University of Michigan Law School
University of Michigan Law School Scholarship Repository

Articles | Faculty Scholarship

1923

International Recognition and the National Courts

Edwin D. Dickinson
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Comparative and Foreign Law Commons, and the Courts Commons

Recommended Citation
Dickinson, Edwin D. "International Recognition and the National Courts." Mich. L. Rev. 21 (1923): 789-92.

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

INTERNATIONAL RECOGNITION AND THE NATIONAL COURTS.—The extending of international recognition to a new government or a new state is a political function which belongs exclusively to the political departments of government. It follows that whenever the question of recognition or not is really involved in litigation the court should inform itself as to the course pursued by the appropriate political department and decide accordingly. This much, if it ever needed to be settled, may now be regarded as settled beyond peradventure. See 18 MICH. L. REV. 531.

The difficulties are those which arise in the application of a doctrine so broadly stated. Not every litigation involving an unrecognized government or state requires the decision of a question of recognition. If a decision on recognition is not required, then it is entirely proper for the court to take cognizance of a mere *de facto* government or state. The judiciary takes cognizance of *de facto* situations at home or abroad, whether related to the conduct of foreign affairs or not, whenever it is possible to do so without becoming improperly involved in the decision of political questions. See *Rose v. Himely*, 4 Cr. 241; *Keene v. M'Donough*, 8 Pet. 308; *United States v. Rice*, 4 Wh. 246; *Thorington v. Smith*, 8 Wall. 1; *The Home Insurance Company's Case*, 8 Ct. Cl. 449, 22 Wall. 99; *Van Deventer v. Hancke and Mossop*, Transvaal L. R. [1903] T. S. 401; *Lemkuhl v. Kock, ibid.* 451; *Yrisarri v. Clement*, 2 Carr. & Payne 223.

It is frequently a matter of peculiar difficulty to know how far the court should go in taking cognizance of an unrecognized *de facto* government or state. In the earlier cases the courts manifested an inclination to be conservative. Most of the situations presented were lumped into one category for which a single broad generalization was thought sufficient. See 18 MICH. L. REV. 531. Later cases, particularly the recent case relating to Mexico and Russia, have made it increasingly evident that the problem is much too complicated for one category and a single generalization.

If it is clear that the rule invoked in a given case applies only to recognized governments or states, then the court has only to ascertain whether recognition has been granted or withheld and apply the rule accordingly. This has been the situation in a number of important cases arising out of loans to insurgents. Suppose, for illustration, that an insurrection is fomented in a neighboring state, that one of our citizens advances funds by way of loan to the revolutionists, and that he later finds that the persons to whom he advanced the funds are perpetrating a fraud and appropriating the proceeds. The courts will afford the lender no relief unless the insurgents have been recognized, either as belligerents or as an independent state, because loans to unrecognized revolutionists to promote insurrection in a friendly state are illegal. Recognition is vital in this type of case because the legality or illegality of the transaction depends upon it. See *Jones v. Garcia Del Rio*, Turn. & Russ. 297; *De Wütz v. Hendricks*, 9 Moo. 586, 2 Bing. 314; *Yrisarri v. Clement*, 2 Carr. & Payne 223; *Thompson v. Powles*, 2 Sim. 194;

Taylor v. Barclay, 2 Sim. 213; *Habershon v. Vardon*, 4 De G. & Sm. 467; *Kennett v. Chambers*, 14 How. 38; CORBETT, CASES (Ed. 3) II, 366.

The problem becomes much more difficult when the government of a foreign state comes into court seeking relief with respect to state property or other public interest. In case of a contest between rival governments it is the recognized government which has standing in court. *The Emperor of Austria v. Day and Kossuth*, 3 De G. F. & J. 217; *The Hornet*, 12 Fed. Cas. 529. Suppose, however, that the recognized government has been in fact completely overthrown and succeeded by a new *de facto* government which has not been recognized. There are at least two possible situations. Either the political departments may continue to regard representatives of the old government, now defunct, as the accredited representatives of the foreign state, or the foreign state may be for the time without any recognized representatives whatever. The former situation has recently arisen as regards Russia; and it has been held in several cases that only the recognized agents of Russia have any standing in court to ask relief on behalf of the state which they claim to represent. *The Rogdai*, 278 Fed. 294; *The Penza*, 277 Fed. 91. Compare *United States v. Trumbull*, 48 Fed. 94. The unrecognized *de facto* government is no better off in the latter situation. *The City of Berne v. The Bank of England*, 9 Ves. 347.

It has been suggested that courts ought to make a distinction between the case in which an unrecognized *de facto* government claims the public property of its predecessor and the case in which such a government seeks relief with respect to some property or other interest of its own. Borchard, "Can an Unrecognized Government Sue," 31 YALE L. JOUR. 534. The latter situation was presented in *Russian Socialist Federated Soviet Republic v. Cibrario*, recently before the courts of New York. One of the departments of the Soviet Government entered into a contract with the defendant in Russia for the purchase of moving picture machines and supplies and delivered one million dollars to the United States commercial attaché at Petrograd to be deposited in an American bank subject to draft according to the contract's terms. The money was deposited in the National City Bank of New York. Thereafter the Soviet Government commenced an action in New York to compel the defendant to account for sums of money which it was alleged he had been obtaining from the fund through fraud. The Appellate Division made no distinction, but held that the action could not be maintained. 191 N. Y. Supp. 543. See also *Preobazhenski v. Cibrario*, 192 N. Y. Supp. 275. This decision has been affirmed very recently by the New York Court of Appeals. The position is taken that the foreign government's privilege of suing in our courts rests upon international comity, that in the absence of recognition there can be no international comity, and consequently that an unrecognized government must be without standing in court. 69 NEW YORK LAW JOURNAL 15.

In another type of situation, closely related to the one just considered, the problem is presented to the court in connection with a claim to exemp-

tion from jurisdiction. The immunities of diplomatic representatives have been conceded to the agents of recognized states only when the diplomatic character has been acknowledged by the executive department. *In re Baiz,* 135 U. S. 403; *United States v. Trumbull,* 48 Fed. 94; *Savic v. City of New York,* 193 N. Y. Supp. 577. Very likely immunities would be denied the agents of an unrecognized government or state, although the case is distinguishable and involves peculiar difficulties. The immunities of public ships, in the recent English cases at least, have been made to depend upon recognition. *The Gagara* [1919], P. 95; *The Annette* [1919], P. 105; 18 MICH. L. REV. 531. The question of the immunities to be accorded other kinds of public property belonging to a state without recognized government appears to have been rather acutely involved in the recent attempt of the Oliver Trading Company to attach Mexican public funds in New York City. According to press reports, when the Secretary of State intervened he informed the New York courts that the public property of a foreign state is immune from attachment. Does this mean that immunities may be enjoyed by a foreign state where recognition of its government has been withheld? Does the situation of a recognized state without recognized government differ in this respect from the situation of an unrecognized state?

If we are to assume that states without recognized government enjoy no immunity for their representatives, ships, or other public property, then it would seem to follow logically that suits may be instituted against the governments themselves. In *Wulfsohn v. Russian Socialist Federated Soviet of Russia,* the lower New York courts arrived at this astounding conclusion. The Supreme Court observed that since there was no comity between the United States and Russia the Soviet Government could claim no immunity from suit. 192 N. Y. Supp. 282. This view was approved by the Appellate Division. 195 N. Y. Supp. 472. But the Appellate Division has very recently been reversed by the Court of Appeals, where it has been held finally that an unrecognized *de facto* government cannot be sued for an act of confiscation within its own territorial jurisdiction. 138 N. E. 24. The plaintiff's case appears to have been weakened by an admission that the Soviet Republic was the existing *de facto* government of Russia, but admission or no the decision is believed to be thoroughly sound. The *de facto* character of the Soviet Government was matter of common knowledge. It was being sued for an exercise of authority within its own jurisdiction. If the court had insisted upon making recognition the criterion of immunity, it would have blundered unwittingly into the very sort of delicate political question which it is the reason of the rule in regard to recognition to avoid.

We come finally to situations like that presented in *Luther v. Sagor & Co.,* [1921] 1 K. B. 456, [1921] 3 K. B. 532, 20 MICH. L. REV. 243, in which the only contest is between individuals about matters of private right. Surely in such situations the courts ought to feel no diffidence about taking cognizance of the existence of an unrecognized *de facto* government or state and of the capacity of a *de facto* government to do such acts as are required

in the appointment of administrators, the adjudication of titles, the collection of taxes, the issuing of currency, the creation of corporations, or even the confiscation of property. Unfortunately, in some of the most important cases of this type decided to date, the courts have been persuaded that the situation required the application of the rule in regard to recognition. In addition to *Luther v. Sagor & Co.*, see *Pelzer v. United Dredging Co.*, 193 N. Y. Supp. 675, 676, holding that so long as the United States withholds recognition from the government functioning in Mexico an administratrix appointed by a Mexican court can maintain no action in courts of the United States. Compare, however, Mr. Justice Ford's decision in *Sokoloff v. National City Bank*, as reported in The New York Times, Dec. 20, 1922. Discussion of this phase of the problem is reserved for a later number of this REVIEW in which it is intended to subject the whole question to more thorough examination. E. D. D.