pay for serving the other interests in the case. Where an executive indication of policy is given, embarrassment to the executive is avoided.

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[71] Falk raises the same question in the analogous context of the Sabbatino amendment. *See* R. FALK, THE AFTERMATH OF SABBATINO 51 (L. Tondel ed. 1965).

If the *Zeiss* case had been approached in the manner suggested here, the Court would have applied East German law as the law of the effective governing authority despite non-recognition by the United Kingdom, since the executive certificate contained no indication that executive policy required a different result. It is suggested that this would have been a much better way of applying East German law than the crude fiction of agency actually employed by the House of Lords.

In a recent article, [72] Dr. Mann has argued that the *Zeiss* case should have been decided on quite different considerations. Dr. Mann's argument is that, since in international law West Germany is entitled to speak for the whole of Germany, while in the Soviet zone the Soviet Union possesses only the limited authority conferred by the Four Power arrangements of 1945 (which did not permit the creation of an East German state), the House of Lords should have referred the question of the validity of the East German decrees to West German law. Though under the inter-zonal law applied by West German courts many East German acts are recognized, in the present case the decrees would not have been applied, and hence should not have been recognized by the English court. Such an argument relies heavily on the "one voice" theory and the desire to avoid executive embarrassment examined above. It is suggested that in so far as these factors are important, and their importance can easily be exaggerated, they are adequately taken account of by the opportunity for executive intervention advocated above. Such an approach is therefore to be preferred to the line of argument put forward by Dr. Mann, requiring, as it does, far reaching "interpretation" of the executive certificate [73] and lengthy examination by the court of complex questions of both West German law and international law, leading to a highly inconvenient result on the facts of the case.

VI. Conclusion

(a) In determining how far an English court should apply the law of an unrecognized foreign government, though reference to conflict of laws rules may be of assistance, satisfactory answer can only be obtained by differentiating the respective areas of competence of executive and judiciary.

(b) In English law, the *Luther v. Sagor* rule could be argued to require that executive non-recognition of a foreign government should involve judicial refusal to acknowledge either its existence in fact or its independent legislative capacity. Both results are in principle unsupportable, but the decision of the House of Lords in the *Zeiss* case, though refuting the first, embodies conflicting attitudes on the second.

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[72] Mann, *supra* note 7.

[73] *Id.* at 773 & n.73.

(c) In the United States, a more realistic appraisal of the policy elements of each problem, plus a greater readiness to investigate the facts, have enabled the courts to escape the rigidity of the *Luther v. Sagor* rule. In this, they have been assisted by the granting of executive certificates of recognition providing guidance on the policy aspects of problems. The Foreign Office, however, does not seem disposed to grant such certificates.

(d) The executive interest in the outcome of most cases will be small. It would therefore seem preferable to substitute for the *Luther v. Sagor* blanket rule of non-enforcement an overall conflict of laws approach. It is the American practice to modify such an approach where there is an executive interest in the non-enforcement of the foreign law. Such a modification should be introduced into the proposed English rule provided that the executive interest is taken into account only where it is made explicit by the executive certificate. Unassisted judicial inquiry would rightly be regarded as beyond the judicial function. To adopt such an approach would require the courts to reappraise their role. It would require them to cast aside illusory limitations on their competence, while recognizing their real limitation, *i.e.*, the investigation and evaluation of executive policy. It would, in short, require an altogether more realistic approach to matters touching upon the foreign policy of the executive.