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International Law - Recognition and Non-Recognition of Foreign Governments

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INTERNATIONAL LAW — RECOGNITION AND NON-RECOGNITION OF A FOREIGN GOVERMENT

Recognition is the assurance given to a new government that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations. The rights and attributes of sovereignty are said to belong to it independently of all recognition, although it is only after recognition that it is assured of exercising them. Recognition is usually accomplished through a formal note sent by the Department of State to the diplomatic representatives of the country in question.[1]

De facto and *de jure* recognition are convenient abbreviations for recognition of a *de facto* government and recognition of a *de jure* government. When a government is recognized as being *de facto* or *de jure* the distinction refers to the requirements of international law. A *de jure* government is one which, in the opinion of the person using the phrase, ought to possess the powers of sovereignty, though at the time, it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious. *De facto* recognition is a declaration that the body claiming to be the government actually wields effective authority without, however, satisfying other conditions of a full *de jure* recognition.[2] *De facto* recognition, then, is merely an admission of the fact of the existence of the new government and such admission is conclusive evidence of such existence in the courts of the recognizing government.[3]

The United States regards itself as free to withhold recognition from a regime professing to function and even successfully functioning as a government of a foreign state. The recognition of a newly created government is an act which the recognizing government may or may not do. The practice of the governments shows that recognition is a political question which the recognizing government decides of its own free outlook upon the entire situation.[4] The recognition of a foreign state or government is a matter peculiarly within the province of the political as distinct from the judicial department of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.[5]

The rule as to recognized governments seems to be without exception, that the judicial follows the political branch of the government.[6] Although there is much uncertainty and conflict in the courts as to the extent to which effect should be given to confiscatory decrees of recognized foreign governments, the more recent cases support the rule that

[1] Hyde, International Law, Second Revised Edition, §§ 36-40.
[2] Lauterpacht, Recognition in International Law, pp. 338-340.
[3] Am. Soc. Int. Law, 84, 88 (1924); 18 Am. J. Int. Law 152 (1924).
[4] *Supra*, note 1; 36 Am. J. Int. Law 106 (1942); 42 Am. J. Int. Law 113 (1948).
[5] *Infra*, notes 25 and 34.
[6] *Infra*, note 25.

such decrees are binding upon the courts of the United States in so far as that government acted upon persons and property within its powers, if that foreign government is formally recognized by the political department of our government as the *de jure* or *de facto* government of that country.[7]

As to decrees of governments not recognized by the political department the courts have some discretion, but the nature and extent of this discretion is indefinite and depends on the nature and facts of the particular case. Usually the courts do not concern themselves with what an unrecognized government intended by its decrees, but consider what effect should be given them according to principles of justice and public policy.[8] The unrecognized government itself has no standing in court and may neither sue or be sued in the courts of the United States.[9] Speaking of Russia, Justice Stone said:

> "It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the government. For this reason, access to the federal and state courts was denied the Soviet Government before recognition."[10]

However, non-recognition does not in general abridge the rights of citizens or corporations of a nation, the government of which has not been recognized, to sue in our courts.[11] Decrees of the non-recognized foreign government may be given effect to such extent as justice and public policy require.[12]

The problem of recognizing a foreign government and its effect on litigants was most recently presented in *Bank of China v. Wells Fargo Bank and Union Trust Company*.[13] The Bank of China, a corporation with two-thirds of its stock owned by the Chinese Government and the remainder owned by Chinese nationals, brought action against the defendant bank to recover a deposit credit. Attorneys representing the new so-called "Peoples Government" of China claimed that they were the only attorneys empowered to represent the Bank of China. The attorneys for the *émigré* directors asserted that the Nationalist Government now in Formosa is the only Government of China recognized by the United States and that the court should not recognize any change in the management of the Bank of China resulting from acts of a government not recognized by the United States. The court denied relief to

[7] Cases collected and discussed in 37 A.L.R. 726; 41 A.L.R. 746; 65 A.L.R. 1494.
[8] Cases collected and discussed in 89 A.L.R. 345; 91 A.L.R. 1426.
[9] Russian Socialistic Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 142 N.E. 296 (1923).
[10] Guaranty Trust Company of New York v. United States, 304 U.S. 126, 58 S.Ct. 785 (1938).
[11] Russian Volunteer Fleet v. United States, 282 U.S. 481, 492, 51 S. Ct. 229, (1931).
[12] Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924).
[13] 92 F. Supp. 920 (D.C.N.D., Calif. 1950).

both groups and continued the trial *sine die*. The court reasoned that to deny the *émigré* directors was not to deprive a recognized government of funds, and these funds are corporate funds which should only be used for the purposes of the corporation. On the other hand, reasoned the court, the new government is not yet so established as to warrant placing the funds in their hands to aid and abet the Communist Government of China. The court said that there was time enough to reach a decision when solid ground was reached.

Private rights and obligations of an individual or a corporation can be distinguished from those of a body or paramount force in control of the country or residence where that paramount force is not recognized by the United States. Even though such a government by paramount force is not recognized by our government, its existence cannot be completely ignored. For example, in naturalization proceedings we require applicants for citizenship to forswear allegiance to "the present government of that nation." The fact of the existence of such a government can be proved in other ways than by determination by the State Department.[14]

Limited recognition of acts of unrecognized, but *de facto* governments has been given as far back at *Thorington v. Smith*,[15] where the Confederate Government was never acknowledged by the United States as a *de facto* government, nor was it acknowledged by other powers. The Supreme Court denominated the Confederate Government as a government of paramount force.[16] Chief Justice Chase opinioned that to the extent of actual supremacy, however unlawfully gained, in all matters of government within its boundaries, the powers of the insurgent government could not be questioned. Acts that would be valid if by a lawful government, should be regarded as valid when coming from an actual, though unlawful government.[17]

In 1899, The Russian Reinsurance Company was incorporated in Russia and received authority to transact business in New York. Money was deposited with a trust company for the protection of policyholders and creditors in the United States. The corporation brought an action[18] to recover this deposit. The court denied recovery because to allow the corporation to recover would be contrary to common sense and justice. The court said that the facts of each case, the result of each possible decision, determines whether that decision accords with com-

[14] Banque de France v. Equitable Trust Company, 33 F. (2d) 202 (D.C.N.Y., 1929).
[15] 75 U.S. 1, 8 Wall. 1 (1868).
[16] The decrees and laws of the Confederate Government were recognized as valid unless public policy and justice required otherwise.
[17] United States v. Insurance Companies, 89 U.S. 99, 22 Wall. 99 (1874); Sprott v. United States, 87 U.S. 459, 20 Wall. 459 (1874); Baldy v. Hunter, 171 U.S. 388, 18 S. Ct. 890 (1898).
[18] Russian Reinsurance Company v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925).

mon sense and justice. There can be no true precedent in the books when the facts are unprecedented. Decrees or acts of foreign unrecognized governments should be given effect or denied in accordance with our public policy. The courts were open or closed to foreign corporations of unrecognized nations according to our public policy and in determining this policy common sense and justice would be consideration of weight.

Speaking of Russia in 1933, Chief Justice Pound of the New York Court of Appeals put it neatly when he 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 nations, and the man on the street. If it is a government in fact, its decrees have force within its borders and over its nationals. 'Recognition does not create the state.'[19] It simply gives to a *de facto* state international status. Must the courts say that Soviet Russia is an outlaw and that the Provisional Government of Russia as the successor of the Russia Imperial Government is still the lawful government of Russia, although it is long since dead?[20] The courts may not recognize the Soviet Government as the *de jure* government until the State Department gives the word. They may, however, say that it is a government maintaining internal peace and order, providing for national defense and the general welfare, carrying on relations with our own government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of that country is to give to fictions an air of reality which they do not deserve."[21]

Petrogradsky Mejdunarodny Kommerchesky Bank v. Natioal City Bank of New York[22] is somewhat similar to the *Bank of China* case.[23] Here, the plaintiff, a Russian bank, was chartered by the Imperial Government of Russia and deposited money with the defendant. The Soviet Revolution drove the bank directors into exile and the Soviet Government took the bank over. The old directors held meetings in Paris and all were alive when the action was begun to collect the balance on deposit with the defendant in New York. The bank refused to recognize the authority of the directors. The court speaking through Chief Justice Cardozo held that the plaintiff was not dissolved and still was a juristic person with capacity to sue. The decrees of the Soviet Government were not law in the United States at that time, nor were they recognized as law. These decrees were exhibitions of power and not pro-

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[19] Wulfosohn v. Russian Socalistic Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).
[20] Nankivel v. Omsk All-Russian Government, 377 N.Y. 150, 142 N.E. 569 (1923).
[21] M. Salinoff and Company v. Standard Oil Company, 262 N.Y. 220, 186 N.E. 679 (1933).
[22] 253 N.Y. 23, 170 N.E. 479 (1930).
[23] *Supra*, note 13.

nouncements of authority. To be ranked as governmental such acts or decrees must come from an authority recognized at least as the *de facto* government by our own government. The courts did not believe the decrees of Soviet Russia were competent to divest the bank directors of title to any assets that would otherwise have the protection of our law and gave judgment for the directors to recover their deposit.

However, the Supreme Court has held that every sovereign state must recognize the independence of every other sovereign state and that the courts of one nation will not sit in judgment upon the acts of the government of another nation done within its own territory.[24] Where the government of the United States recognizes a government as the *de facto* or *de jure* government of a nation, the propriety of what is done by that government shouldn't be subject to judicial inquiry in decision by courts of the United States. Who is sovereign of a nation is to be determined by the political department of the government and that determination conclusively binds the courts and recognition is retroactive and validates all action and conduct of the government recognized from the date of its existence. If the validity of acts of one nation were examined and perhaps condemned by courts of another nation relations between governments would be imperiled and peace of nations would be vexed more than it is at present if such were possible.[25]

In *United States v. Belmont*,[26] a deposit by a Russian corporation was assigned to the United States by the recognized Soviet Government after expropriation by the Soviet Government. The District Court held that a judgment for the United States could not be had because in view of the result, it would be contrary to the controlling public policy of the State of New York. This judgment was affirmed by the United States Court of Appeals on the same ground.[27] The Supreme Court reversed because state policy cannot prevail against an international compact as involved in this case. The recognition of the Soviet Government, the establishment of diplomatic relations with it, and the *Litinov Assignment*[28] were all parts of one transaction resulting in an international compact between two governments. The external powers of the United

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[24] Underhill v. Hernandez, 168 U.S. 250, 18 S. Ct. 83 (1897).

[25] Oetjen v. Central Leather Company, 246 U.S. 297, 38 S. Ct. 309 (1918); Ricaud v. American Metal Company, 246 U.S. 304, 38 S. Ct. 312 (1918).

[26] 301 U.S. 324, 57 St. Ct. 758 (1937).

[27] 85 F. (2d) 542 (2d cir., 1937).

[28] For the purpose of bringing about a final settlement of claims and counterclaims between the Soviet Government and the United States, it was agreed that the Soviet Government would take no steps to enforce claims against American nationals, but all such claims, including the deposit account, were assigned to the United States with the understanding that the Soviet Government would be notified of all amounts realized by the United States.

States are to be exercised without regard to state laws and policies. Supremacy of a treaty has been recognized from the beginning.[29]

The decrees of the Soviet Government caused much litigation regarding funds and property of Russian companies doing business abroad. The difficulties are due to what Chief Justice Cardozo called, "the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic,"[30] and to endeavor to adjust these hazards and embarrassments to "the largest considerations of public policy and justice."[31] The decrees were recognized because to do otherwise would do violence to the course of negotiations between the United States and Russia. In dealings with the outside world the United States should have its voice in one and not be embarrassed by the courts of individual states.[32]

What will be the outcome of the *Bank of China* case[33] if at a later date the "Peoples Government" of China is recognized by the United States? Such a situation was present in *Guaranty Trust Company of New York v. United States.*[34] In 1916, the Imperial Russian Government opened a bank account with the Guaranty Trust Company. In 1917, the Provisional Government of Russia overthrew the Imperial Government and was recognized by the United States. Five million dollars was deposited by that government in the Guaranty Company. The same year the Provisional Government was overthrown by the Soviet Government, but we did not recognize the Soviet Government until 1933, at which time the five million dollar deposit was assigned to the United States. The United States argued that recognition of the Soviet Government validated that government's previous acts. The Supreme Court said that was tantamount to saying that the judgments in suits maintained here by diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. The Court would not sanction such a doctrine and concluded that the recognition of the Soviet Government could not affect the legal consequences of the previous recognition of the Provisional Government. The doctrine that recognition validates all acts of that government was limited to those acts that do not affect consequences of previous recognition of prior governments.

When a government falls and another government comes into power by force, all under the new government are affected by the rule of the

[29] United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216 (1936).
[30] Beha v. Russian Reinsurance Company of Petrograd, 255 N.Y. 415, 420, 175 N.E. 114, 115 (1931).
[31] James and Company v. Second Russian Insurance Company, 239 N.Y. 248, 256, 146 N.E. 369, 370 (1925).
[32] United States v. Pink, 315 U.S. 203, 62 S. Ct. 552 (1941).
[33] *Supra*, note 13.
[34] 304 U.S. 126, 58 S. Ct. 785 (1938).

new government. The rule may be lawful or unlawful, but its existence is a fact that cannot be destroyed by courts of another nation. The State Department determines whether it will recognize the existence of the new government as lawful and until that recognition the courts should not be allowed to pass on the legitimacy of that nation. The State Department alone determines that question. It cannot, however, determine private rights and obligations of individuals affected by the acts of a body not sovereign, or with which our government will have no dealings. Such a question is not one of foreign relations and not a political question, but a judicial one. The courts should consider the result and not the cause. The courts should not pass upon what an unrecognized government may do or if what has been done is right or wrong, but should consider the effect on others of that which has been done from the factual viewpoint as distinguished from the theoretical point of view.

It appears that we have a clear right to refuse recognition of a new government and hold to our recognition of the old government. The *Bank of China* case[35] should be governed by the rule of the *Petrogradsky Mejdunarodny Kommerchesky Bank* case[36] as laid down by Chief Justice Cardozo. Recovery by the directors in that case was allowed because we did not recognize the acts of the new government that attempted to dissolve the corporation.The bank was still a juristic person and could sue and recover in our courts. Applying this reasoning the *émigré* directors should be allowed to recover the deposit in the Wells Fargo Bank. We do not recognize the Communist Government of China nor do we recognize their acts or decrees.[37] It is a presumption that the directors will use the money properly and the court should not recognize a change in the management of the Bank of China that was brought about by unrecognized acts of an unrecognized government.

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[35] *Supra*, note 13.
[36] *Supra*, note 22.
[37] On June 27, 1950, the President of the United States announced that the United States will defend Formosa, the present seat of the de jure Chinese Government. It appears from this that the policy of the United States is one of active intervention against the aims of the "Peoples Government" of China.