

Washington University Law Review

Volume 14 | Issue 2

January 1929

Review of “The Legal Effects of Recognition in International Law, as Interpreted by the Courts of the United States,” By John Hervey

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Recommended Citation

Sterling E. Edmunds, *Review of “The Legal Effects of Recognition in International Law, as Interpreted by the Courts of the United States,” By John Hervey*, 14 ST. LOUIS L. REV. 217 (1929).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol14/iss2/26

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the parties and causes for divorce. He thinks that such uniformity, coupled with a restriction of grounds for divorce, would be better for our law as well as our social institutions.

Governor Whitman, in a comparison of the administration of the criminal law in England, France, and America, shows rather pointedly our slow and defective procedure here, as a probable contributing factor to the crime wave. Judge Cohalan, in his article, "How Not to Try a Case," gives a message which every young lawyer, as well as the experienced practitioner, would do well to read. It is an interesting topic, and carries with it a message which it is well to heed, but, nevertheless, the knack of trying a case seems to be acquired only with experience. Thus, we have a book which contains the thoughts of many great minds, a book which it is well worth everyone's while to study, if not for the learning itself, then for the viewpoint one gets.

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THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW, AS INTERPRETED BY THE COURTS OF THE UNITED STATES, by *John G. Hervey*, Philadelphia: University of Pennsylvania Press, 1928. Pp. xiv, 170.

In this small volume Mr. Hervey has made a very practical and useful contribution to the literature of international law in a field of growing importance to the preservation of peace and justice among nations.

The so-called Family of Nations, arising out of the Peace of Westphalia as some four or five hundred autocratic political entities, each supreme and unaccountable, has very naturally exhibited few of the traits of forbearance and sympathy which are to be found in a normal family. The very nature of their sovereignty, which the Peace of Westphalia confirmed to them, precluded the idea of the existence of international duties resting upon them corresponding to their arrogated unlimited international rights.

In organization the Family of Nations suggests an exclusive club split into cliques yet held together by an assumed common superiority. They admit no obligation to recognize any new State or any new government in an old State, save in their own good pleasure. States and governments not recognized are in a condition of ostracism, are ignored as though non-existent. As to them, there is no application of the so-called fundamental rights of existence, independence, equality, commerce, respect and jurisdiction; and their subjects and citizens are left without international protection in non-recognized states.

Such was the situation when the United States came into being. But, under the inspiration of its liberal political philosophy of that day, our government, through Thomas Jefferson as Secretary of State, immediately laid down for itself a rule of recognition which did credit to our logic as well as to our zeal for liberty. It was conveyed to Gouverneur Morris, our Minister to France, in 1792, on the occasion of the deposition of Louis XVI, in these words:

"It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared."

And in 1793:

"We surely cannot deny to any nation that right whereon our own government is founded—that every one may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether King, Convention, Assembly, Committee, President or anything else it may choose."

But this doctrine of "The will of the nation," as determinative of the right of recognition, was without a chance of adoption by those states of Europe which were to spend the next half-century ruthlessly suppressing "the will of the nations" wherever it was declared contrary to the claims of legitimacy. Nor did the United States adhere for long to this fine logical test. Rather it adopted the policy generally that it would recognize any government that held adequate power, however acquired, with such exceptions as interest might dictate.

The granting or withholding of recognition to states and governments, is commonly used as a powerful instrument of policy. The United States has granted recognition at times in great haste, as in Panama three days after its revolt and before Colombia could prepare for reconquest; and it has refused to recognize obvious facts in Central America because they were unpleasant, until inconvenience to itself forced a change of attitude.

The main concern of Mr. Hervey's work, however, is with the more practical aspect of the legal effects of recognition and non-recognition, or to use his own words:

"The object of the present work is to study the effects of recognition as revealed by the decisions of the courts, and to determine critically the correctness or incorrectness of the positions assumed by the courts with a view toward furnishing a guide for future use in the determination of such cases and controversies."

And to this end Mr. Hervey has gathered together and analyzed more than two hundred of the leading American and English decisions ranging over a period of 150 years.

In these days of increasing interdependence of peoples, the importance of the subject becomes plain when it is realized that, by practice, recognition of a new state or government is necessary to confer a status before the courts of the recognizing state; that unrecognized governments and states have no *persona standi in judicio*, and yet, like alien enemies, may not be immune from suit in non-recognizing states. When a numerous people, such as the Russians, finds itself thus outside the protection of prevailing law, well might the earnest student seek for new guides in the interest of common sense and common justice.

As Mr. Hervey points out, the courts of the United States and England have not been entirely insensible to the anachronisms of past practice and they are gradually feeling their way to juster action.

Recognition of a new state may be granted in several ways, as by the negotiation of a treaty, impliedly or expressly according to it; and by the sending of a diplomatic agent. Recognition being a political act, the

power to extend it usually vests in the political or executive department of government.

The judicial branch of government uniformly considers itself bound in such political questions by the action or deliberate inaction of the executive, not only with respect to new states and new governments but also with respect to conditions of belligerency and insurgency. Any other course would necessarily lead to confusion and conflict of policy.

When a new government has ousted a former recognized one, it may or may not be recognized as the *de facto* government. If not recognized the old government is by practice viewed as continuing, even though it has been annihilated. Such was and is the attitude of the United States toward Russia, though the Kerensky and Czarist governments were swept away more than a decade ago. In 1918, when the Soviet government had in fact been in power for a year, the Department of State certified to a New York Federal court that one Serge Ughet, financial attaché of the Russian Embassy under the Kerensky Government, was the duly accredited representative of Russia in this country; and as late as 1927 a judgment for \$984,104.62 obtained by Mr. Ughet, on behalf of the Czarist government, was paid to him as a good discharge with the approval of the United States Supreme Court. Though a Soviet representative, unofficially in the United States, protested and sought to intervene, both he and the Soviet government were treated as non-existent.

This suit, growing out of the Black Tom explosion in 1916, was originally styled *Imperial Russian Government v. Lehigh Valley Railway Co.* Since both the Imperial and the successor Kerensky governments had disappeared, the court granted a motion to entitle the plaintiff "The State of Russia," which still lived. This is significant of an attempt to meet the realities, though by prevailing conceptions a state without a government is in suspense.

Our courts and those of England have had to deal with many cases growing out of the confiscation decrees of the Soviet government, where the property came within their jurisdictions. In one recent case of *Wulfsohn v. Russian Socialist Federated Soviet Republic*, involving valuable furs confiscated and sent to New York, the lower State Courts, following the implications of earlier doctrine, allowed an attachment, holding that the immunity of state property was a matter of comity. The Court of Appeals ultimately reversed this position, holding that a *de facto* government, even though not recognized, was immune from suit; that this immunity did not rest in comity, but upon fundamental considerations of international relations.

Yet the English courts have indicated in like cases that they would allow recovery of such property. In one case, in fact, a recovery was allowed in the Court of the King's Bench of which the Court of Appeals spoke approvingly, but which that Court set aside only because meantime recognition had been granted to the Soviet government by Great Britain. And such recognition, in practice, has the effect of legitimizing, or at least placing beyond judicial inquiry, all prior acts of the recognized government, under a doctrine of retroactivity. All remedies thereafter must be

sought through the political rather than through the judicial department.

The rigidity of the doctrines of the law with respect both to recognized and unrecognized governments is such as frequently to do violence to justice and to public policy. Mr. Hervey makes a number of thoughtful suggestions to ameliorate these conditions. He would allow suit in certain cases of unrecognized governments in the name of the state rather than in the name of the government; and he would introduce some form of public conservation for the properties of states having unrecognized governments, pending the advent of a recognized government. He feels that courts of non-recognizant states should admit the fact where a de facto government is functioning, and give effect to its acts and decrees, in so far as they affect individual rights, where equity and public policy require it. Such views, while not sustained by precedents, are nevertheless sustained by reason and analogy, he declares.

Mr. Hervey has not only made an interesting contribution toward the elucidation of a complex legal subject, but it is worthy of mention that he has placed text-writers in his debt for the introduction of a new adjective in our legal terminology in "recognizant" and its negative, "non-recognizant," in place of the rather awkward verbal adjective "recognizing" and "non-recognizing," heretofore employed to describe states extending or withholding recognition.

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