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The Ultimate Fiction

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THE ULTIMATE FICTION

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Mrs. Soled contends that the very existence of "legal fictions" is the ultimate fiction. She examines the traditional axiomatic propositions that legal fictions exist and that legal fictions are not real, contending that these traditional conceptualizations result in many factual situations being paradoxically characterized as illegal, although simultaneously being treated as if they were legal. She illustrates the confusion involved in the application of legal fictions in the areas of corporate law, public offices and legislatures, divorce, and international recognition. In Mrs. Soled's analysis the confusion surrounding the application of legal fiction in all of these areas results from the basic assumption that law is based upon objective reality. She denies the relevance of the distinction between "reality" and "fiction" insofar as the law is concerned, and starting with the assumption that law is based upon "subjective reality" proposes an alternative conceptualization, relative recognition, which avoids the logical pitfalls of traditional analysis.

THE EXISTENCE of "legal fictions"** is an axiom of legal theory.[1] It is the inevitable complement of the axiom that the Law is constructed upon objective reality.[2] Both axioms are common to almost all concepts of the law.[3] Both also are fallacious.

Coexistent with these fallacies, and dependent for its continued existence upon them, is a conceptual confusion as to the meaning attributable to "Law," for the purpose of applying the terms "legal," "legality," "illegal," and "illegality." This confusion has generated the juristic classification of factual situations as (1) legal; or (2) illegal; or (3) illegal, but treated as legal, *i.e.*, simultaneously legal and illegal. This categorization is doubly objectionable: First, it postulates a paradox — the synonymity of the antonymous concepts "legality" and "illegality." Second, it involves a misconception as to the nature of the analysis to be made.

Acknowledgment that the Law is a creature of subjective reality, necessarily will result in clarification of the meaning attributable to "Law" in the above context. The effect of this elucidation will be to rectify the prevalent error as to the character of the analysis which should be made.

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**All words or phrases enclosed in quotation marks upon their first appearance in this article shall be read as if so enclosed upon all subsequent appearances herein.

[1] *See* J. FRANK, LAW AND THE MODERN MIND 32-41, 312-22 (1949); J. GRAY, THE NATURE AND SOURCES OF THE LAW 30-64 (2d ed. 1927); P. TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 294-300, 383-99 (1922); Fuller, *Legal Fictions* (pts. 1-3), 25 ILL. L. REV. 363, 513, 877 (1930-1931).

[2] *See* note 1 *supra.*

[3] *See, e.g.,* J. GRAY, *supra* note 1, chs. II & IV; Fuller, *supra* note 1.

I. THE LAW IS PREMISED UPON SUBJECTIVE REALITY.

Many and varied are the definitions of the "Law." At one end of the spectrum is the theory that "[t]he Law . . . is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are the Law, they are not the Law because they are laid down by the judges . . . ,"[4] *i.e.* "the judges discover pre-existing Law . . . ."[5] At the other end of the spectrum is the hypothesis that "[t]he Law . . . is composed of the rules which the courts, that is, the judicial organs . . . lay down for the determination of legal rights and duties."[6] In other words, "*the* Law is the body of rules which the courts . . . apply in deciding cases."[7] Between these two extremes lies Austin's definition of Law as commands of the sovereign.[8] Also in the median range, is the supposition that "the courts, in deciding cases, are, in truth, applying what has previously existed in the common consciousness of the people."[9]

Common to all these concepts of the Law is the axiom that "legal fictions" exist.[10] According to Fuller, for example:

> Probably no lawyer would deny that judges and writers on legal topics frequently make statements which they know to be false. These statements are called "fictions." There is scarcely a field of the law in which one does not encounter one after another of these conceits of the legal imagination. . . . Even the austere science of Jurisprudence has not found it possible to dispense with fiction. The influence of the fiction extends to every department of the jurist's activities.[11]

Similarly, according to Tourtoulon, "juridical logic often asserts what is false. . . . The fiction is the algebra of law, and a picturesque form of algebra besides."[12] Tourtoulon further states:

> [T]he fiction has played a part in law exactly identical with that of the metaphor in language. A whole world of fiction has gone toward the making of juridical ideas which seem to us most practical and familiar. The legal systems which were the richest in

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[4] J. GRAY, *supra* note 1, at 93.

[5] *Id.* at 96. *See also* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 161 (M. Hall ed. 1947): "The old Blackstonian theory of pre-existing rules of law which judges found, but did not make . . . ."; J. FRANK, *supra* note 1, at 32.

[6] J. GRAY, *supra* note 1, at 84.

[7] *Id.* at 110. *See also* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 5, at 158: "The theory of the older writers . . . was that judges did not legislate at all. A pre-existing rule was there . . . . From holding that the law is never made by judges, the votaries of the Austinian analysis have been led at times to the conclusion that it is never made by anyone else." J. FRANK, *supra* note 1, at 33; W. FRIEDMANN, LEGAL THEORY 218-19 (4th ed. 1960); J. SALMOND, JURISPRUDENCE § 20 (7th ed. 1924).

[8] 1 J. AUSTIN, JURISPRUDENCE (4th ed. 1873); W. FRIEDMANN, *supra* note 7, at 211-13; J. GRAY, *supra* note 1, at 85.

[9] J. GRAY, *supra* note 1, at 89.

[10] Note 1 *supra.*

[11] Fuller, *supra* note 1, at 363.

[12] P. TOURTOULON, *supra* note 1, at 385.

> imagery at their origin are today the richest in precise and learned conceptions, and it was by passing from fiction to fiction that their most important progress has been realized. . . . The oldest and most essential ideas are nearly all, if not all, fictitious.[13]

Although it is considered axiomatic that there are such creatures as legal fictions, it is asserted, with equal dogmatism, that legal fictions are not real.[14] This is true even of those who maintain that the law consists of the rules recognized and applied by judges in deciding cases.[15] Thus, it has been said:

> One who employs a fiction makes a statement which deviates from or contradicts reality, but with full awareness of this deviation or contradiction. . . . The chief characteristics of a fiction are . . . [i]ts arbitrary deviation from reality. . . . Fictions are "assumptions made with a full realization of the impossibility of the thing assumed." . . . One must guard against the vice of assuming that, because a fiction is useful, it therefore has objective validity. "The gulf between reality and fiction must always be stressed"; one must avoid "the fundamental error of converting fictions into reality."[16]

Common definitions of "legal fictions" explicitly assume that such fictions are not real. A legal fiction has been defined as "[a]n assumption of a possible thing as a fact irrespective of the question of its truth . . . ."[17] It further has been described as a "statement made with full consciousness, at the moment of utterance, that it does not correspond to the truth of the matter . . . ."[18] Tourtoulon has stated that "the fiction is the enunciation of a fact which is false and is recognized and presented as false. . . . The juridical nature of all of these assertions is identical; when one enunciates them without being his own dupe or wishing to dupe others, a fiction is created."[19]

"Reality" commonly is defined as the "[s]tate, character, quality, or fact of being real, existent . . . or of having real being or existence . . . . That which actually exists, that which is not imagination, fiction or pretense . . . ."[20] It would appear, therefore, that by defition, fictions cannot be considered as real. For the concept of "fiction" exists only as a correlative of the concept of "reality." Yet, as a matter of semantics, "reality" has a dual connotation. In common usage, "reality" is understood to denote objective reality — "That which actually exists . . . that which has objective existence, and is

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[13] *Id.* at 387.

[14] Note 1 *supra.*

[15] J. FRANK, *supra* note 1; J. GRAY, *supra* note 1.

[16] J. FRANK, *supra* note 1, at 312. *See also* P. TOURTOULON, *supra* note 1, at 385: "[T]he fiction does falsify reality . . . ."

[17] WEBSTER'S NEW INT'L DICTIONARY 940 (Fiction) (2d ed. unabr. 1937).

[18] J. FRANK, *supra* note 1, at 312.

[19] P. TOURTOULON, *supra* note 1, at 384. *Cf.* Fuller, *supra* note 1, at 369: "A fiction is either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."

[20] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937).

not merely an idea."[21] "Reality," however, also can be subjective in nature. Subjective reality is "reality as perceived or known as opposed to reality as independent of mind . . . ."[22] The concept of "subjective reality" is expressed most succinctly as *esse est percipi* — to be is to be perceived.[23] In other words, subjective reality is that which is perceived or recognized as having actual existence.[24] Since the relationship of legal fictions to reality customarily is defined *only* in terms of objective reality,[25] the fact that the concepts of "legal fictions" and "reality" are considered to be mutually exclusive[26] is not determinative of whether legal fictions are real. For, the concept of "fiction" is correlative *only* to the concept of "*objective* reality."[27]

Thus, definition of legal fictions in terms of objective reality is required only by, and dependent upon, the assumption that the Law is based upon objective reality — that there is such an animal as an "objective legal truth."[28] Yet, the very writers who postulate the Law to be constructed upon objective reality state categorically that it is, in fact, constructed upon legal fictions.[29] The argument, however, is presented most cogently by Tourtoulon,[30] who observes:

> [V]ery old fictions are no longer considered as such. All of our institutions were of a fictitious character originally; if one would try to strip the Law of every fiction of the past as well as of the

[21] *Id.*

[22] WEBSTER'S COLLEGIATE DICTIONARY 992 (Subjective) (5th ed. 1946). *See also* Idealism.

[23] This concept also is known as Berkleianism, in honor of its proud parent, George Berkeley, Bishop of Cloyne. See B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 648 *et seq.* (1961).

[24] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality), 2510 (Subjective), 1815 (Perceive), 520 (Cognizance) (2d ed. unabr. 1937).

[25] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937).

[26] J. FRANK, *supra* note 1, at 312; WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937).

[27] WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937). *See also* authorities cited note 1 *supra.*

[28] *See* J. FRANK, *supra* note 1; P. TOURTOULON, *supra* note 1; WEBSTER'S NEW INT'L DICTIONARY 2072 (Reality) (2d ed. unabr. 1937). Frank, for example, states, *supra* at 37, that "[l]egal fictions are mistaken for objective legal truths . . . ."

[29] J. FRANK, *supra* note 1; J. GRAY, *supra* note 1. Gray, for example, observes, *supra* at 31, 34, and 35, that "[f]ictions have played an important part in the administration of the Law in England . . . . There was no lack of other fictions in the English Law, in the shape of allegations which one of the parties made and the other was not allowed to deny, in order that the wine of new law might be put into the bottles of old procedure. . . . Such fictions are scaffolding, — useful, almost necessary, in construction . . . ." Frank comments, *supra* at 40: "Neither in law nor elsewhere could we afford to do away with fictional contrivances." In addition, Frank, *supra* at 39, quotes Bentham's vituperative views on "legal fictions": " 'Lying, he might have said, without any such hyperbole — lying and nonsense compose the groundwork of English Judicature. . . . In English law, fiction is a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness.' " *See also* R. POUND, THE SPIRIT OF THE COMMON LAW 166-73 (1921); Fuller, *supra* note 1.

[30] Who, it should be noted, considers it to be a "strange delusion that the law can be constructed upon objective realities." P. TOURTOULON, *supra* note 1, at 295.

> present, not much would be left.[31] [He further observes that] [i]t would not therefore be inaccurate to claim that our reality is simply fiction differentiated, and that at bottom all law is reduced to a series of fictions heaped one upon another in successive layers.[32]

Once it is recognized that the Law is constructed upon legal fictions, as opposed to objective reality, the true relation of legal fictions to legal reality becomes apparent.

Subjective reality is that which is perceived or recognized as having actual existence.[33] A legal fiction is the enunciation of a fact which is or may be false, but which the Law recognizes as having actual existence.[34] Therefore, legal fictions are subjectively real.

Since the Law is constructed upon legal fictions,[35] and legal fictions are subjectively real, the Law is constructed upon subjective reality.

Recognition of subjective reality as the substratum of the Law is implicit in discussion of "legal fictions" *qua* "fictions."[36] Thus, Tourtoulon:

> Finally, precisely because the fiction does falsify reality, it frequently happens that it is very strictly and subjectively exact, much more strictly so than any other form of thought expression . . . . A fiction, be it understood, is only a juridical "construction" like any other . . . . In any case, one must steer clear of the belief that a fictitious construction is opposed to a real one. Every juridical construction is simply a question of form, hence arbitrary and artificial. The fiction is a form created by the imagination . . . . [L]ogically, it is absolutely identical with any other form.[37]

Timberg, moreover, observes that "[o]ur knowledge of all 'reality' is largely referential and symbolic, and fictions, therefore, necessary logical expedients on which we must rely."[38] He also quotes from *The Philosophy of As If,* by Vaihinger: " 'A fiction can

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[31] *Id.* at 388.

[32] *Id.* at 387.

[33] *See* note 24 *supra.*

[34] BLACK'S LAW DICTIONARY 772 (Fiction) (3d ed. 1933). This premise has been stated: *Fictio est contra veritatem, sed pro veritate habetur.* (Fiction is against the truth, but it is to be esteemed truth.)

[35] *See* notes 29, 31, 32 *supra.*

[36] *See* J. FRANK, *supra* note 1; P. TOURTOULON, *supra* note 1; Fuller, *supra* note 1; Timberg, *Corporate Fictions,* 46 COLUM. L. REV. 533, 540 *et. seq.* (1946).

[37] P. TOURTOULON, *supra* note 1, at 385, 391. Similarly, Patterson relates that Professor Dewey told his students "that, logically speaking, a fact and a fiction are the same." *Pragmatism As a Philosophy of Law,* reprinted from THE PHILOSOPHER OF THE COMMON MAN 181 (1940). Patterson further stated, at 224 of An Introduction to Jurisprudence (4th mimeographed ed. 1951): "We call a 'legal fiction' any affirmation that a certain symbol (word or phrase) that is connotative in a legal context has a denotative reference that contradicts the denotative reference of the same symbol in some other context, usually that of popular language. Thus the affirmation that 'husband and wife are one person' in the English common law had a considerable variety of legal consequences, and *in that context* it was a warranted ('true') assertion. Thus Professor Dewey said that *in that context* it was a 'legal fact'. Only when we transfer the affirmation to another context does it become fictitious."

[38] Timberg, *supra* note 36, at 541.

be substituted for the actual world . . . but it is not a picture of true reality, it is only a sign used in order to deal with reality, a logical expedient devised to enable us to move about and act in the real world.' "[39]

Frank, by tacitly acknowledging the subjective reality of legal fictions, also accords implicit recognition to subjective reality as the foundation of the Law.[40] Although he approves Vaihinger's thesis that "[o]ne must guard against the vice of assuming that, because a fiction is useful, it therefore has objective validity,"[41] he refers, several times, to the existence of "valid fictions."[42] Since "validity" connotes "reality,"[43] Frank must be presumed to be acknowledging the non-objective, or subjective, reality of fictions.

Recognition of subjective reality as the substratum of the Law is explicit, as well as implicit. Kelsen's Pure Theory of Law categorically denies the existence, in Law, of objective facts: Law is based solely upon subjective facts, upon only those facts recognized as such by the Law.[44] In other words,

> In the world of law, there is no fact "in itself," no "absolute" fact, there are only facts ascertained by a competent organ in a procedure prescribed by law . . . . It is a typical layman's opinion that there are absolute, immediately evident facts. Only by being first ascertained through a legal procedure are facts brought into the sphere of law or do they, so to speak, come into existence within this sphere. Formulating this in a somewhat paradoxically pointed way, we could say that the competent organ ascertaining the conditioning facts legally "creates" these facts.[45]

Similarly, Nékam states:

> There is no exterior reality, no absolute fact, no natural relation, which by itself could necessarily enter into the system of the law, or could have any legal significance merely because of its experimental existence, or could become what might be called "legal reality" . . . .[46]
>
> Law must somehow correspond to reality . . . . But the reality of law . . . cannot consist of its concepts being present as, or represented and determined by, the experimental realities of the outside world. Its reality is entirely subjective.[47]

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[39] *Id.* n.36.

[40] Note 29 *supra.*

[41] J. FRANK, *supra* note 1, at 312.

[42] *Id.* at 37, 320. "This is not the place to discuss at length the immense importance of valid fictions. Suffice it to say that valid fictions . . . are invaluable."

[43] WEBSTER'S COLLEGIATE DICTIONARY 1105 (Validity), 1075 (Truth) (5th ed. 1946).

[44] H. KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg transl. 1961).

[45] *Id.* at 135-36.

[46] A. NEKAM, THE PERSONALITY CONCEPT OF THE LEGAL ENTITY 8 (1938).

[47] *Id.* at 55.

> [E]verything which is reality in the world of the law is such only because the law created it . . . .[48]

Since the concept "legal fiction" can be conceived only as a correlative of the concept "objective legal reality," recognition that the Law is founded upon subjective reality should result in the elimination of the phrase "legal fictions," from legal vocabulary and thought. Nevertheless, writers in the area have clung as tenaciously to the concept of legal fictions as a bulldog to the throat of his prey. Fuller, for example, considers a complete elimination of legal fictions to be impossible.[49] Frank asserts the existence of "valid fictions."[50] And Tourtoulon avers that "juridical theory is all the more objective when it presents itself as fictitious, and all the more delusive when it claims to do without fictions."[51] Tourtoulon's inability to relinquish this conceptual pacifier is peculiarly difficult to comprehend, in view of his acknowledgment that "[a] fiction . . . is only a juridical 'construction' like any other. . . . In any case, one must steer clear of the belief that a fictitious construction is opposed to a real one."[52]

This recalcitrance must be overcome. Existence of legal fictions is the ultimate fiction. Toleration of this concept generates confusion and the proliferation of paradoxes. It is improper, as well as erroneous, to distinguish between objective and subjective reality in the context of Law. For the Law recognizes only subjective facts, "created" by the "competent organ ascertaining" them[53] — objective facts exist, in Law, only to the extent that they are recognized so to exist.[54] Conversely, all that the Law recognizes to exist has legal reality. Thus, Tourtoulon's phrase, "juridical constructions,"[55] is the most appropriate one for all facts recognized as such in Law.

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[48] *Id.* at 64.

[49] Fuller, *supra* note 1, at 378.

> Conceivably we might eliminate the pretense from all our fictions; we might cease to say, "A is legally treated as if it were B," and simply say, "In a technical sense, A *is* B". . . . This attitude has, indeed, been dignified by a name — "the theory of the juristic truth of fictions."
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> But it is clear enough that such a wholesale process of redefinition could not be carried out. One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat.

[50] *See* note 42 *supra.*

[51] P. TOURTOULON, *supra* note 1, at 295.

[52] *Id.* at 391.

[53] H. KELSEN, *supra* note 44, at 135-36.

[54] *Id.*

[55] P. TOURTOULON, *supra* note 1, at 391. *Cf.* Fuller, *supra* note 1, at 908-09: "All of our facts . . . are conceptual facts . . . . Our language, our 'common sense' notions, our scientific theories, our legal constructs — all of these are conceptual devices for dealing with and simplifying reality. 'Facts' are only those thought-constructs which are useful for so many purposes and are so commonly accepted that no one doubts their 'existence' or 'reality' . . . . When we say that a fiction 'changes the facts to fit the theory', what we usually mean is that in adjusting our conceptual apparatus to accommodate a new situation, we have made the adjustment in a clumsy way and in the wrong place."

II. LEGAL CONCEPTUALISM — A PROCRUSTEAN INCUBUS

Common to all theories of the legal process is a quadripartite sequence:[56] First, the existence of facts is determined by the competent authority.[57] Second, this competent authority recognizes or determines the rules applicable to the facts as ascertained. These rules express legal concepts. Third, this competent authority applies these rules to the facts.[58] Fourth, this process of application produces legal consequences[59] — the attribution, or non-attribution, to a factual situation of the essential characteristics of the legal concepts formulated in the second stage of the legal process.

Legal consequences which realize these legal concepts are characterizable by the quality of legality — "the quality of being legal";[60] "conforming to the law; . . . required or permitted by law; . . . good and effectual in law . . . [p]roper or sufficient to be recognized by the law."[61]

Legal consequences which fail to realize these legal concepts, in any manner, are characterizable by the quality of illegality — "the quality of being illegal";[62] "contrary to law";[63] "not according to or authorized by, law."[64]

"Legality" and "illegality" are antonymous. Assertions that they coexist are, therefore, paradoxical. Yet the possibility of their coexistence is postulated by legal theory, which asserts that a factual situation may be characterized as illegal although it is treated as if it were legal.[65] This assertion occurs only where the inherent qualities of a legal concept are attributed to a factual situation which does not conform ideally to the conditions deemed requisite for realization of the concept. Elimination of this paradox is a two-step process. Acknowledgment that that which the competent authority

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[56] *See* BLACK'S LAW DICTIONARY (Law) (3d ed. 1933); 1 J. AUSTIN, *supra* note 8; W. FRIEDMANN, *supra* note 7; J. GRAY, *supra* note 1; H. HART, THE CONCEPT OF LAW (1961); H. KELSEN, *supra* note 44; H. KELSEN, WHAT IS JUSTICE? (1957).

[57] These facts, as so determined, correspond to the Aristotelean "material cause." WEBSTER'S NEW INT'L DICTIONARY 427 (Cause) (2d ed. unabr. 1937). "[T]he *material cause,* that which is to be wrought to this form, as the brick, timber, etc., of which the house is to be constructed."

[58] The process of application corresponds to the Aristotelean *efficient, or moving, cause,* "that which acts as the immediate agency for the production of the effect." WEBSTER'S NEW INT'L DICTIONARY 427 (Cause) (2d ed. unabr. 1937).

[59] These consequences correspond to the Aristotelean *final cause*: "that which is the end or object of the process." *Id.* (Cause (4)). They consist in either realization, or non-realization, of the *idea,* or legal concept, expressed in the rules determined in the second stage of this sequence.

[60] WEBSTER'S COLLEGIATE DICTIONARY 572 (Legality) (5th ed. 1946).

[61] BLACK'S LAW DICTIONARY 1085 (Legal) (3d ed. 1933). *See also* WEBSTER'S NEW INT'L DICTIONARY 1411 (Legal) (2d ed. unabr. 1937).

[62] WEBSTER'S COLLEGIATE DICTIONARY 496 (5th ed. 1946).

[63] BLACK'S LAW DICTIONARY 916 (3d ed. 1933).

[64] WEBSTER'S NEW INT'L DICTIONARY 1241 (2d ed. unabr. 1937).

[65] *See* pt. III *infra.*

recognizes as legal can be characterized *only* as legal,[66] is but half the battle. It remains to establish that that which the competent authority *treats* as legal, it *recognizes* as legal — that attribution of the qualities of a concept necessarily involves its realization.

Determination of what constitutes recognition of legality depends upon the meaning to be ascribed to "Law" in this context. Broadly speaking, the Law consists of the rules formulated in the second stage of the legal process.[67] The legal concepts expressed by these rules possess three aspects: (1) Each concept is an "idea" denominative of the meaning of the universal term which it represents.[68] (2) Each concept also is a schematism, establishing and classifying its constituents and the conditions requisite for their realization, as well as determining the extent to which its qualities must be attributed to each of its constituent classes.[69] These classes possess varying degrees of correspondence to the ideal form of the concept. (3) Finally, each concept comprises the essential attributes or inherent qualities of the idea whose meaning it represents.[70]

Since the schematic and qualitative aspects of legal concepts *are* correlative,[71] those factual situations, to which the essential attributes of these concepts are ascribed, must be presumed, conclusively, to meet their schematic requirements — *i.e.*, to realize them.[72] These factual situations thus conform to the law, and are

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[66] Pt. I *supra*; note 61 *supra.*

[67] *See, e.g.*, J. Salmond, as quoted in W. FRIEDMANN, *supra* note 7, at 219: "law consists of the rules recognized and acted on by the courts of justice."

[68] WEBSTER'S NEW INT'L DICTIONARY 552 (2d ed. unabr. 1937). [*E.g.*, the term *Corporation* designates the concept *corporateness.*] They are "the form or conception of that which is to be, as it exists ideally." *Id.* (Cause (1)) (defining the Aristotelean *formal cause*). In this context, ideas are either Platonic archetypes or patterns, or Aristotelean forms or form-giving causes. *Id.* at 1236 (Idea).

[69] *Id.* at 1236 (Idea); *see* Pattern, Form, Schema, Schematic, Schematism. The concept *corporateness* establishes three classes — *corporation, de facto corporation, corporation by estoppel* — specifies the circumstances which, in each case, require the attribution of the qualities of *corporateness,* and specifies the extent thereof.

[70] "[A]ll that is characteristically associated with, or suggested by" the generic term denominating the classes which it comprehends. *Id.* at 552 (Concept). "The ideal or intrinsic character of anything or that which imposes this character." WEBSTER'S COLLEGIATE DICTIONARY 394 (Form (3)) (5th ed. 1946). The concept *corporateness* comprehends the essential characteristics of the generic term *corporation.*

[71] Notes 68-70 *supra. Cf.* Hart, *Definition and Theory in Jurisprudence,* 70 LAW Q. REV. 37, 54 n.21 (1954): "It is also the explanation of the sense of a *tertium quid* between the 'facts' and the 'legal consequences' which troubles the analysis of many legal notions, *e.g.* status. The status of a slave is not (*pace* Austin) just a collective name for his special rights and duties: there is a sense in which these are the 'consequences' of his status . . . ."

[72] Notes 68-70 *supra. See also* Patterson, Introduction to Jurisprudence 96, 100 (4th mimeographed ed. 1951): "A complete legal norm is one which designates more or less precisely the legal consequences of operative facts." " 'When we state that some particular legal relation exists we are impliedly asserting the existence of certain facts. . . .' " *Id.*

sufficient to be recognized by the law.[73] In other words, attribution of the qualities of a concept constitutes recognition of legality. This attribution may be termed the consequences of legality, since it necessarily involves realization of the concept. These factual situations therefore must be characterized as legal,[74] even when they do not correspond to the conditions essential for realization of the conceptual class which most nearly approximates the concept. Conversely, no factual situation which is treated as legal — to which the consequences of legality are attributed — can be characterized as illegal.

Failure to recognize the reciprocal relation of the schematic and qualitative aspects of legal concepts results from the tautotypical nomenclature of these concepts — *i.e.,* ascription to a legal concept of a generic name identical with the specific name of one of its component classes.[75] This failure, in turn, causes the procrustean equation of the genus with its denominative species. Consequently, it is assumed that the characteristics, or inherent qualities, of a legal concept can be attributed to a factual situation which does not correspond to the conditions necessary for realization of the concept. For example, designation of the concept of "corporateness" by the specific appellation "corporation" results in a supposition that the whole is identical with one of its constituent parts, that factual situations do not fulfill the requirements of corporateness if they do not constitute a corporation. Yet, "corporation" is but one class of corporateness, albeit the one which corresponds most nearly to the schematic definition of the concept. Moreover, the attributes of corporateness *are* ascribed to factual situations which are not classifiable as corporations.

Temptation to attribute illegality to factual situations which are recognized as legal can be eliminated by adoption of a new system of conceptual nomenclature. This system should denominate legal concepts in qualitative terms which do not constitute tautotypes. Assuredly there is as much need for precision in the Law as in the natural sciences.[76]

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[73] *See* H. KELSEN, *supra* note 56; *See* authorities cited notes 68-70 *supra. Cf.* Hart, note 71, at 56: "If we put aside the question 'What is a corporation?' and ask instead 'Under what types of conditions does the law ascribe liabilities to corporations?' this is likely to clarify the actual working of a legal system."

[74] Notes 60, 61 *supra.*

[75] Invariably, the generic name applied to a legal concept is identical with the specific name of the class which possesses the highest degree of correspondence to the concept as a schematism.

[76] Identity of generic and specific names is forbidden by the International Code of Botanical Nomenclature. *See* WEBSTER'S NEW INT'L DICTIONARY 2586 (Tautonym, Tautotype) (2d ed. unabr. 1937).

III. THE DE FACTO DOCTRINE — EXEMPLIFICATION OF IDIOMATIC BIGOTRY

Many factual situations which give rise to the consequences of legality are characterized as illegal. They are described, *inter alia,* as *de facto,* voidable, legal by reason of res judicata or estoppel, constructive, or implied. *De facto* denotes "an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate."[77] *De factoism* generally is justified in terms of public policy. "Voidable" signifies that which is "valid and effectual until . . . avoided by some act."[78] "Res judicata" and "estoppel" produce the consequences of legality by interdicting the assertion of facts preclusive of realization of the legal concept.[79] The basis for these doctrines is that a party should not be permitted to disavow his own conduct. "Constructive" and "implied" denote "that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law."[80]

This terminology assumes three categories of juristic fact: "legal," "illegal," and "concurrently legal and illegal." The final category encompasses all circumstances designated as *de facto,* voidable, legal in consequence of res judicata or estoppel, constructive, or implied. It may be designated "legal illegality."

A. *Legal Illegality — the Dogma*

Legal illegality establishes the conditions which necessitate the ascription of the consequences of legality to factual situations which do not correspond to the schematism of the denominative class of the pertinent legal concept. It further identifies the persons who are precluded from controverting the attribution of the consequences of legality to these situations.

Legal illegality pervades the Law. It is, however, most conspicuous in connection with existence, or personality, and status. The most prominent examples of this paradox are associated with corporations, corporate officers and directors, public officers, legislatures, and divorce.

1. Corporations

"Corporation" is the *ne plus ultra* of legal tautotypes. Most tautotypical legal nomenclature is simple, consisting in the ascription to a legal concept of a generic name identical with the name

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[77] BLACK'S LAW DICTIONARY 513 (3d ed. 1933).

[78] *Id.* at 1822 (Void).

[79] *See* G. STUMBERG, CONFLICT OF LAWS: 112-14 (2d ed. 1951); WEBSTER'S NEW INT'L DICTIONARY (Estoppel) (2d ed. unabr. 1937).

[80] BLACK'S LAW DICTIONARY 413 (Constructive) (3d ed. 1933).

of one of its component species. "Corporation," however, is a complex tautotype — a generic name identical both with the name of one of its component species *and* with the name of one of its component *sub*-species. To wit, "corporation" properly is the name of but one of the species of the specific legal concept of "corporateness," which, in turn, is but one of the species of the generic legal concept of "artificial personality." Yet, as a general rule, it is presumed that the genus, the species, and the sub-species are mutually identical. Hence, the qualities of both "artificial personality"[81] and "corporateness"[82] commonly are deemed attributable, strictly, only to those factual situations which constitute corporations. In this context, a "corporation" properly is considered to exist only if (1) incorporation has been accomplished pursuant to statute;[83] and (2) the resultant institution is an entity distinct from its constituent human beings, both as to the latter and as to third parties,[84] possessing at least the following powers, rights, and capacities:

> 1. To have perpetual succession . . . . 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors . . . . 4. To have a common seal . . . . 5. To make by-laws or private statutes for the better government of the corporation . . . .[85]

Although considerations of public policy necessitate exceptions to the rule, these exceptions customarily are characterized as illegal, notwithstanding the ascription to them, for certain purposes, of the qualities of artificial personality or corporateness.[86] These exceptions fall into two categories. The first encompasses those institutions which, although neither incorporated nor claiming to be corporations, are treated, for certain purposes, as entities distinct from

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[81] *See* 1 BLACKSTONE, COMMENTARIES *123, *467; L. GOWER, PRINCIPLES OF MODERN COMPANY LAW 62, 68, 228-29 (1954); LLOYD, LAW OF UNINCORPORATED ASSOCIATIONS (1938); F. MAITLAND, *The Corporation Sole, The Unincorporate Body, Trust and Corporation, Moral Personality and Legal Personality*, in SELECTED ESSAYS (1936); WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 10-12 (1929). Warren, for example, states: "According to Blackstone, ... A legal unit was either a natural person or it was not. If it was not, the proper name for it was corporation." WARREN, *supra* at 10. Similarly, "[p]ersons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations." F. MAITLAND, *supra* at 73. And, likewise: "We in England say that persons are natural or artificial, and that artificial persons are corporations aggregate or corporations sole." *Id.* at 136.

[82] *See* H. BALLANTINE, MANUAL OF CORPORATION LAW AND PRACTICE §§ 19, 21-27 (1930); R. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS §§ 26-29 (2d ed. 1949).

[83] Authorities cited note 82 *supra.*

[84] *See* Liverpool Ins. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870); LLOYD, *supra* note 81, at 15-18.

[85] 1 BLACKSTONE, COMMENTARIES **475-76.

[86] *See, e.g.*, H. BALLANTINE, *supra* note 82; W. FRIEDMANN, LAW IN A CHANGING SOCIETY 263 (Penguin ed. 1964); L. GOWER, *supra* note 81, at 234-36; R. STEVENS, *supra* note 82.

their constituent human beings, because they rightfully possess one or more of the powers, rights, and capacities "necessarily and inseparably incident to every corporation."[87] These institutions all are species of the generic legal concept "artificial personality," of which "corporation" is the tautonym. They have been referred to, *inter alia,* as "*de facto* legal persons."[88] The second category encompasses those associations which are treated, for certain purposes, as the corporations which they claim to be, although they are neither incorporated, nor rightfully possess any inherently corporate powers, rights, or capacities. These associations are species of the specific legal concept "corporateness." Consequently, they are sub-species of the generic legal concept "artificial personality." They have been referred to as *de facto* corporations, or as corporations by estoppel.

a. "Artificial Personality" — *De facto* Legal Persons

According to orthodox theory, "artificial personality" is a monobasic concept, of which "corporation" is the solitary species. This theory derives from the unfortunately deathless prose of Blackstone, who stated:

> Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.[89]

Consequently, it commonly is considered that the only *de jure* artificial legal persons are *de jure* corporations.[90]

Yet, in many instances, institutions which rightfully possess one or more inherently corporate powers, rights, or capacities, are treated, for certain purposes and to a more or less limited extent, as legal persons — entities distinct from their constituent human beings — although they neither are incorporated nor claim to be *de jure* corporations.[91] Thus, unincorporated institutions which, by virtue of the law of the place of their creation, possess all of the inherently corporate powers, rights, and capacities, have been treated elsewhere as corporations.[92] Furthermore, unincorporated institu-

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[87] 1 BLACKSTONE, COMMENTARIES *475.

[88] *See* W. FRIEDMANN, *supra* note 86, at 263.

[89] 1 BLACKSTONE, COMMENTARIES *123.

[90] *See* note 81 *supra.*

[91] *See* G. BOGERT, TRUSTS AND TRUSTEES § 712 (2d ed. 1960); L. GOWER, *supra* note 81, at 234-36; LLOYD, *supra* note 81, at 17-18, 48-49, 59, 89, 98-99, 157-58, 221-22.

[92] English joint stock association treated as *corporation* for purposes of Massachusetts taxing statute, Liverpool Ins. Co. v. Massachusetts, 77 U.S. (10 Wall.) 566 (1870). Michigan limited partnership treated as *corporation* for purposes of California's regulatory legislation, Hill-Davis Co. v. Atwell, 215 Cal. 444, 10 P.2d 463 (1932). *Massachusetts trusts* treated as corporations for purposes of the forum's regulatory legislation, Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924); State *ex rel.* Colvin v. Paine, 137 Wash. 566, 243 P. 2 (1926).

tions have been treated, at the place of their creation, as non-corporate entities, distinct from their constituent human beings, to the extent of the inherently corporate powers, rights, and capacities which they rightfully possess, and those which they properly may be inferred to possess. Among the unincorporated institutions which have been so treated are partnerships,[93] limited partnerships,[94] joint stock companies,[95] labor or trade unions,[96] friendly societies,[97] Massachusetts or business trusts,[98] trustees or trust estates,[99] and other unincorporated institutions.[100] This treatment, however, generally is accorded only insofar as third persons are concerned, *not* insofar as the entity's constituent human beings are concerned.[101] However, it has been held that a member of a registered trade union can sue it for breach of contract;[102] that a statutory limited partnership can hire one of its members as an ordinary employee;[103] and that an ordinary partnership can contract with one of its members.[104]

The entitative treatment of non-corporations constitutes a practical judicial recognition of the jurisprudential theory that "artificial personality" is, in fact, a polybasic concept, comprising every entity to which, in its capacity as such entity, the law attributes rights and

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[93] Fitzgerald v. Grimmell, 64 Iowa 261 (1884); Lobato v. Paulino, 304 Mich. 668, 8 N.W.2d 873 (1943); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); *In re* Estate of Zents, 148 Neb. 104, 26 N.W.2d 793 (1947); Roop v. Herron, 15 Neb. 73, 17 N.W. 353 (1883); Finston v. Unemployment Compensation Commission, 132 N.J.L. 276, 39 A.2d 697 (1944), *aff'd*, 134 N.J.L. 232, 46 A.2d 734 (1946); Whitman v. Keith, 18 Ohio St. 134 (1868); Walker v. Wait, 50 Vt. 668 (1878). *See also* Mason v. Mitchell, 135 F.2d 599 (9th Cir. 1943); Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P.2d 373 (1941); *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).

[94] Carle v. Carle Tool & Engineering Co., 36 N.J. Super. 36, 114 A.2d 738 (1955).

[95] Walker v. Wait, 50 Vt. 668 (1878).

[96] Bonsor v. Musician's Union, [1956] A.C. 104; The Taff Vale Ry. Co. v. The Amalgamated Society of Ry. Servants, [1901] A.C. 426; National Union of General and Municipal Workers v. Gillian, [1946] K.B. 81 (C.A. 1945), *aff'g* [1945] 2 All E.R. 593 (K.B.); Bonsor v. Musician's Union, [1954] 2 W.L.R. 687 (C.A.).

[97] L. GOWER, *supra* note 81, at 234-36; LLOYD, *supra* note 81, at 59.

[98] Wagner Oil and Gas Co. v. Marlow, 137 Okla. 116, 278 P. 294 (1929). *See also* Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924).

[99] Tuttle v. Union Bank & Trust Co., 112 Mont. 568, 119 P.2d 884 (1941); CONN. G.S.A. § 52-202 (1958); MONT. R.C. ANN. § 86-507 (1947); NO. DAK. CENT. CODE § 59-02-10 (1960); OKLA. STAT. ANN. tit. 60, § 174 (1961); PA. STAT. ANN. tit. 20, § 320.939 (Purdon 1950); R.I.G.L. § 9-2-9 (*as amended* 1965); S.D. CODE § 59.0209 (1939); G. BOGERT, *supra* note 91, § 712.

[100] Hamner v. B. K. Bloch & Co., 16 Utah 436, 52 P.770 (1898); Morrison v. Standard Bldg. Soc'y, [1932] S. Afr. L.R. 229 (App. Div.).

[101] Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Bonsor v. Musician's Union, [1954] 2 W.L.R. 687 (C.A.). *See also* Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P.2d 373 (1941); Hamilton v. Young, 116 Kan. 128, 225 P. 1045 (1924); Adams Express Co. v. Schofield, 111 Ky. 832, 64 S.W. 903 (1901); Finston v. Unemployment Compensation Comm'n, 132 N.J.L. 276, 39 A.2d 697 (1944); *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).

[102] Bonsor v. Musician's Union, [1956] A.C. 104, *rev'g* [1954] 2 W.L.R. 687 (C.A.).

[103] Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (1955).

[104] Walker v. Wait, 50 Vt. 668 (1878).

duties.[105] Hence, the sole criterion of legal personality is entitativeness — a legal person is that which the law treats as a unit, even if it be so treated only with respect to a single right or duty.[106] Consequently, "the difference between natural and artificial persons is irrelevant, since all legal personality is artificial and derives its validity from superior norms."[107] The quantum of rights and duties attributed to an entity also is irrelevant,[108] as are its composition,[109] its form,[110] and the manner of its creation.[111]

Yet, only rarely is a non-corporate entity characterized as legal — as a "legal entity," or *"persona juridica,"* in its own right.[112] Generally, such entities, although treated as legal, are characterized as illegal because of their "non-corporate" status. To wit, they commonly are characterized as "quasi-corporations,"[113] "quasi-persons,"[114] "near-corporations,"[115] or "*de facto* legal persons."[116]

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[105] A. KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 277-85 (1930); A. NEKAM, *supra* note 46; J. SALMOND, *supra* note 7, §§ 108, 113; Smith, *Legal Personality*, 37 YALE L.J. 283 (1928). Smith, for example, states: "To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality." Smith, *supra* at 283. Similarly, Kocourek states: "A legal person is a conceptual point of reference created by the the law for the attribution of rights and ligations." A. KOCOUREK, *supra* at 283.

[106] A. KOCOUREK, *supra* note 105; A. NEKAM, *supra* note 46; Smith, *supra* note 105, at 289. *Cf.* J. SALMOND, *supra* note 7, at 337. Nékam, for example, states: "[T]here exists a gradation among the legal entities which extends from those which are considered as such for the purpose of a single right only to those which have a great number of rights attributed to them." A. NEKAM, *supra* at 45.

[107] W. FRIEDMANN, *supra* note 7, at 233 (expounding Kelsen's pure theory of law). *Accord*, J. SALMOND, *supra* note 7, at 329. "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man." *Id.*

[108] A. KOCOUREK, *supra* note 105; A. NEKAM, *supra* note 46; Smith, *supra* note 105, at 289.

[109] Although legal personality commonly is considered to be a possible attribute only of an individual, or of an entity representing a group of individuals, it also can be predicated of an individual acting in a dual or multiple capacity, with the result that the individual possesses a dual or multiple legal personality. *See, e.g.*, BOGERT, *supra* note 91, § 712. It even can be predicated of property — such as a fund *consecrated to a specific purpose.* LLOYD, *supra* note 81, at 48-49. *See also* W. FRIEDMANN, *supra* note 7, at 511-29.

[110] *See, e.g.*, Smith, *supra* note 105, at 289.

[111] *Id.*

[112] Bonsor v. Musician's Union, [1956] A.C. 104, 149-50 (opinion of Lord Keith of Avonholm); National Union of Gen. and Municipal Workers v. Gillian, [1945] 2 All E.R. 593, 600, 602 (K.B.), *aff'd*, [1946] K.B. 81, 84-86 (C.A. 1945) (opinion of Scott, L.J.).

[113] Hill-Davis Co. v. Atwell, 215 Cal. 444, 10 P.2d 463 (1930); Adams Express Co. v. Schofield, 111 Ky. 832, 64 S.W.2d 903 (1901); Carle v. Carle Tool & Engineering Co., 36 N.J. Super. 36, 114 A.2d 738 (1955); LLOYD, *supra* note 81, at 59, 89, 98-99.

[114] *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941); LLOYD, *supra* note 81, at 157-58.

[115] National Union of Gen. and Municipal Workers v. Gillian, [1946] K.B. 81, 87-88 (C.A. 1945) (opinion of Uthwatt, J.); Bonsor v. Musician's Union, [1954] 2 W.L.R. 687, 705 (C.A.) (opinion of Evershed, M.R.).

[116] W. FRIEDMANN, *supra* note 86, at 263.

b. "Corporateness" — *De facto* and by Estoppel

Corporations *de facto* and by estoppel are unincorporated associations which are treated, for certain purposes, as if they are *de jure* corporations. They differ in three respects from the other non-corporations which are accorded entitative treatment. First, they assume corporate status. Second, they do not rightfully possess any inherently corporate powers, rights, or capacities. And, third, for the purposes for which they are considered as entities, they are so considered to the same extent as is a *de jure* corporation.

The *de facto* corporation is a judicially-created concept. It is deemed to exist where there is a statute under which incorporation might have been had; a real, but insufficient, attempt to comply with the statute; and an exercise of corporate privilege.[117] In some instances, it has received legislative sanction.[118] As a general rule, the existence of a *de facto* corporation is not dependent upon the existence of an estoppel.[119]

The considerations of public policy which have engendered the *de facto* corporation consist in the protection of third persons, and the public, who deal, or might deal, with the persons purporting to represent a corporation.[120] This policy has given rise to the controversy as to whether an unconstitutional statute can be the foundation for a *de facto* corporation.

The basis of the requirement that there must be a statute authorizing creation of a corporation is that the "consent of the state is absolutely necessary to the creation of any corporation and must be expressly or impliedly given."[121] For purposes of the *de facto* doctrine, this consent is deemed to be given by a statute authorizing

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[117] H. BALLANTINE, *supra* note 82, §§ 19, 23; R. STEVENS, *supra* note 82, § 27.

[118] *See, e.g.,* IDAHO CODE § 30-114 (1949); 32 ILL. STAT. ANN. § 157.49 (Smith-Hurd 1954); 20 MINN. STAT. ANN. § 301.08 (1946); N.Y. BUS. CORP. LAW § 403 (McKinney 1963), *as amended* (1967); OKLA. STAT. ANN. tit. 18, § 1.14(c) (1941); PA. STAT. ANN. tit. 15, § 2852-207 (Purdon 1967); S.C. CODE LAWS tit. 12, § 12-62 (1962); S.D. CODE, § 11.0108 (1939); REV. CODE WASH. ANN. § 23A.12.040 (1961) (add. 1965, eff. July 1, 1967); ENGLISH COMPANIES ACT 19 & 20 Geo. 5, ch. 23, § 15-(1) (1929); R. STEVENS, *supra* note 82, § 29.

[119] Society Perun v. Cleveland, 43 Ohio St. 481, 3 N.E. 357 (1885); H. BALLANTINE, *supra* note 82, § 23. *Contra,* R. STEVENS, *supra* note 82, § 29.

[120] H. BALLANTINE, *supra* note 82, §§ 19, 22; R. STEVENS, *supra* note 82, § 29. Ballantine observes,

> The recognition of *de facto* corporate existence when the conditions precedent to incorporation have not been substantially complied with is founded on public policy and practical convenience. It is essential to the safety of business transactions with corporations. It would endanger the rights of corporations and of those dealing with them if questions could be raised as to irregularities in incorporation, in cases in which such questions have no just bearing on the transaction involved.

H. BALLANTINE, *supra* at 70.

[121] H. BALLANTINE, *supra* note 82, § 19, at 68. *See also id.* §§ 21, 22; R. STEVENS, *supra* note 82, § 29.

de jure formation of the *de facto* corporation.[122] Consequently, it frequently is held that "there cannot be a corporation *de facto* under a statute which is unconstitutional, for an unconstitutional statute is absolutely void . . . is the same in effect as no law at all, even if associates organize in good faith in reliance on it."[123] Ballantine has observed:

> The fundamental principle is that the state controls the formation of corporations by statute. If the state has not authorized or consented to the formation of such a corporation, it is a different case than where the state has authorized it upon certain conditions and formalities and the associates have attempted to comply but have fallen into some irregularity in their proceedings.[124]

Cases holding that an unconstitutional statute can constitute the foundation for a *de facto* corporation, acknowledge that the consent of the state is essential to *de facto* corporate existence.[125] They assert, however, that an unconstitutional statute is as evidentiary of consent as a constitutional one.[126] The real basis of decision, however, is that "[e]ven though the statute be unconstitutional, the ethical considerations are the same as in those cases where all the elements are present . . . ."[127] No case has been found which attributes the qualities of corporateness to an alleged corporation whose organization was attempted subsequent to the determination of unconstitutionality.

Recognition of *de facto* corporateness generally is phrased in terms of liability of its purported *de jure* status to attack. Thus, a *de facto* corporation invariably is subject to direct attack only in proceedings brought by the State to "question the right of an association to be a corporation, and to oust it from the exercise of corporate powers."[128] The same result obtains where there is legislative sanction for *de facto* corporations.[129] The general rule, however, is that *de facto* corporations never are subject to collateral attack.[130] This is true irrespective of whether the party seeking to make the collateral attack is an individual or the State.[131].

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[122] H. BALLANTINE, *supra* note 82, § 19. *See also id.* §§ 21, 22; R. STEVENS, *supra* note 82, § 29.

[123] H. BALLANTINE, *supra* note 82, § 21, at 74. *See also* R. STEVENS, *supra* note 82, § 27.

[124] H. BALLANTINE, *supra* note 82, at 74.

[125] *Id.* § 21.

[126] *Id.*

[127] R. STEVENS, *supra* note 82, at 144.

[128] H. BALLANTINE, *supra* note 82, at 67.

[129] *See* note 118 *supra.*

[130] H. BALLANTINE, *supra* note 82, §§ 19, 22, 23, 26; R. STEVENS, *supra* note 82, §§ 26, 27, 29. *See* material cited note 118 *supra.*

[131] H. BALLANTINE, *supra* note 82, §§ 19, 22, 23, 26; R. STEVENS, *supra* note 82, §§ 26, 27, 29. *See* material cited note 118 *supra.*

Only rarely is a *de facto* corporation characterized as "legal." It has been asserted that "[a] *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation.*"[132] Ballantine has stated that "a corporation *de facto* has an *actual* existence, and *is a corporation* in contemplation of the law, as against every person except the state, and even as against the state except in a direct proceeding to question its corporate existence."[133] Yet both quotations tenaciously describe such corporations as *de facto* — illegal, but treated as legal. Stevens, moreover, observes that "the fact that there are still deviations from this general rule supports the contention that decisions are reached by applying a *de facto* doctrine rather than by recognizing the existence of a *de facto* corporation."[134]

Corporations by estoppel constitute a very limited exception to the principle that the qualities of "corporateness" shall be attributed only to "corporations." Unlike *de facto* corporations, which have been said to have "an actual and substantial legal existence,"[135] corporations by estoppel uniformly are characterized as illegal.[136] So, it has been said:

> The doctrine of "corporation by estoppel" does not involve a recognition that an irregular corporation has acquired the corporate status generally. It only considers the legal consequences of a particular transaction done in the corporate name by associates assuming to be a corporation and dealt with as such by the other party. The *de facto* doctrine on the other hand, by excluding collateral attack for various irregularities, on grounds of public policy and more convenient remedies, in effect recognizes the acquisition of a corporate status.[137]

Neither complete absence of a statute under which incorporation could be had, nor the unconstitutionality of such a statute, if existent, can prevent the creation of a corporation by estoppel.[138] For, "a corporation by estoppel is not based on statutory authorization."[139] Rather, it is based upon conduct. The doctrine requires denial of collateral attack upon the corporate existence *only* in the particular litigation, as between the parties thereto.[140] As in the

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[132] Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N.E. 357, 360 (1885).

[133] H. BALLANTINE, *supra* note 82, at 78. *Id.* §§ 25, 26, 27.

[134] R. STEVENS, *supra* note 82, at 169-70. *See also* Eaton v. Aspinwall, 19 N.Y. 119 (1859).

[135] H. BALLANTINE, *supra* note 82, at 85.

[136] *Id.* §§ 21, 27.

[137] *Id.* at 90-91.

[138] *Id.* § 21.

[139] *Id.* at 72-73.

[140] *Id.* § 27.

case of *de facto corporations,* corporations by estoppel have received legislative sanction.[141]

2. Corporate Officers and Directors

Persons who act as corporate officers and directors have a legal status distinct from their status as individuals.[142] The essential characteristics of corporate officers and directors properly are attributable only to those persons who comply, in every respect, with the conditions requisite to investment with such legal status.[143] Public policy, however, is deemed to require deviations from this principle.[144] As in the case of corporations, these exceptions are denominated illegal, despite the attribution to them of the qualities possessed by corporate officers and directors.[145] Also, akin to the corporateness situation, is the division of exceptions into those based on a *de facto* doctrine and those arising out of an estoppel.[146]

De facto corporate officers and directors are those persons who are in actual possession of the offices which they claim to hold, and actually exercise their functions and discharge their duties, under claim and color of right, with the consent of the corporation, but who are illegally, or irregularly, elected or appointed.[147] "A person who has not the qualifications for office prescribed by the charter or statute is not strictly a *de facto* officer . . . . "[148]

The *de facto* doctrine "exists for the protection of the innocent."[149] It evolves from the assumption that

> "third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."[150]

Recognition of the *de facto* status of persons claiming to be corporate officers or directors is couched in terms of the circum-

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[141] R. STEVENS, *supra* note 82, § 29. *See, e.g.,* DEL. CODE ANN. tit. 8, § 329 (1953); FLA. STAT. ANN. tit. 18, § 608.50 (1955); GA. CODE ANN. tit. 22, § 22-714 (1966); TENN. CODE ANN. § 48-711 (1964). *See also* MINN. STAT. ANN. tit. 20, § 301.08 (1946).

[142] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[143] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[144] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[145] *See* H. BALLANTINE, *supra* note 82, §§ 126, 127; R. STEVENS, *supra* note 82, § 160.

[146] H. BALLANTINE, *supra* note 82, § 126.

[147] *Id.* § 126; R. STEVENS, *supra* note 82, § 160.

[148] H. BALLANTINE, *supra* note 82, at 399-401.

[149] R. STEVENS, *supra* note 82, at 744.

[150] *In re* Ringler & Co., 204 N.Y. 30, 42-43, 97 N.E. 593, 597 (1912). *See also* H. BALLANTINE, *supra* note 82, § 126.

stances under which the qualities inherent in this status, *de jure*, will be ascribed to these persons. Thus, the official acts of *de facto* corporate officers and directors, are, insofar as third persons are concerned, as valid and binding upon these officers and directors, and the corporation which they claim to represent, as if the *de facto* officers and directors were *de jure*.[151] Nor can *de facto* corporate officers or directors deny the *de jure* character of their status, as against the corporation or its creditors, in order to escape liability for their official acts.[152] Except, however, where the issue involves the possible liability of the *de facto* officers to the corporation, the *de facto* doctrine does not apply as between the *de facto* corporate officers or directors and the corporation or its stockholders.[153] Nor can rights dependent upon *de jure* existence as a corporate officer or director be enforced by one whose status is *de facto* — *e.g.*, claims for salary.[154] For the *de facto* doctrine does not operate to benefit the *de facto* entity.

The doctrine of *de facto* corporate officers and directors has been described as a legal fiction.[155] The assertion further has been made that "the doctrine of de facto directors does not have the effect of constituting one a director or officer, even in fact. The doctrine expresses only a principle, intended to effect justice between the parties in each particular case."[156]

Status by estoppel is more limited in scope than the *de facto* doctrine.[157] It attributes the consequences of legality to circumstances which do not fulfill the requirements of the *de facto* doctrine.[158] It exists only as between parties who have dealt with each other on the supposition that the person holding himself out to be a corporate officer or director has that status *de jure*. And, it operates only to prevent the would-be corporate officer or director from denying his status *de jure* in the particular litigation.

3. Public officers

Persons who act as public officers, like those who act as corporate officers and directors, possess dual legal status, *i.e.*, their status *qua* public officers is distinct from their status *qua* individuals. In common with corporations, and with corporate officers and direc-

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[151] H. BALLANTINE, *supra* note 82, § 126; R. STEVENS, *supra* note 82, § 160.

[152] H. BALLANTINE, *supra* note 82, § 126.

[153] *Id.*

[154] *Id.*

[155] *In re* Ringler & Co., 204 N.Y. 30, 44, 97 N.E. 593, 598 (1912). "The classification, as we have seen, is merely a legal fiction which the law invokes for the protection of third persons and the public." *Id.*

[156] R. STEVENS, *supra* note 82, at 746.

[157] *Id.* at 744.

[158] H. BALLANTINE, *supra* note 82, § 126.

tors, public officers, if, and only if, constituted as such by exact compliance with specified conditions, inherently possess the qualities characteristic of public officers. Public policy requires, and permits, but one exception to this rule.[159] Like the remainder of public policy's posterity, it is a species of the genus *de facto,* and is characterized as illegal, although treated as legal.[160] Unlike them, however, it conceals a doctrine of generalized estoppel beneath the mask of *de factoism.*[161]

A *de facto* public officer "is one who has the reputation or appearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold."[162] Prerequisite to the existence of a *de facto* public officer are possession of the office, under color of right or title thereto, and exercise of the franchise of the office.[163] There is serious doubt as to whether existence of a *de facto* public officer is possible in the absence of a corresponding office *de jure.*[164] The orthodox approach is that "under a constitutional government there can be no such thing as an office *de facto,* as distinguished from an officer *de facto.* Hence, the general rule that the acts of an officer *de facto* are valid, has no application where the office itself does not exist."[165] The conflict between this principle, and the public policy on which

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[159] E. MCQUILLIN, MUNICIPAL CORPORATIONS §§ 12.102, 12.103, 12.106 (3d ed. rev. 1963).

[160] *Id.* § 12.106.

[161] *Id.*

[162] *Id.* at 435-36.

[163] *Id.* § 12.102; Note, *The De Facto Officer Doctrine,* 63 COLUM. L. REV. 909 (1963); 17 N.Y.U.L. REV. 300 (1939-1940).

[164] Norton v. Shelby County, 118 U.S. 425 (1886); State v. Carroll, 38 Conn. 449, 9 Am.R. 409 (1871); Michigan City v. Brossman, 105 Ind. App. 259, 11 N.E.2d 538 (1937); Hildreth's Heirs v. McIntire's Devisee, 24 Ky. (1 J. J. Marsh.) 206, 19 Am.Dec. 61 (1829); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); Lang v. Mayor of Bayonne, 74 N.J.L. (45 Vroom) 455, 68 A. 90 (1907); Gwynne v. Board of Educ., 259 N.Y. 191, 181 N.E. 353 (1932); E. MCQUILLIN, *supra* note 159, § 12.104; *The De Facto Officer Doctrine, supra* note 163; *The Validity of Acts of Officers Occupying Offices Created Under Laws Declared Unconstitutional,* 3 U. NEWARK L. REV. 123 (1938); 29 MINN. L. REV. 36 (1944-1945); 86 U. PA. L. REV. 551 (1937-1938).

[165] E. MCQUILLIN, *supra* note 159, at 444. *See also* Norton v. Shelby County, 118 U.S. 425 (1885); Hildreth's Heirs v. McIntire's Devisee, 24 Ky. (1 J.J. Marsh.) 206, 19 Am.Dec. 61 (1829); *The De Facto Officer Doctrine, supra* note 163; *The Validity of Acts of Officers Occupying Offices Created Under Laws Declared Unconstitutional,* 3 U. NEWARK L. REV. 123 (1938); 29 MINN. L. REV. 36 (1944-1945); 86 U. PA. L. REV. 551 (1937-1938). In Norton v. Shelby County, *supra,* the leading exponent of the orthodox view, it was stated at 442:

> Their position is, that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent . . . . An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

the doctrine of *de facto* public officers is based, has resulted in its denial in many jurisdictions,[166] and its modification in others.[167]

Acknowledgment of the existence of *de facto* public officers is motivated by a desire to "preserve the rights of third persons and the organization of society."[168] It is a "matter of recognized necessity to protect the rights of the public and individuals involved in the official acts of persons exercising the duties of, and occupying offices under color of law."[169] Although it is the interests of the public, *not* the interests of the State, which are intended to be protected, it has been observed that "[w]ariness on the part of the general public of the authority of public officers would seriously interfere with the efficient administration of the government and therefore the public is encouraged to deal in confidence with them."[170]

In the case of public officers, public policy has generated a doctrine nominally *de facto,* the intrinsic character of which is generalized estoppel. That is to say, it is based upon justifiable conduct, in reliance on the existence, as true, of a state of facts. Substantiation of this theory is to be found in the reasoning behind the validation of acts of public officers, exercising the duties of their offices pursuant to unconstitutional statutes, when such acts are performed prior to the declaration of unconstitutionality.[171] Furthermore, the authority of a *de facto* public officer is asserted to be

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[166] State v. Carroll, 38 Conn. 449, 9 Am.R. 409 (1871); Michigan City v. Brossman, 11 N.E.2d 538 (Ind. App. 1937); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); Lang v. Mayor of Bayonne, 74 N.J.L. 455, 68 A. 90 (1907); E. McQUILLIN, *supra* note 159, §§ 12.104, 12.106; *The De Facto Officer Doctrine, supra* note 163; 29 MINN. L. REV. 36 (1944-1945); 3 U. NEWARK L. REV. 123 (1938); 86 U. PA. L. REV. 551 (1937-1938).

[167] *The De Facto Officer Doctrine, supra* note 163; 86 U. PA. L. REV. 551 (1937-1938).

[168] E. McQUILLIN, *supra* note 159, at 448-53.

[169] 3 U. NEWARK L. REV. 123, 124-25 (1938). *See also* State v. Carroll, 38 Conn. 449, 9 Am.R. 409 (1871); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); 29 MINN. L. REV. 36 (1944-1945).

[170] 17 N.Y.U.L. REV. 300 (1939-1940).

[171] Thus, it has been stated:

> Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and if thought unconstitutional resisted, but must be received and obeyed, as to all intents and purposes law, until questioned in and set aside by the courts. This principle is essential to the very existence of order in society.

State v. Carroll, 38 Conn. 449, 472, 9 Am.R. 409 (1871). *See also* State v. Poulin, 105 Me. 224, 74 A. 119 (1909).

Coexistent with this principle is that which denies absolute retroactivity to a declaration of unconstitutionality:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration .... [A]n all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940). *See also* Linkletter v. Walker, 381 U.S. 618 (1965); material cited *supra* note 166.

founded in reputation.[172] More explicitly, it has been observed that "the reason for validating the acts of a *de facto* officer does not exist if the public and third persons are aware of defects in the officer's title and are not deceived thereby."[173] This constitutes a clear-cut departure from the nature of the *de facto* doctrines laid down with respect to corporateness and corporate officers and directors. For, genuine *de factoism* is *not* dependent upon the existence of an estoppel.

Non-existence of a distinct category of "public officers by estoppel" results from the fact that the doctrine of *de facto* public officers is intrinsically one of estoppel. Persons who assume to act as public officers thus must be classified either as "*de jure* public officers," or "*de facto* public officers," or as usurpers.[174]

In common with the *de facto* doctrines pertaining to "corporateness" and corporate officers and directors, the doctrine of *de facto* public officers is framed in terms of the circumstances under which the inherent characteristics of the entity, *de jure,* will be attributed to persons erroneously claiming to be such entities. The status of one who claims to be a public officer, for example, is stated to be subject, at all times, to direct attack by the State, or by private persons acting in the name of the State.[175] A *de facto* officer, moreover, is not permitted to obtain personal benefit from his *de facto* status.[176] Hence, his title may be assailed directly when "he seeks to enforce a perquisite, such as salary, appendant to the office, or when he raises a privilege, such as judicial immunity, in a proceeding brought against him personally."[177]

As a general rule, however, the status of a person acting as a public officer is not subject to collateral attack, unless he is a usurper.[178] The rule applies irrespective of whether the collateral attack is made by "the public or by private parties seeking to challenge the officer's action or exercise of jurisdiction, whether that

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[172] E. MCQUILLIN, *supra* note 159, § 12.102; *The De Facto Officer Doctrine, supra* note 163, at 912.

[173] E. MCQUILLIN, *supra* note 159, at 451. *See also* State v. Carroll, 38 Conn. 449, 467, 9 Am.R. 409 (1871); *The De Facto Officer Doctrine, supra* note 163, at 913 ("... appearance of right to the office requires that the public be unaware of the defect in the officer's authority.").

[174] E. MCQUILLIN, *supra* note 159, §§ 12.102, 12.103; *The De Facto Officer Doctrine, supra* note 163.

[175] Gwynne v. Board of Education, 259 N.Y. 191, 181 N.E. 353 (1932); Field, *The Effect of an Unconstitutional Statute in the Law of Public Officers: Effect on Official Status,* 13 MINN. L. REV. 439, 441 (1928-1929); *The De Facto Officer Doctrine, supra* note 163, at 909-10. *See also* E. MCQUILLIN, *supra* note 159, §§ 12.102, 12.106.

[176] E. MCQUILLIN, *supra* note 159, § 12.106 at 453; *The De Facto Officer Doctrine, supra* note 163.

[177] *The De Facto Officer Doctrine, supra* note 163, at 909-10.

[178] *Id.* at 909-12.

challenge is in an independent proceeding or in the pending litigation."[179]

Recently, however, the doctrine of absolute immunity of *de facto* public officers from collateral attack upon their status has been eroded.[180] Thus it has been held that the status of judges may be attacked collaterally when the alleged defect in authority affects the jurisdiction of courts.[181] Such collateral attack may be made upon trial,[182] upon direct appeal[183] or in the course of a collateral attack upon the judgment.[184]

De facto public officers uniformly are characterized as illegal.[185] It has been asserted that "[o]ffice holding *de facto* is a fiction of the law designed to serve a useful purpose, but the fiction does not abolish the law. A *de facto* officer is not an officer although his acts may have legal effect."[186] It also has been stated that the *de facto* doctrine expresses not "any quality or character *conferred upon the officer,* or attached to him by reason of any defective election or appointment, but a name or character given to his acts by the law, for the purpose of validating them."[187] In this respect, therefore, the doctrine of *de facto* public officers conforms to that of *de facto* corporate officers and directors.

4. Legislatures

Legislatures are juristic entities, possessed of legal personalities separate and distinct from the personalities of their component legislators, irrespective of whether the latter are considered in their capacities as public officers, or as individuals.[188] Strictly speaking, the intrinsic characteristics of legislatures are attributable only to those bodies which constitute legislatures *de jure*.[189] Yet, as so frequently happens in connection with legal concepts, attempts at realization of the idea are abortive. This insufficiency, as usual, is cured by application of the panacea universally prescribed by

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[179] *Id.* at 909-10.

[180] *Id.* at 917-18.

[181] Glidden Co. v. Zdanok, 370 U.S. 530 (1961); U.S. v. Allocco, 305 F.2d 704 (2d Cir. 1962). *See also The De Facto Officer Doctrine, supra* note 163, at 918.

[182] Glidden Co. v. Zdanok, 370 U.S. 530 (1961); U.S. v. Allocco, 305 F.2d 704 (2d Cir. 1962).

[183] Cases cited note 182 *supra.*

[184] U.S. v. Allocco, 305 F.2d 704 (2d Cir. 1962).

[185] State v. Carroll, 38 Conn. 449, 9 Am. R. 409 (1871); State v. Poulin, 105 Me. 224, 74 A. 119 (1909); Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850 (Sup. Jud. Ct. 1945).

[186] Lawrence v. MacDonald, 318 Mass. 520, 527, 62 N.E.2d 850, 854 (Sup. Jud. Ct. 1945).

[187] State v. Carroll, 38 Conn. 449, 467, 9 Am.R. 409, 423 (1871).

[188] *See* Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907).

[189] *Id.*

public policy — a *de facto* doctrine.[190] The patient, however, while appearing to be in perfect health, in fact is not, and must be characterized as illegal, although acknowledged as legal.

The problem of illegally-constituted legislatures, as distinct from their component legislators, usually is created by a judicial declaration of invalidity of a State constitutional or statutory plan of legislative apportionment, as violative of the State or Federal Constitutions.[191]

Where the issue is one of unconstitutionality *vis-a-vis* the *State* constitution, and is raised subsequent to the election of a State legislature pursuant to the allegedly illegal apportionment plan, a *de facto* character is ascribed to the legislature.[192] This result proceeds from one of two causes. One alternative is refusal of the judiciary to take jurisdiction to adjudicate unconstitutionality of the apportionment plan.[193] It is based on the premise that a declaration of invalidity of the apportionment scheme would result in destruction of the State legislature.[194] However, by refusing to allow any attack to be made upon the *de jure* status of an entity which it acknowledges as illegal, the court, in effect, recognizes the existence of a *de facto* entity.[195] The other alternative is a determination that, if the legislature has been elected, *and* has assembled, prior to the

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[190] Honsey v. Donovan, 236 F. Supp. 8 (D.C. Minn. 1964); Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D.C. Neb. 1964); Paulson v. Meier, 232 F. Supp. 183 (S.D.N.D. 1964); Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907). *See also* Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906); People *ex rel.* Baird v. Bd. of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893); Burns v. Flynn, 155 Misc. 742, 281 N.Y.S. 494 (Sup. Ct. 1935), *aff'd*, 246 App. Div. 799, 281 N.Y.S. 497 (1935), *aff'd*, 268 N.Y. 601, 198 N.E. 424 (1935). Note that the doctrine of estoppel is as inapplicable to legislatures as to public officers.

[191] *See, e.g.*, WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965); Travia v. Lomenzo, 382 U.S. 9 (1965), and Screvane v. Lomenzo, 382 U.S. 11 (1965), *aff'g per curiam*, orders of Fed. Dist. Ct., S.D.N.Y., dated May 24, 1965, and July 13, 1965; Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965), *aff'd, per curiam, sub nom* Harrison v. Schaefer, 383 U.S. 269 (1966); Herweg v. Thirty-Ninth Legislative Assembly, 246 F. Supp. 454 (D. Mont. 1965); Paulson v. Meier, 246 F. Supp. 36 (S.D.N.D. 1965); Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965); Honsey v. Donovan, 236 F. Supp. 8 (D.C. Minn. 1964); Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D.C. Neb. 1964); Paulson v. Meier, 232 F. Supp. 183 (S.D.N.D. 1964); Reynolds v. State Election Bd., 233 F. Supp. 323 (W.D. Okla. 1964); Baker v. Carr, 222 F. Supp. 684 (D. Tenn. 1963); Moss v. Burkhart, 220 F. Supp. 149 (W.D. Okla. 1963), *aff'd, per curiam, sub nom.* Williams v. Moss, 378 U.S. 558 (1964); Sims v. Frink, 208 F. Supp. 431 (N.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 533 (1964); Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906). *See also* Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[192] *See, e.g.*, Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906); Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[193] Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[194] *Id.*

[195] A *de facto* entity is one which is illegal, but is treated as legal. BLACK'S LAW DICTIONARY 513 (3d ed. 1933).

declaration of invalidity of the apportionment plan, it is a legislature *de facto*.[196] Under this approach, the legislators also are *de facto*.[197] Theoretically, therefore, they could be ousted from office in a direct proceeding to try their titles thereto — and *only* in such direct proceeding.[198] Since, however, each house of the legislature is the exclusive judge of the election and qualifications of its members, the courts have no jurisdiction to entertain this proceeding once the legislature has assembled.[199] Consequently, a State legislature, elected and in office pursuant to an apportionment scheme *thereafter* held to violate the *State* constitution, not only is a *de facto* entity, but is one whose *de jure* status is impregnable to attack, *whether collateral or direct*.[200]

The status of a legislature, elected pursuant to an apportionment plan held violative of the *State* constitution *prior* to the election, has not been determined by State courts.[201]

Where the issue is one of unconstitutionality *vis-a-vis* the *Federal* Constitution, three situations possibly may arise. The first involves a decision by the federal courts that a State legislature, presently existing as such, was elected pursuant to an apportionment plan violative of the Federal Constitution. Under federal law, this legislature is considered to be a *de facto* entity.[202] Its existence is, however, subject to termination at the pleasure of the federal courts.[203] The second involves the granting of permission, by the federal courts, for the holding of a State legislative election pur-

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[196] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907). *See also* People *Ex rel.* Baird v. Bd. of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893); Burns v. Flynn, 155 Misc. 742, 281 N.Y.S. 494 (Sup. Ct. 1935). In Sherrill v. O'Brien, 188 N.Y. at 212, the New York Court of Appeals stated: "[W]hether the Apportionment Act of 1906 was constitutional or not, the legislature which might be actually chosen by the electors of the state under that apportionment would be a *de facto* legislature, whose acts would, in all respects be binding."

[197] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Sherrill v. O'Brien, 186 N.Y. 1, 79 N.E. 7 (1906).

[198] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907).

[199] *Id.*; Sherwood v. State Board of Canvassers, 129 N.Y. 360, 29 N.E. 345 (1891).

[200] Sherrill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40 (Sup. Ct. 1956).

[201] In New York, the courts recently have taken jurisdiction to declare a legislative apportionment scheme void as violative of the state constitution. *In re* Orans, 45 Misc. 2d 616, 257 N.Y.S. 2d 839 (Sup. Ct. 1965), *aff'd* 15 N.Y. 2d 339, 206 N.E.2d 854 (1965). The judgment of invalidity was rendered *prior* to the holding of any election pursuant to the void plan. An injunction against the holding of any such election was granted. Glinski v. Lomenzo, 16 N.Y.2d 27, 209 N.E.2d 277 (1965). The federal courts thereupon intervened to compel the holding of an election pursuant to the void plan. WMCA, Inc. v. Lomenzo, 246 F. Supp. 953 (S.D.N.Y. 1965) *aff'd, per curiam,* Travia v. Lomenzo, 382 U.S. 287 (1965). Since no proceedings were brought to set aside the election after it had been held pursuant to federal court order, it is unknown what status the *New York* courts would have attributed to the *legislature* elected thereunder, if left to their own devices. As a matter of federal law, however, this *legislature* is *de facto*. *See* notes 202, 204, 206 *infra*.

[202] Honsey v. Donovan, 236 F. Supp. 8 (D. Minn. 1964).

[203] *Id.*

suant to an apportionment scheme which they previously have held to contravene the Federal Constitution. Legislatures so elected also are characterized as *de facto*.[204] Theoretically, their existence also is terminable at the will of the federal courts.[205] Finally, the federal courts have *created de facto* legislatures. To wit, they have directed the holding of State legislative elections pursuant to apportionment plans promulgated by the federal courts.[206] These legislatures are *de facto* because (1) they are illegally constituted, insofar as State law is concerned;[207] and (2) they are treated as legal, their legality being maintained by the federal courts.[208]

Although all of the *de facto* legislatures described above are characterized as illegal,[209] none of them are vulnerable to collateral attack,[210] and only two of them are subject to direct attack.[211] The exceptions, moreover, are liable to extinction only by the federal courts, at their pleasure.[212]

5. Divorce

Jurisdiction to create the status of divorce is possessed, in theory, only by the courts of a jurisdiction in which at least one of the parties to the marriage is domiciled.[213] Yet, the intrinsic characteristics of divorce frequently are attributed to situations in which it is found that the condition of domicile was not fulfilled.[214] These situations are treated as legal, but denominated illegal.[215] This variety of legal illegality rests upon the doctrines of res judicata and estoppel, not *de factoism*.[216]

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[204] Jonas v. Hearnes, 236 F. Supp. 699 (W.D. Mo. 1964); League of Nebraska Municipalities v. Marsh, 232 F. Supp. 411 (D. Neb. 1964); Paulson v. Meier, 231 F. Supp. 183 (S.D.N.D. 1964).

[205] Cases cited note 204 *supra*.

[206] *See, e.g.*, Screvane v. Lomenzo, 382 U.S. 11 (1965); Travia v. Lomenzo, 382 U.S. 9 (1965); WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965); Herweg v. The Thirty-Ninth Legislative Assembly, 246 F. Supp. 454 (D. Mont. 1965); Paulson v. Meier, 246 F. Supp. 36 (S.D.N.D. 1965); Petuskey v. Rampton, 243 F. Supp. 365 (D. Utah 1965); Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965); Reynolds v. State Election Board, 233 F. Supp. 323 (W.D. Okla. 1964); Baker v. Carr, 222 F. Supp. 684 (D. Tenn. 1963); Moss v. Burkhart, 220 F. Supp. 149 (W.D. Okla. 1963); Sims v. Frink, 208 F. Supp. 431 (N.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 533 (1964).

[207] State law generally requires that legislative apportionment schemes be created by act of the state legislature, or a commission set up for this purpose. It does not authorize their creation by the federal judiciary.

[208] Cases cited at note 206 *supra*.

[209] Cases cited at note 191 *supra*.

[210] Cases cited at note 191 *supra*.

[211] Cases cited notes 202, 204 *supra*.

[212] Cases cited notes 202, 204 *supra*.

[213] G. STUMBERG, *supra* note 79, at 296.

[214] H. GOODRICH & E. SCOLES, CONFLICT OF LAWS § 127 (4th ed. 1964).

[215] *Id.*

[216] *Id.*

Res judicata operates to preclude all collateral attacks, by whomsoever made, upon a divorce decree obtained in a proceeding in which both parties to the marriage appeared.[217] This result obtains irrespective of whether the fact of domicile was litigated in the divorce proceeding.[218]

Ex parte divorces are not entitled to the benefits of res judicata.[219] Their effectiveness depends upon the selective operation of the doctrine of estoppel.[220] Estoppel bars both the party procuring the divorce, and a spouse who remarries in apparent reliance upon it, from collaterally contesting its validity.[221] Third parties, however, such as the State and children of the first marriage, may assert the invalidity of the divorce in a collateral proceeding.[222]

Where estoppel is the cause of a situation being characterized as a divorce, it has been observed that the divorce still must be considered as invalid.[223] And, where the status of divorce is produced by application of res judicata, discussion is couched in terms of vulnerability to attack, not validity.[224]

B. *Legal Illegality — Genesis and Regenesis*

Examination of the judicial approach to corporations, corporate officers and directors, public officers, legislatures, and divorce, manifests a pattern of consistent inconsistency. In the case of each of these categories, the inherent attributes of the juristic entity, or legal status — its consequences of legality — are imputed to a variety of factual situations. Yet only one of these situations is characterized as legal — *de jure.* Uniformly, it is the one whose name is borne by the legal concept of which it is a constituent class. The remainder, denominated variously as "quasi,"[225] "near,"[226] *de facto,*[227] "by estoppel,"[228] or the result of res judicata,[229] commonly are characterized as illegal.

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[217] *Id.* at 258-59. Thus, the decree is impregnable to attack, not only by the parties thereto, but by their children, subsequent spouses, and the state.

[218] *Id.* at 258-59.

[219] *Id.*, § 127.

[220] *Id.* at 259-60.

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] *Id.* at 258.

[225] *Legal persons. See* pt. III A 1a *supra.*

[226] *Id.*

[227] *Corporateness,* corporate officers and directors, public officers, and legislatures. *See* pts. III A 1b-4 *supra.*

[228] *Corporateness,* corporate officers and directors, and divorce. See pts. III A 1b, 2, and 5 *supra.*

[229] Divorce. *See* pt. III A 5 *supra.*

Classification of facts as legal, simultaneously legal and illegal, or as illegal, constitutes a paradox. It originates from two sequential misconceptions: one semantic, the other analytic.

On the semantic side of the coin, the fallacious belief that legality and illegality can have objective existence, has perpetuated the procrustean identification of legal concepts with the component classes whose names they bear. Thus, artificial personality and corporateness are equated with corporation; corporate and public officeholding with corporate officers and directors, and public officers; legislativeness with legislatures; and termination of marital status with divorce. This false identification of the genus with one of its species has necessitated the assumption that the inherent qualities of a concept can be attributed to a factual situation which does not correspond to the concept as a schematism. This fallacy, in turn, results in postulation of the coincident existence of the antipodal concepts "legality" and "illegality."

Since, however, the attributes of a legal concept are correlative to the conditions of its realization, it is impossible to recognize a concurrence of "legality" and "illegality." For, all circumstances to which are attributed the inherent qualities of a legal concept *a priori* comply with the conditions for its realization, and are "legal." Hence, those factual situations, described as "quasi" or "near," or as possessing the consequences of legality *de facto,* by estoppel, or as the result of res judicata, must be characterized as "legal."

Acceptance of this radical inversion of a keystone of juristic thought, requires extirpation of the jural chimeras known as "legal fictions" — recognition that distinctions between reality and fiction are irrelevant, insofar as the Law is concerned. For, the fallacious assumption, that factual situations possessed of the consequences of legality can be described as illegal, has been perpetuated by universal acceptance of the erroneous theory that there *are* such creatures as legal fictions. To wit, that which the law recognizes as real can be characterized as fiction. For example, apart from the imputation of illegality implicit in the terms quasi, near, *de facto,* estoppel, res judicata, voidable, constructive, and implied, it has been stated that the *de facto* doctrine does not recognize the existence, as legal entities, of *de facto* corporations,[230] *de facto* corporate officers and directors,[231] or *de facto* public officers.[232] Non-

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[230] R. STEVENS, *supra* note 82, § 29. *See also* Eaton v. Aspinwall, 19 N.Y. 119 (1859).

[231] R. STEVENS, *supra* note 82, § 160.

[232] State v. Carroll, 38 Conn. 449, 9 Am. R. 409 (1871); City of Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850 (Sup. Ct. 1945); State v. Poulin, 105 Me. 224, 74 A. 119 (1909).

corporate legal persons,[233] *de facto* corporate officers and directors,[234] and *de facto* public officers,[235] have been described, moreover, as legal fictions. The doctrine of estoppel, likewise, is said not to involve recognition of the legal existence of the status, created thereby, of corporations,[236] or of divorce.[237]

The only effective method of eradicating legal fictions from juristic thought is "nominicide."[238] That is to say, all words and phrases connotative of "legal illegality" must be expunged from legal terminology. Included in this "little list of society offenders who . . . never would be missed"[239] are "quasi," "near," "*de facto*," "legal by estoppel," "legal by reason of res judicata," "voidable," "constructive," and "implied." And, like Abou Ben Adhem's name,[240] the term "legal fiction" leads all the rest.

The necessity for this measure is manifested by examination of the scanty expressions of belief in the actual existence of so-called *de facto* corporations.[241] These expressions are self-defeating, in that they describe an entity as being, at one and the same time, both *de facto* and real. Likewise, some statutes which provide legislative authorization for the impregnability to attack of the legal existence of so-called *de facto* corporations, in all proceedings except direct attacks by the State, refer to these corporations as *de facto*.[242]

The resultant terminological deficiency can be alleviated by use of the phrase "juridical construction" as the appropriate denomination for all facts, or aggregates of facts, recognized in Law.[243] A fact, or aggregate of facts, to which is attributed the consequences of legality properly would be described as a juridical construction of the relevant concept. For example, all factual situations to which are imputed the attributes of corporateness, whether presently denominated *de jure, de facto,* or by estoppel, would be called juridical constructions of corporateness.

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[233] *In re* Morrison's Estate, 343 Pa. 157, 22 A.2d 729 (1941).

[234] *In re* Ringler & Co., 204 N.Y. 30, 97 N.E. 593 (1912).

[235] City of Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850 (Sup. Ct. 1945).

[236] H. BALLANTINE, *supra* note 82, § 127.

[237] H. GOODRICH & E. SCOLES, *supra* note 214, § 27.

[238] A semantic fabrication, signifying the destruction of names.

[239] GILBERT & SULLIVAN, *The Mikado,* in THE COMPLETE PLAYS OF GILBERT AND SULLIVAN 345, 352 (1938).

[240] L. HUNT, *Abou Ben Adhem, in* THE BOOK OF CLASSIC ENGLISH POETRY 600-1830, at 1510 (E. Markham ed. 1926).

[241] *See* notes 132-33 *supra.*

[242] S.D. CODE § 11.0108 (1939). *See also* MINN. STAT. ANN. tit. 20, § 301.08 (1947); OKLA. STAT. ANN. tit. 18, § 1.14(c) (1941) (refers to psuedo-corporation). The Commissioner's Note to § 9 of the Model Business Corporation Act quotes, moreover, from Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N.E. 357 (1885), referring to *de facto* corporations as real. MODEL BUS. CORP. ACT 71, § 9 (1953) (withdrawn 1957).

[243] *See* pt. I *supra.*

Consequently, the path to comprehension of the true character of the analysis to be made is clear. The classification of facts as simultaneously legal and illegal, involves a purely qualitative analysis of facts according to their juristic nature. This analysis ignores the gradational aspect of attributions of consequences of legality. Proper analysis is bivalent in nature. Qualitatively, it categorizes factual situations as legal or illegal. In other words, it determines *whether* the consequences of legality are attributable to a particular factual situation. Quantitatively, it *measures the extent* to which the consequences of legality are attributable to the "juridical constructions" of a concept. Since attribution of the consequences of legality recognizes both the existence and the degree of the quality of legality — *i.e.,* is constitutive of them — legal illegality is regenerated as a doctrine of relative recognition.

IV. RELATIVE RECOGNITION — OLD WINE IN A NEW BOTTLE

Acceptance of a doctrine of relative recognition operates to substitute one system of legal terminology for another. The present system considers legality as independent of the attribution of its consequences to factual situations. In other words, definitions and descriptions of rights, duties, personality, status, and other expressions of legality, do not correspond to the entirety of circumstances which require or permit attribution of the consequences of legality. Legality, however, *is* dependent upon, and correlative to, the totality of these circumstances. This system, therefore, is both inadequate and misleading. John Chipman Gray, for example, has observed, apparently in all seriousness:

> What we want for the conduct of life is to know what are the acts and forbearances which the State protects, and what are the acts and forbearances which it compels; in other words, what are legal rights and duties? *At whose instance these acts and forbearances are protected and enforced, though important, is yet of secondary importance.*[244] [Italics supplied.]

The function of the proposed system of legal terminology is to make manifest the correlation between legality and the circumstances which require or permit attribution of its consequences.

A. *Relative Recognition — Formulation*

Simply to state that all factual situations which require or permit attribution of the consequences of legality must be characterized as legal, because such attribution recognizes, or is constitutive of, the quality of legality, is inadequate as an analysis of legality. For, "legality" is a compound expression. It encompasses both the

[244] J. GRAY, *supra* note 1, at 83.

inherent qualities of the idea whose meaning is represented by a legal concept, and the attribution of these qualities to a factual situation. Although these qualities are absolute,[245] attribution of these qualities is relative. The variable which constitutes this relativity, consists in the class of persons who are capable of forbidding this attribution.[246] Adequate analysis must take account of both aspects of "legality." It must be formulated as a doctrine of relative recognition, in terms of the variable constitutive of the relativity. That is to say, all circumstances which require or permit the attribution of the consequences of legality not only must be characterized as "legal," but also must be classified with reference to the class of persons who are capable of barring recognition of legality.

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[245] Attribution of the *consequences of legality* of a legal concept necessarily involves attribution of *all* of the inherent qualities of the *idea* whose meaning is represented by the concept. WEBSTER'S NEW INT'L DICTIONARY 552 (Concept) (2d. ed. unabr. 1937).

[246] Although the relative aspect of *legality* heretofore has been recognized in connection with *artificial personality,* its true nature has been obscured by the misconception that the variable, constitutive of this relativity, consists in the quantum of the qualities of *corporateness* which are attributable to a factual situation. Friedmann, for example, accurately states: "It would, perhaps, be truer to say that legal personality is not absolute, that it can exist to a smaller or greater degree . . . ." Yet, he goes on to observe, quoting Gower: "The relativity of corporate personality, both in quantity and quality, thus is demonstrated by the modern treatment of incorporated associations as well as the status of unincorporated associations. 'Between the two extremes of an unincorporated club or society and the corporation there are many hybrids which, though formally unincorporated, possess a greater or lesser number of the attributes of a corporation.' " W. FRIEDMANN, *supra* note 7, at 525-26. Similarly Nékam observes: "[T]here exists a gradation among the legal entities which extends from those which are considered as such for the purpose of a single right only to those which have a great number of rights attributed to them." A. NEKAM, *supra* note 46, at 45. This approach derives from the identification of artificial personality with corporateness. *See* Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (1955); National Union of Gen. & Municipal Workers v. Gillian, [1946] K.B. 81 (C.A. 1945). It involves a confusion between differences in kind and differences in degree. Artificial personality, however, is not identical with corporateness. Inherent in it is but one quality, *i.e.,* entitativeness — any institution which possesses one or more inherently entitative powers, rights, or capacities, is an artificial person. A. KOCOUREK, *supra* note 105, at 277-85; A. NEKAM, *supra;* J. SALMOND, *supra* note 7, §§ 108, 113; Smith, *supra* note 105, at 283. The fact that an *artificial person* does not possess all of the inherently corporate powers, rights, and capacities does not constitute it a *lesser* type of artificial person, but simply a *different* type of artificial person. That is to say, although legal entities are classified according to the number of inherently entitative powers, rights, and capacities which they possess, the differences between the resultant classes are in kind, not in degree. Corporations, for example, are considered to be *de jure* legal persons although they lack the capacity to marry possessed by the competent natural person. Infants and incompetents, moreover, are considered to be *de jure* legal persons although they lack many powers, rights and capacities possessed by competent adult natural persons. Consequently, the variable constitutive of the relativity of artificial personality cannot be said to consist in the *quantum* of inherently corporate powers, rights and capacities attributable to a factual situation. Rather, as in the case of other legal concepts, it consists in the class of persons capable of forbidding the attribution, to a particular factual situation, of the quality of entitativeness.

It follows that proper analysis of artificial personality is dual: First, according to differences in *kind,* arising from the *number* of inherently entitative powers, rights, and capacities possessed. These differences are absolute. This classification demarcates the species of the generic legal concept artificial personality, one of which is corporateness. Each of these species is itself a legal concept, possessed of inherent qualities peculiar to it. Second, according to differences in *degree,* arising from the class of persons capable, with respect to each *kind* of artificial personality, of barring the attribution of entitativeness. These differences are relative.

The proposed doctrine of relative recognition, therefore, should be formulated as a hierarchy of juridical constructions of legal concepts.[247] For example, the doctrine first would be stated in general terms: (1) attribution to a factual situation of the consequences of legality constitutes recognition that the factual situation possesses the quality of legality — *all* the qualities inherent in the idea represented by the concept being applied; (2) all factual situations which thus are recognized to possess the quality of legality, are denominated juridical constructions of the legal concept whose consequences of legality are attributed to them; (3) juridical constructions of a legal concept must be classified with reference to the extent to which the consequences of legality are attributable to them — in terms of the class of persons who are capable of barring their recognition.

Classification of the juridical constructions of legal concepts produces a four-tiered arrangement. The highest category is that of absolute impregnability. To wit, recognition of the quality of legality can be precluded by no one. The most prominent members of this grouping are the tautonyms of legal concepts, presently described as *de jure.* Examples of these include, *inter alia, de jure* corporations; *de jure* corporate officers and directors; *de jure* public officers; *de jure* legislatures; valid divorce and those varieties of so-called *de facto* legislatures whose existence *de jure* can be controverted by no one.[248] Similarly included are those so-called *de facto* legal persons, which are treated as entities, to the extent of the inherently corporate powers, rights, and capacities, which they rightfully possess, not only as to third persons, but also insofar as their constituent human beings are concerned.[249] Additional components of this class are those factual situations to which certain varieties of res judicata are applicable,[250] as well as those which are conclusively presumed to exist.[251] All members of this category are denominated juridical constructions of the first degree.

The second category is one of particular vulnerability. It comprises the circumstances which permit denial of the attribution of the consequences of legality of a legal concept to its *de jure* tautonyms. The most obvious illustrations of this variation are the circumstances which require or permit lifting the veil of corporate person-

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[247] *See* pt. III B *supra.*

[248] *See* pt. III A 4 *supra.*

[249] *See, e.g.,* Carle v. Carle Tool & Eng'r Co., 36 N.J. Super. 36, 114 A.2d 738 (1955) (statutory limited partnership); Walker v. Wait, 50 Vt. 668 (1878) (ordinary partnership); Bonsor v. Musicians' Union, [1956 H.L.] A.C. 104 (trade unions).

[250] *See, e.g.,* pt. III A 5 *supra.*

[251] *E.g.,* constructive possession, constructive delivery, constructive notice.

ality.[252] A further example is the so-called *de facto* merger doctrine.[253] Its function is to invalidate otherwise valid sales of corporate assets, on the ground that they are really mergers which have failed to comply with statutory requirements therefor.[254] Also included in this category are those factual situations presently characterized as voidable. Members of this category may be described as juridical constructions of the second degree.

The third category is one of modified impregnability. That is to say, recognition of enjoyment of the quality of legality, by factual situations which do not fulfill, strictly, the conditions for *de jure* legality, can be precluded only by an exceedingly restricted class of persons, and only under limited conditions. The most conspicuous members of this class are the so-called *de facto* situations. Some examples of these are *de facto* corporations; *de facto* corporate officers and directors; and *de facto* public officers. Also included in this grouping are those *de facto* legislatures whose existence is subject to termination at the pleasure of the federal courts.[255] Additional components of this class are those so-called *de facto* legal persons which are treated as entities, to the extent of the inherently corporate powers, rights and capacities, which they rightfully possess, but only insofar as third persons are concerned.[256] Their entitativeness can be precluded by their constituent human beings, although only with respect to dealings between the entity and its components.[257] Possible further candidates for inclusion in this class are circumstances in which res judicata is deemed inapplicable, although, conceivably, it might have been applicable. For example, where the person sought to be bound by the doctrine was not a party to the prior action, although he should have been. The phrase, juridical constructions of the third degree, denotes members of this category.

The lowest tier of this hierarchy is that of particular impregnability. To wit, recognition of enjoyment of the quality of legality, by factual situations which do not fulfill, strictly, the conditions for *de jure* legality, can be precluded by *all but* an exceedingly limited class of persons, under *all but* exceedingly limited conditions. Encompassed in this category are all factual situations to which the doctrine of estoppel is applicable. Representative of the members

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[252] *See* W. FRIEDMANN, *supra* note 7, at 473, 515-28.

[253] Folk, *De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.*, 49 VA. L. REV. 1261 (1963).

[254] *Id.*

[255] *See* pt. III A 4 *supra.*

[256] *See, e.g.*, Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947) (ordinary partnership); Bonsor v. Musicians' Union, [1954] 2 W.L.R. 687 (C.A.) (trade unions). The same is true of trusts, when treated as entities insofar as third persons are concerned.

[257] Note 256 *supra.*

of this class are corporations by estoppel; corporate officers and directors by estoppel; and divorce by estoppel. Also included in this class are those factual situations whose existence is implied, *e.g.*, implied contracts, and implied or constructive trusts. Members of this class are denominated juridical constructions of the fourth degree.

Formulation of legal consequences in terms of recognition is not novel. The legal effects of judgments, for example, frequently are expressed in this fashion.[258] Recognition also is an operative principle of international law.[259] Yet, although acceptance of a doctrine of relative recognition would cause no substantial change in juristic thinking with respect to recognition of judgments, it possibly might avail to sever the Gordian Knot of "recognition" in international law.

B. *Recognition as an Instrument of Juristic Analysis in International Law*

"State" and "government," like "corporation," "corporate officer or director," "public officer," "legislature," and "divorce," are tautotypical legal concepts. It follows, therefore, that all factual situations, which require or permit attribution of the consequences of legality of these concepts, must be characterized as legal — as juridical constructions of "States" or "governments." For, attribution of these consequences recognizes, or is constitutive of, the quality of legality. Yet, in international law, as in municipal law, legal illegality endures. In this sphere, it occurs as a function of international recognition. Its existence causes application of the doctrine of relative recognition to be as logically unavoidable in the sphere of international law, as it is in the sphere of municipal law. This doctrine, however, is insufficient, in and of itself, to resolve the problem of legal illegality in international law. For, in this area, legal illegality has enabled the treatment, as legal, of entities which, as a matter of public policy, are incapable of being characterized as legal. This treatment has been justified by the ancient error: that attribution of the consequences of legality is not constitutive of the quality of legality. Thus, prerequisite to the necessary application, in international law, of the doctrine of relative recognition, is a redetermination of the circumstances to which the consequences of legality of statehood and government can be attributed.

1. Legal Illegality in International Law

Classification of States and governments, as commonly expressed, is identical with that of public officers: *de jure; de facto;*

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[258] *See, e.g.*, G. STUMBERG, *supra* note 79, at 111-33.

[259] *See* pt. IV B *infra*.

and usurping — those whose continued existence is in doubt.[260] Yet, whereas these terms, in municipal law, are rigid in their meanings,[261] they have, in international law, such variegated meanings as to be useless as analytic tools.[262]

Thus, Austin, although asserting that "every government properly so called is a government *de facto*,"[263] distinguishes between three kinds of governments:

> First, governments which are governments *de jure* and also *de facto;* secondly, governments which are governments *de jure* but not *de facto;* thirdly, governments which are governments *de facto* but not *de jure*.[264]

According to Borchard, however, as a matter of practice, the term *de jure* is applied to states and governments "one likes and recognizes,"[265] often irrespective of whether they presently are established and effective; the term *de facto* being applied to states and governments "one dislikes and declines to recognize,"[266] also irrespective of whether they presently are established and effective.

Borchard would prefer to apply the term *de facto* to usurpers:

> The suggestion that recognized governments are governments *de jure,* and unrecognized governments only de facto . . . is . . . unlegal . . . . The term *de facto* has a more appropriate application with reference to revolutionists in the field, who administer public affairs in some limited area, before they establish themselves as a government or found a state.[267]

The term *de facto,* moreover, is applied not only to established states and governments, when unrecognized, and to those whose

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[260] 1 J. AUSTIN, *supra* note 8, at 336; 2 J. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 503-555 (1901); J. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW 12-16 (1928); Borchard, *The Unrecognized Government in American Courts,* 26 AM. J. INT'L L. 261 (1932) For classification of *public officers,* see pt. III A 3 *supra.*

[261] When used with reference to corporations, corporate officers and directors, or public officers, etc.

[262] In fact, they could be said to qualify for additional compensation under Humpty-Dumpty's principle: "When I make a word do a lot of work like that . . . I always pay it extra." LEWIS CARROLL, THROUGH THE LOOKING-GLASS, ALICE IN WONDERLAND 247 (Modern Library ed.). *See, e.g.,* 1 J. AUSTIN, *supra* note 8; J. HERVEY, *supra note* 260; H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 275-77 (1956); Borchard, *supra* note 260; Lauterpacht, *Recognition of Governments: I,* 45 COLUM. L. REV. 815 (1945).

[263] 1 J. AUSTIN, *supra* note 260.

[264] *Id.* Austin describes these classes as follows: "A government *de jure* and also *de facto* is a government deemed lawful . . . which is present or established. . . . A government *de jure* but not *de facto,* is a government deemed lawful . . . which, nevertheless, has been supplanted or displaced. . . . A government *de facto* but not *de jure,* is a government deemed unlawful . . . which, nevertheless, is present or established. . . . A government supplanted or displaced, and not deemed lawful, is neither a government *de facto* nor a government *de jure.* Any government deemed lawful, be it established or be it not, is a government *de jure* . . . . In strictness, a so called government *de jure* but not *de facto,* is not a government. It merely is that which was a government once, and which (according to the speaker) ought to be a government still."

[265] Borchard, *supra* note 260, at 262.

[266] *Id.*

[267] *Id.* at 263.

continued existence is in doubt, as in the case of revolution or civil war, but to those which are recognized conditionally.[268] Furthermore, classification of States and governments as *de jure, de facto,* or usurping, does not determine, *per se,* whether, or to what extent, the consequences of legality shall be attributed to them.[269] For, in international law, the *sine qua non* of juristic personality is recognition, as defined by international law.[270]

States and governments, therefore, properly are classified, under international law, either as recognized, or as unrecognized. As in municipal law, however, the consequences of legality of statehood and government are attributed not only to recognized, or *de jure,* entities, but also to unrecognized, or illegal, entities.

In contrast to the situation existing in municipal law, however, application of the doctrine of relative recognition, to all non-recognition situations now treated as legal, does not eliminate legal illegality. For, the treatment, as legal, of non-recognition situations, can create a state of affairs in which the judiciary has recognized, or constituted, the existence of a State or government whose non-existence is required by executive policy. Where this state of affairs exists, public policy, in the form of national self-interest, prohibits the characterization as legal of the non-recognition situations judicially treated as legal. Hence, a reclassification of the factual situations to which the consequences of legality of statehood or government *can be attributed,* is prerequisite to the inescapable application of the doctrine of relative recognition in the sphere of international law. This redetermination involves isolation of those non-recognition situations to which public policy denies the characterization of legality.

Once these situations are eliminated from the group of non-recognition situations which are treated as legal, the doctrine of relative recognition can be applied in conformity with the exigencies of public policy.

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[268] *Institut DeDroit International: Resolutions Concerning the Recognition of New States and New Governments,* 30 AM. J. INT'L L. SUPP. 185 (1936).

[269] *See, e.g.,* The Arantzazu Mendi, [1939] P. 37 (C.A.), *aff'd,* [1939] A.C. 256, 33 AM. J. INT'L L. 583 (1939); Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A.); Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] 1 Ch. 513; J. HERVEY, *supra* note 260, at 3-19; H. KELSEN, *supra* note 262, at 267-92; Borchard, *supra* note 260.

[270] J. HERVEY, *supra* note 260, at 7; H. KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* note 44, at 221-29; H. KELSEN, *supra* note 262, at 267-88; D. O'CONNELL, 1 INT'L LAW 94, 139-40 (1965); Borchard, *supra* note 260; Lauterpacht, *Recognition of Governments: I,* 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law,* 53 YALE L.J. 385 (1944). *See also* pt. IV B 3 *infra.* Although exponents of the declaratory theory of recognition (pt. IV B 2, *infra*) assert that the *sine qua non* of legal personality is compliance with the requirements, other than *recognition,* laid down by international law for the existence of *States* and *governments,* this assertion is contradicted by judicial practice (pts. IV B 3, 4, *infra*).

2. International Recognition — *Sine qua non* of International Juristic Personality

International recognition, of a State or government, is a declaration by one State that, according to international law, another State fulfills the conditions of statehood, or that its government is capable of binding the State which it claims to represent.[271] It is a condition precedent to the proper attribution of the consequences of legality of statehood or government.[272] That is to say, recognition is the determination of a fact which must be made by the competent authority, in the first phase of the legal process, of which the attribution of consequences of legality is the last phase.[273]

Attribution of the consequences of legality of statehood or government to non-recognized entities, however, is not, *per se,* inconsistent with the principle that international recognition is an indispensable prerequisite to the legal existence of States and governments. For, in international law, as elsewhere, there are degrees of legality, *i.e.,* degrees of international recognition. The majority of the non-recognition situations, for example, involve situations which may be termed "representative recognition." That is to say, the non-recognized entity was deemed, in law, to be acting as the representative of a recognized entity. Where, however, no similar substitute for international recognition can be adduced, public policy

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[271] H. KELSEN, GENERAL THEORY OF LAW AND STATE, *supra* note 44, at 221-24; H. KELSEN, *supra* note 262, at 267-75, 280-90; Kelsen, *Recognition in International Law: Theoretical Observations,* 35 AM. J. INT'L L. 605 (1941); Kunz, *Critical Remarks on Lauterpacht's 'Recognition in International Law',* 44 AM. J. INT'L L. 713 (1950); Lauterpacht, *Recognition of Governments:* I, 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law,* 53 YALE L.J. 385 (1944); Meeker, *Recognition and the Restatement,* 41 N.Y.U.L. REV. 83 (1966). Although international *recognition* can be granted either *de jure* or *de facto,* the legal effects, if not the political ones, of both forms of *recognition* are identical. Arantzazu Mendi, [1939] A.C. 256, 265, *aff'g* [1939] P. 37 (C.A.); Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.); Republic of Peru v. Peruvian Guano Co., 36 Ch. D. 489 (1887); J. HERVEY, *supra* note 260, at 12-16; H. KELSEN, *supra* note 262, at 275-77; Briggs, *De Facto and De Jure Recognition: The Arantzazu Mendi,* 33 AM. J. INT'L L. 689 (1939); Kallis, *The Legal Effects of Nonrecognition of Russia,* 20 VA. L. REV. 1, 2-3 (1933); Kelsen, *Recognition in International Law: Theoretical Observations, supra.* The only exception to this rule occurs when a dispute arises between two entities, one recognized *de jure* as the government of a state, and the other recognized *de facto* as the government of the same state. Effective and established, the *de facto* entity will prevail where the acts in question were to be effective within its territorial jurisdiction or where the property or claim in question is that of the state *qua* state. Banco de Bilbao v. Sancha, [1938] 2 K.B. 176 (C.A.); Bank of Ethiopia v. National Bank of Egypt & Liguori, [1937] 1 Ch. 513; Haile Selassie v. Cable & Wireless, Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

[272] J. HERVEY, *supra* note 260, at 3-19; D. O'CONNELL, *supra* note 270, at 94, 138; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts,* 25 COLUM. L. REV. 544 (1925); Kelsen, *supra* note 271. *See also* Rose v. Himely, 8 U.S. (4 Cranch) 240 (1808); Republic of China v. Merchants' Fire Assur. Corp. of N.Y., 30 F.2d 278 (9th Cir. 1929); The Hornet, 12 F. Cas. 529 (No. 7621) (D.C. N.C. 1870); Taylor v. Barclay, 2 Sim. *213 (1828); The Annette, The Dora, [1919] P. 105.

[273] H. KELSEN, *supra* note 262, at 269-75; Kelsen, *supra* note 271. *See also* cases cited note 292, *infra.*

absolutely forbids the characterization of non-recognition situations as legal. Correlatively, these situations cannot be treated as legal.

Attribution of the consequences of legality of statehood or government, where representative recognition is inapplicable, necessarily involves a rejection, total or partial, of the necessity of international recognition. This rejection has been engendered by four misconceptions: First, as to the conditions requisite for the legal existence of a State or government. Second, as to the authority competent to determine whether these conditions have been met. Third, as to the effects of attribution of the consequences of legality of statehood or government. Fourth, as to the circumstances which compensate for the lack of international recognition.

Clarifying these misconceptions will prevent the treatment, as legal, of those non-recognition situations to which public policy denies the characterization of legal, by re-establishing international recognition as the *sine qua non* of the juristic personality of States and governments.

The prevalent confusion, as to the conditions prerequisite to the legal existence of States and governments, manifests itself as a controversy over the nature and function of international recognition. It has resulted in partially erroneous, and totally antithetical, descriptions of international recognition as constitutive[274] and declaratory.[275]

The constitutive theory considers international recognition of statehood, or government, by the competent authority, to be the sole factor constitutive of the legal existence of the recognized entity, *vis-a-vis* the recognizing entity.[276] At this point, exponents of the constitutive theory come to a parting of the ways. Kelsen denies any right to recognition or any duty to recognize.[277] Lauterpacht, on the other hand, affirms a right in new States and governments to recognition, and a corresponding duty in established States to grant it, if the requirements of international law are fulfilled.[278] The

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[274] H. KELSEN, *supra* note 262, at 269-75; Kelsen, *supra* note 271; Lauterpacht, *Recognition of Governments: I*, 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385 (1944). *See also* D. O'CONNELL, *supra* note 270, at 139-40; Borchard, *Recognition and Non-Recognition*, 36 AM. J. INT'L L. 108 (1942); Brown, *The Effects of Recognition*, 36 AM. J. INT'L L. 106 (1942); Meeker, *supra* note 271.

[275] D. O'CONNELL, *supra* note 270, 139-40; Borchard, *supra* note 274; Brown, *The Effects of Recognition*, 36 AM. J. INT'L L. 106 (1942); Kunz, *supra* note 271; Meeker, *supra* note 271.

[276] *See* authorities cited note 274 *supra*.

[277] H. KELSEN, *supra* note 262, at 269-75; Borchard, *supra* note 274; KELSEN, *supra* note 271.

[278] D. O'CONNELL, *supra* note 270, at 139-40; Lauterpacht, *Recognition of Governments: I*, 45 COLUM. L. REV. 815 (1945); Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385 (1944).

constitutive theory affirms that international recognition is a prerequisite to attribution of the consequences of legality of statehood and government.[279] The error of this theory lies, not in itself, but in its effects. It appears to require the erroneous conclusion that these consequences of legality cannot be attributed to *any* acts of unrecognized States or governments.[280]

The declaratory theory asserts that international recognition merely proclaims a *pre*-existing fact; that unrecognized States and governments can have rights and duties in international law.[281] It denies, moreover, the existence of any right to, or duty of, international recognition.[282] Furthermore, it totally rejects international recognition as a condition precedent to attribution of the consequences of legality of statehood or government.[283]

This rejection, however, and its parent theory, arise from the ancient misconception that the Law is founded upon objective realities. Thus, it is asserted that the consequences of legality of statehood and government, *ipso facto*, arise from the objectively real existence of States and governments — in somewhat the same manner as Athena sprang, full-grown, from the forehead of Zeus; a sort of legal parthenogenesis.[284]

Self-existence of States and governments may be conceded in the context of their internal municipal affairs.[285] Their existence, however, insofar as other States and governments are concerned, is a fact which must be determined by competent authority.[286] This fact exists, in law, only if so determined.[287] In practice, moreover, international recognition is considered to be a condition precedent to the attribution of the consequences of legality of statehood and government.[288] The majority of cases which have attributed the consequences of legality of statehood or government to acts of unrecognized States or governments, have done so on theories of representation.[289] In these cases, therefore, the condition precedent, of international recognition, must be deemed to have been met.

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[279] *See* authorities cited note 274 *supra.*

[280] *See* pts. IV B 3, 4 *infra.*

[281] D. O'CONNELL, *supra* note 270, at 139-40; Kunz, *supra* note 271; Meeker, *supra* note 271.

[282] Kunz, *supra* note 271.

[283] *See* authorities cited note 281 *supra.*

[284] D. O'CONNELL, *supra* note 270, at 139-40.

[285] Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827); McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 208 (1808); J. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW 9-10 (1928); D. O'CONNELL, *supra* note 270, at 94; Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts*, 25 COLUM. L. REV. 544 (1925); Kunz, *supra* note 271.

[286] *See* note 273 *supra.*

[287] *See* note 273 *supra.*

[288] *See* notes 272-73 *supra* and note 292 *infra.*

[289] *See* pts. IV B 3 and 4 *infra.*

Equation of the objective existence of States and governments with their legal existence is but one of the errors of the declaratory theory. According to this theory, the judiciary is competent to determine the fact of legal existence of international entities.[290]

Yet, it is clear that international recognition is an indispensable prerequisite to the legal existence of States and governments, *vis-a-vis* other States and governments.[291] That is to say, a State or government exists, insofar as other States and governments are concerned, only in relation to the States or governments which have granted it international recognition. It further is clear, that the only authority competent to grant, or withhold, international recognition of a State or government, is the political department of the recognizing State.[292] Moreover, since the State has a unitary juristic personality, its judiciary is bound by the granting, or withholding, by its political department, of international recognition.[293]

Adherents of the declaratory theory do not dispute the exclusive power of the political department of a State to grant, or withhold, international recognition.[294] They further agree that international recognition absolutely requires attribution, to the recognized entity, of the consequences of legality of statehoood or government.[295] They assert, however, that these consequences of legality can be attributed, by the judiciary, to non-recognized entities whose objective existence has been established by the judiciary.[296]

The only possible legal justification for this assertion, is the

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[290] D. O'CONNELL, *supra* note 270, at 139-40, 181-82; *See* pt. IV B 3, infra. *See, e.g.,* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

[291] *See* notes 272-73 *supra* and pts. IV B 3, 4 *infra.*

[292] *See, e.g.,* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Pearcy v. Stranahan, 205 U.S. 257 (1907); Duff Dev. Co. v. Government of Kelantan, [1924] A.C. 797 (H.L.); Taylor v. Barcley, 2 Sim. *213 (1828); Foster v. Globe Venture Syndicate, Ltd. [1900] 1 Ch. 811; The Annette, The Dora, [1919] P. 105; Dickinson, *The Unrecognized Government or State in English and American Law,* 22 MICH. L. REV. 29, 118 (1923). The above cases expressly disapprove the few cases in which judicial determination of the facts of existence of a *State* or *Government* was made.

[293] *See* note 292 *supra. See also* United States v. Pink, 315 U.S. 203 (1941).

[294] *See, e.g.,* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

[295] *See, e.g.,* United States v. President and Directors of the Manhattan Co., 276 N.Y. 396, 12 N.E.2d 518 (1938); Dougherty v. Equitable Life Assur. Soc'y, 266 N.Y. 71, 193 N.E. 897 (1934); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933). *See also* United States v. Pink, 315 U.S. 203 (1942); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

[296] *See, e.g.,* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Sokoloff v. National City Bank, 239 N.Y. 158, 145 N.E. 917 (1924); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923); Upright v. Mercury Bus. Mach. Co., 13 App. Div. 2d 36 (1st Dep't 1961).

fallacious theory that attribution of the consequences of legality of statehood or government is *not* constitutive of the quality of legality.[297] For, public policy bars the judiciary from nullifying the exercise, by the political department of a State, of the latter's exclusive power to determine whether an international entity shall be considered to have legal existence.[298] Yet, the attribution, to an international entity, of the consequences of legality of statehood or government, *is* constitutive of its legal existence.[299]

This error arises from a misconception of the basis of decision of the pre-Russian Revolution non-recognition cases, in which legal effect was given to acts of non-recognized international entities.[300] These cases were not decided on the broad principle that the acts of the non-recognized entities had objective effects which the courts, in justice, could not disregard.[301] Rather, they were decided on the theory that the non-recognized entities, as a matter of law, were acting as representatives of recognized entities.[302]

This theory of representative recognition is the most feasible solution to the impasse created by the attribution, to unrecognized entities, of the consequences of legality of statehood or government. On the one hand, failure of the constitutive theory to realize that there are degrees of legality, has resulted in the theory that a state or governmental act can be treated as such only if performed by a duly authorized agent of a recognized State or government. On the other hand, the objective realities theory fails to realize that attributing to an entity the consequences of legality of statehood or government constitutes that entity a State or government, insofar

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[297] *See, e.g.,* Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 158, 147 N.E. 703, 705 (1925).

[298] United States v. Pink, 315 U.S. 203 (1941); United States v. Belmont, 301 U.S. 324 (1936); *In re* Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (1965); Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.), *rev'g on other grounds,* [1965] 1 Ch. 596 (C.A.). *See also* 4 COLUM. J. TRANSNAT'L L. 328 (1966).

[299] *See* note 274 *supra* and pts. II, III, IV A *supra; In re* Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (Sur. Ct. 1965). O'Connell, moreover, concedes that judicial attribution of the *consequences of legality* of *statehood* or *government* to *unrecognized entities* is, or may be, violative of the public policy vesting exclusive recognitive powers in the political department. D. O'CONNELL, *supra* note 270, 181-82. As a matter of practical politics, it further should be noted that non-recognition frequently stems from a desire to exercise coercion on the non-recognized entity; not from such entity's lack of objective existence. In these cases, it is especially important for the judiciary to implement executive policy. Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

[300] *See* pt. IV B 4 *infra.*

[301] *See* pts. IV B 3, 4 *infra. See, e.g.,* for a statement of the broad general principle, M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 18 N.E. 679 (1933); Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925).

[302] *See* pt. IV B 4 *infra. See, e.g.,* Keith v. Clark, 97 U.S. 454 (1878); Williams v. Bruffy, 96 U.S. 176 (1877); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868); Pepin v. Lachenmeyer, 45 N.Y. 27 (1871); United States *ex rel.* Hopkins v. United Mexican States, (General Claims Comm'n, U.S. and Mexico, 1926) 21 AM. J. INT'L L. 160 (1927); Silvanie, *Responsibility of States for Acts of Insurgent Governments,* 33 AM. J. INT'L L. 78 (1939).

as the attributing entity is concerned, irrespective of the granting of international recognition. Correlatively, the objective realities theory fails to realize that, insofar as the law is concerned, there are no objective realities; reality is only that which is recognized by the law as such. These failures of the objective realities theory have resulted in recognition, by the judiciary, of the existence of States and governments whose non-existence is recognized, or constituted, by its political department.

Representative recognition, however, avoids the pitfalls of both the constitutive and objective realities theories. It permits the attribution of the consequences of legality of statehood or government to factual situations which do not comply, strictly, with the conditions prerequisite to the existence of statehood or government. Yet, by treating unrecognized entities as if they were the duly constituted agents of recognized entities, it avoids recognition of the former as entities distinct from the latter.

This approach to international recognition parallels the tripartite treatment of public officers — as *de jure, de facto,* and usurpers. And, as is the case with the *de facto* public officer doctrine, representative recognition intrinsically is a doctrine of generalized estoppel.

Moreover, the results, in many cases, would be identical with those flowing from application of the broad principle requiring acknowledgment of objective realities.[303] Furthermore, use of this theory, as a basis for decision, would increase the number of situations in which legal effect properly could be given to acts of unrecognized entities. For example, the ministerial acts of unrecognized governments, to which legal effect has been denied in cases involving the non-recognition of incorporation of the Baltic States into the U.S.S.R.,[304] properly could be given legal effect under this theory.[305]

On the other hand, application of this theory would deny the quality of legality to those non-recognition situations which public

[303] *Cf.* Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961); Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.). Both cases gave legal effect to acts of the unrecognized East German government. Yet, *Upright* did so on the theory that the unrecognized government has "*de facto* existence which is juridically cognizable," whereas *Carl-Zeiss-Stiftung* considered the unrecognized government to be acting as agent for the recognized government of the U.S.S.R.

[304] *See, e.g., In re* Luks, 45 Misc. 2d 72, 256 N.Y.S.2d 194 (Sur. Ct. 1965); *In re* Kapocius' Estate, 36 Misc. 2d 1087, 234 N.Y.S.2d 346 (Sur. Ct. 1962); *In re* Mitzkel's Estate, 36 Misc. 2d 671, 233 N.Y.S. 2d 519 (Sur. Ct. 1962); *In re* Braunstein's Estate, 202 Misc. 244, 114 N.Y.S.2d 280 (Sur. Ct. 1952); *In re* Adler's Estate, 197 Misc. 104, 93 N.Y.S.2d 416 (Sur. Ct. 1949).

[305] *See, e.g.,* Agricultural Cooperative Ass'n of Lithuania Lietukis v. The Denny, 127 F.2d 404 (3d Cir. 1942); Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).

policy bars from being characterized as legal. It would preclude, for example, such decisions as *Bank of China v. Wells Fargo Bank & Union Trust Co.*[306] In this case, a federal district court, on the theory that objective realities are the paramount consideration, permitted the unrecognized Communist Government of China to intervene in an action, brought by the recognized Nationalist Government of China, to recover funds deposited with the defendant by the Bank of China, a government-controlled entity. The court, moreover, felt constrained to justify its award of the funds to the Nationalist Government by a finding of fact that it has objective existence as a government of China. Yet, it is clear, in such a case as this, application of the objective realities theory is subversive of executive policy.

It would appear, therefore, that acceptance of representative recognition, as the sole permissible alternative to international recognition, is the most equitable method of reconciling the exigencies of individual justice with the imperatives of national political policy; of recognizing degrees of legality of statehood and government, while avoiding the situation in which the existence of an entity is constituted by the judiciary of a State whose executive constituted the entity's non-existence.

3. International Recognition — All or Nothing

Until quite recently, the judiciary has failed to appreciate the applicability of the doctrine of representative recognition.[307] This failure has caused the judicial approach to the legal effects of non-recognition to evolve in two sharply divergent directions.

a. The Ministerial Approach — Equation of Judicial Existence with Political Existence

The unyielding approach of the British judiciary is that, in the absence of international recognition, States and governments must be viewed as legally non-existent; as judicially non-cognizable.[308] This view arises from two undisputed principles. First, the power to grant, or withhold, international recognition belongs exclusively to the political department of a State.[309] Second, the determination

[306] 92 F. Supp. 920 (N.D. Cal. 1950), *remanded for reconsideration,* 190 F.2d 1010 (9th Cir. 1951), *subsequent decision in light of remand,* 104 F. Supp. 59 (N.D. Cal. 1952).

[307] The only recent overt application of *representative recognition* giving legal effect to the acts of a *non-connected,* non-recognized entity, is Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.).

[308] Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1965] 1 Ch. 596 (C.A.), *rev'd on other grounds,* [1966] 3 W.L.R. 125 (H.L.); Luther v. James Sagor & Co., [1921] 1 K.B. 456; Foster v. Glove Venture Syndicate, Ltd., [1900] 1 Ch. 811; Taylor v. Barclay, 1 Sim. *213 (1828); Thompson v. Powles, 2 Sim. *194 (1828); Dolder v. Bank of England, [1805] 10 Ves. Jr. 352; Berne v. Bank of England, [1804] 9 Ves. 347.

[309] *See* cases cited note 292 *supra.*

of the political department, with reference to the existence of other States or governments, as evidenced by its granting, or withholding, of international recognition is conclusive upon the judiciary of the determining State.[310] According to this view, the function of the judiciary, in cases in which the existence of other States, or governments, is a relevant factor, is purely ministerial. International recognition is constitutive of judicial cognizability.[311] Lack of international recognition is constitutive of judicial non-existence.[312] This approach has received sporadic approval from the American courts.[313]

The principal difficulty with this approach is the unfortunate effect of its application to questions of status, over which the individual concerned has little or no control.[314] It is more difficult to sympathize with those individuals who knowingly have purchased property from an unrecognized entity, or from one whose title derived from such entity.[315]

b. The Discretionary Approach — Objective realities can cause the juridical cognizability of international entities to which international recognition has not been accorded.

The American courts are the principal exponents of the doctrine that a "foreign government, although not recognized by the political arm of the . . . Government, may nevertheless have *de facto* existence which is juridically cognizable."[316] This doctrine first was expounded during the era which followed the Russian Revolution and preceded international recognition of the U.S.S.R. by the United States.[317] It has been formulated as follows:

> Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people

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[310] *See* note 293 *supra.*

[311] Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.); Bank of Ethiopia v. National Bank of Egypt and Ligouri, [1937] 1 Ch. 513.

[312] Luther v. James Sagor & Co., [1921] 1 K.B. 456; Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1965] 1 Ch. 596 (C.A.), *rev'd on other grounds,* [1966] 3 W.L.R. 125 (H.L.).

[313] *See, e.g.,* Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); The Nueva Anna and Liebre, 19 U.S. (6 Wheat.) 193 (1821); The Divina Pastora, 17 U.S. (4 Wheat.) 52 (1819); Estonian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 447 (Ct. Cl. 1953); Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951); The Maret, 145 F.2d 431 (3d Cir. 1944); cases cited note 304, *supra. See also* Dickinson, *The Unrecognized Government or State in English and American Law,* 22 MICH. L. REV. 29, 118 (1923).

[314] *See* D. O'CONNELL, *supra* note 270, at 195-97.

[315] *Cf.* M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); Luther v. James Sagor & Co., [1921] 1 K.B. 456.

[316] Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 39, 213 N.Y.S.2d 417, 419 (1961).

[317] *See, e.g.,* Banque De France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); *In re* First Russian Ins. Co., 255 N.Y. 428, 175 N.E. 118 (1931); Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 479 (1930); James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928); Sokoloff v. Nat'l City Bank, 239 N.Y. 158 (1924); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

> over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force, is a fact, not a theory.[318]
>
> Exhibitions of power may be followed or attended by physical changes, legal or illegal. These we do not ignore, however lawless their origin, in any survey of the legal scene. They are a source at times of new rights and liabilities. . . . The everyday transactions of business or domestic life are not subject to impeachment, though the form may have been regulated by the command of the usurping government. . . . To undo them would bring hardship or confusion to the helpless and the innocent without compensating benefit.[319]

Yet, of these cases which involved the acts or decrees of the unrecognized Soviet government, only four can be said to have been decided on the basis of this doctrine.[320] And, only one of the four cases is justifiable *solely* on a theory of acknowledgment of objective realities.[321]

Of the other cases, two involved alternate grounds of decision. One apparently rests on the ground that the proceeding was an equitable one, in which not all of the proper parties were joined, thus subjecting the defendant to possible double liability.[322] The other involved a different alternate ground of decision: that plaintiff, a French citizen, whose government had recognized the U.S.S.R., might thereby be precluded from suing to recover gold, deposited in a New York bank by the unrecognized Soviet government, which had confiscated the gold from a Russian bank, wherein it had been deposited by plaintiff prior to the Revolution.[323]

The third case was decided solely on the ground that "[t]he Soviet decree restoring the gold standard is to be ranked with those 'every-day transactions of business or domestic life' that 'are not subject to impeachment, though the form may have been regulated by the command of the usurping government.' "[324] Yet, clearly, this type of currency regulation is entitled to be given legal effect on the theory that the Soviet government was acting as a representa-

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[318] Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 375, 138 N.E. 24, 25 (1923).

[319] Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 28, 170 N.E. 479, 481 (1930).

[320] Banque De France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929); M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933); *In re* First Russian Ins. Co., 255 N.Y. 428, 175 N.E. 118 (1931); Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925), *motion for reargument denied,* 240 N.Y. 682, 148 N.E. 757 (1925).

[321] M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933), which involved title to property within the U.S.S.R. at the time of its confiscation, but within New York at the time of trial of the action.

[322] Russian Reins. Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925). *See* for basis of distinction, People v. Russian Reins. Co., 225 N.Y. 415, 175 N.E. 114 (1931); *In re* Second Russian Ins. Co., 250 N.Y. 449, 166 N.E. 163 (1929); First Russian Ins. Co. v. Beha, 240 N.Y. 601, 148 N.E. 722 (1925).

[323] Banque De France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y. 1929).

[324] *In re* First Russian Ins. Co., 155 N.Y. 428, 175 N.E. 118 (1931).

tive of a recognized government.[325] Thus, the case cannot be said to be authority for the general proposition that objective realities can cause the juridical cognizability of non-recognized entities.

Two additional cases, it is true, gave legal effect to ministerial acts of the Soviet government. Neither, however, referred to the objective realities doctrine. One of them held that certificates, made before a notary in Russia, were admissible, as affidavits, in a federal court.[326] However, it is difficult to determine whether these certificates were admissible in spite of being made before an officer of an unrecognized government, or because they were validated by the retroactivity of Russia's recognition, or because they were made after Russia was recognized.[327] Moreover, notarization of certificates is a ministerial act to which legal effect may be given on the theory of representative recognition.[328] The other case gave legal effect to birth certificates authenticated by officials of the non-recognized Soviet government,[329] but only because supported by *other* proof of birth.

The remainder of the Russian recognition cases denied legal effect to acts and decrees of the Soviet government, on the ground of non-recognition, simultaneously enunciating, with great vigor, the theory that, under other circumstances, objective realities would require legal effect to be given to these acts and decrees.[330]

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[325] *See, e.g.,* Delmas v. Ins. Co. 81 U.S. (14 Wall.) 661 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868); pt. IV B 4 *infra.*

[326] Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934).

[327] *Id.*

[328] *See* pt. IV B 4 *infra.*

[329] Werenjchik v. Ulen Contracting Corp., 229 App. Div. 36, 240 N.Y.S. 619 (1930).

[330] Non-recognition held to preclude an unrecognized government from being either a party plaintiff or a party defendant in any action or proceeding brought in the courts of the non-recognizing state. Nankivel v. Omsk All-Russian Gov't, 237 N.Y. 150, 142 N.E. 569 (1923); Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923). *See also* The Rogdai, 278 F. 294 (N.D. Cal. 1920). Non-recognition further held to render Soviet confiscatory decrees ineffective to terminate the corporate existence of banks or insurance companies, whether incorporated in Russia and doing business in the United States, or incorporated in the United States and doing business in Russia. *In re* Northern Ins. Co., 255 N.Y. 433, 175 N.E. 120 (1931); People v. Russian Reins. Co., 255 N.Y. 415, 175 N.E. 114 (1931); Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 170 N.E. 470 (1930); *In re* Second Russian Ins. Co., 250 N.Y. 449, 116 N.E. 163 (1929); Fred S. James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (1928); Joint Stock Co. v. National City Bank, 240 N.Y. 368, 148 N.E. 552 (1925); Fred S. James & Co. v. Second Russian Ins. Co., 239 N.Y. 248, 146 N.E. 369 (1925); Sokoloff v. National City Bank, 239 N.Y. 158 (1924). These decrees, moreover, were held to be ineffective to affect the title to property situated in the United States at the time when they were enacted. See cases cited *supra* this paragraph. *See also* Severnoe Sec. Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 174 N.E. 299 (1931). In this connection, it is of interest to note that *subsequent to the recognition of the U.S.S.R.* legal effect *also* was denied to the extraterritorial operation of these decrees. Moscow Fire Ins. Co. v. Bank of New York & Trust Co., 280 N.Y. 286, 20 N.E.2d 758 (1939); United States v. President & Directors of the Manhattan Co., 276 N.Y. 396, 12 N.E.2d 518 (1938); Vladikavkazsky R.R. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934). This accords with the general rule that extraterritorial effect

The objective realities theory has received only sporadic acceptance in the American courts since the era of non-recognition of the U.S.S.R. The first opportunity for its application arose in the Baltic cases — those involving the failure of the United States to recognize the incorporation of Latvia, Lithuania, and Estonia, into the U.S.S.R. These cases fall into three categories.

The first denies extraterritorial effect to the nationalization decrees of the new, non-recognized, governments,[331] on the ground that these governments were unrecognized.[332] It is clear, however, that the decisions would have been the same had these governments been recognized.[333]

The second group of cases denied legal effect to the ministerial acts of the non-recognized governments, equating non-recognition with judicial non-existence.[334] The third group, however, adhering to the objective realities theory, reached a contrary result.[335] It gave legal effect to such ministerial acts. This group also includes the decisions permitting New York corporations, as agents of the non-recognized governments, to bring actions, in federal courts, on behalf of their principals.[336]

The most extraordinary extension of the objective realities theory occured in *Bank of China v. Wells Fargo Bank & Union Trust Co.*[337] Implicit in the court's opinion is the intimation that, had it been unable to hold that the recognized claimant government also was one in fact, it would have felt constrained to acknowledge objective realities by awarding the funds in controversy to the non-recognized claimant government.[338] Yet, clearly, an executive policy of non-recognition requires that, the objective realities notwithstand-

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will be denied to the acts of state even of recognized governments. Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Iraq v. First Nat'l City Bank, 241 F. Supp. 567 (S.D.N.Y. 1965); Bollack v. Societe Generale, 263 App. Div. 601, 33 N.Y.S.2d 986 (1942); The Jupiter (No. 3), [1927] P. 122, *aff'd.* [1927] P. 250; The 'El Comdado,' [1939] 63 Lloyd's List. L.R. 330. The United States Supreme Court subsequently held that such extraterritorial effect was required by the Litvinov Assignment. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[331] Latvian State Cargo & Passenger S.S. Line v. McGrath, 188 F.2d 1000 (D.C. Cir. 1951); The Maret, 145 F.2d 431 (3d Cir. 1944); The Florida, 133 F.2d 719 (5th Cir. 1943); Latvian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 717 (Ct. Cl. 1953); Estonian State Cargo & Passenger S.S. Line v. United States, 116 F. Supp. 447 (Ct. Cl. 1953); A/S Merilaid & Co. v. Chase Nat'l Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (Sup. Ct. 1947); *In re* Grauds' Estate, 43 N.Y.S.2d 803 (Sur. Ct. 1943).

[332] *See* cases cited note 331, *supra.*

[333] *See* note 330 *supra.*

[334] *See* cases cited note 304 *supra.*

[335] The Denny, 127 F.2d 404 (3d Cir. 1942); *In re* Luberg's Estate, 19 App. Div. 2d 370, 243 N.Y.S.2d 747 (1963).

[336] The Maret, 145 F.2d 431 (3rd Cir. 1944). *See also* Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934); Upright v. Mercury Bus. Mach. Co., 13 App. Div. 2d 36 (1st Dep't 1961).

[337] For the facts in this case, see the textual material pertaining to note 306 *supra.*

[338] 104 F. Supp. 59 (N.D. Cal. 1952).

ing, the recognized government always must prevail in any controversy between itself and its unrecognized counterpart.[339]

The most recent application of the objective realities theory is to be found in *Upright v. Mercury Business Machines Co., Inc.*[340] The case involved an action by the assignee of a trade acceptance, drawn on and accepted by the defendant in payment for typewriters, sold to it by an East German corporation, allegedly a creature of the non-recognized East German government. The New York Appellate Division held that allegations of non-recognition of the East German government are insufficient, standing alone, to avoid liability on transactions with such government. According to the opinion of the court, a valid defense must assert a violation of public policy with respect either to the underlying sale, or to the assignment of the trade acceptances. The court said, *inter alia*:

> A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have *de facto* existence which is juridically cognizable. . . . The lack of jural status for such government or its creature corporation is not determinative of whether transactions with it will be denied enforcement in American courts, so long as the government is not the suitor.[341]

The result in *Upright* clearly is correct. Yet the reasoning of the court goes beyond the necessities of the situation. It would have been sufficient to say, as did the English courts in a similar situation, that the acts of the East German government are entitled to be given legal effect in their character, by attribution, as acts of the recognized government of the U.S.S.R.[342]

The objective realities theory has been adopted outside the United States, although not expressed in precisely the same manner.[343] The result, in these cases, is to attribute to a non-recognized government a civil personality, distinct from its official personality.[344]

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[339] *See, e.g.,* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

[340] 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

[341] *Id.* at 38, 213 N.Y.S.2d at 419.

[342] Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.); Greig, *The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law,* 83 LAW Q. REV. 96 (1967).

[343] *See, e.g., In re* Sack, Case No. 35 (Argentine, Camara Federal of Rosario Nov. 11, 1936) *reprinted in* 1935-1937, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 117; 'Exportchleb' Ltd. v. Goudeket, Case No. 36 (Holland, Dist. Ct., Amsterdam, Feb. 15, 1935) *reprinted in* 1935-1937, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 117; Russian Trade Delegation in Turkey v. Levant Red Sea Coal Co., Case No. 35 (Egypt, Tribunal of Alex., Mar. 1933) *reprinted in* 1933-1934, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 82.

[344] 'Exportchleb' Ltd. v. Goudeket, Case No. 36 (Holland, Dist. Ct., Amsterdam Feb. 15, 1935) *reprinted in* 1935-1937, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 117; Russian Trade Delegation in Turkey v. Levant Red Sea Coal Co., Case No. 35 (Egypt, Tribunal of Alex., Mar. 1933) *reprinted* in 1933-1934, LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 82.

4. International Recognition — The Golden Mean

The objective realities approach to non-recognition situations is an extreme reaction to the orthodox approach: that non-recognition of an international entity causes it to be judicially non-cognizable. Until recently, the exponents of neither approach would acknowledge the existence of a third alternative.[345] Yet, this alternative exists. Moreover, its establishment, as the standard for determining whether to attribute the consequences of legality to non-recognition situations, is essential to the elimination of the difficulties inherent in the existing approaches.

This third alternative may be termed representative recognition. It is an expression of the principle, long established in international law, of continuity of the State. This principle requires the limited attribution, to non-recognition situations, of the consequences of legality of statehood or government. To the extent that it requires this attribution, it is a valid substitute for international recognition as a condition precedent thereto, and constitutes an adequate standard for determining the legal effects of non-recognition situations. Moreover, application of this standard is inherently incapable of contravening the policy of the political department.

In this connection, however, it must be borne in mind that the principle of continuity of the State customarily is applied under two sets of circumstances. On the one hand, it is applied by the parent State, or recognized government. On the other, it is applied by an unrelated State. Both varieties of application may be made either before or after the cessation of hostilities. The conditions precedent to the former type of application are not necessarily identical with those of the latter. For the latter type of application involves policy considerations not involved in the former — at least when the former occurs after the cessation of hostilities. To wit, the necessity of the unrelated entity to avoid affront to the recognized entity, or inadvertent recognition of the non-recognized entity.

a. Continuity of the State — Representative Recognition

Inherent in the nature of a State, within the meaning of international law, is the possession of a government.[346] Hence, international recognition of statehood, whether initial or continued, implies that the entity, recognized as a State, has a government.[347] Moreover, changes in the government of a State, whether accomplished in a constitutional manner or by revolution, do not interrupt the legal continuity of the State, insofar as international law is

[345] Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.).
[346] H. KELSEN, *supra* note 262, at 279-80.
[347] *Id.*

concerned.[348] Nor do they affect the rights or liabilities of the State, since the State is the actual owner of the property, its government being but the representative of the national sovereignty.[349]

Hence, where there has been an objectively real, but unrecognized, change in the government of a recognized State, the judiciaries of non-related States must consider "the ancient state of things as remaining unaltered," until international recognition of this change has been granted by their political departments.[350] For example, where a government continues to be recognized as such, despite the fact that it has been overthrown, its diplomatic representatives must be considered as the accredited representatives of the State,[351] entitled to sue on its behalf.[352]

Moreover, upon international recognition of an objectively real change in the government of a recognized State, the newly recognized government is considered as a continuation of the formerly recognized government.[353] It succeeds to the property, rights, and liabilities of the State, as the agent thereof, by right of representation.[354] It further is entitled to be substituted for the formerly-recognized government in pending litigation involving the rights of the State.[355] And, its right to sue, on a claim belonging to the State, is barrable by the running of the Statute of Limitations against

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[348] *Id.* at 264.

[349] *See, e.g.,* The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Lehigh Valley R.R. Co. v. Russia, 21 F.2d 396 (2d Cir. 1927), *aff'g* 293 F. 135 (S.D.N.Y. 1923); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.). *See also* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941).

[350] Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852); Rose v. Himely, 8 U.S. (4 Cranch) 240 (1808); Lehigh Valley R.R. Co. v. Russia, 21 F.2d 396 (2d Cir. 1927); Clark v. United States, 5 F. Cas. 932 (No. 2838) (D. Pa. 1811). *See also* Dahan & Dorra Bros. v. Tchoureff, Case No. 34 (Egypt Ct. App., 1st Chamber, June 24, 1936) *reprinted in* 1935-1937 LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 115; Lesser v. Rotterdamsche Bank (Ct. 1st Instance Rotterdam, The Netherlands Dec. 30, 1953), 2 Nederlands Tijdschrift voor Int'l Recht 420, 50 AM. J. INT'L L. 441 (1956).

[351] Russian Gov't v. Lehigh Valley R.R. Co., 293 F. 135 (S.D.N.Y. 1923); *aff'd,* 21 F.2d 396 (2d Cir. 1927); Canadian Car & Foundry Co. v. American Can Co., 253 F. 152 (S.D.N.Y. 1918); United States v. Trumbull, 48 F. 94 (S.D. Cal. 1891).

[352] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941); Russian Gov't v. Lehigh Valley R.R. Co., 293 F. 135 (S.D.N.Y. 1923); Canadian Car & Foundry Co. v. American Can Co., 253 F.152 (S.D.N.Y. 1918).

[353] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

[354] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

[355] The Sapphire, 78 U.S. (11 Wall.) 164 (1870); Haile Selassie v. Cable & Wireless Ltd. (No. 2), [1939] 1 Ch. 182 (C.A.).

its recognized predecessor, despite the fact that it was precluded, by non-recognition, from bringing timely suit.[356]

Correlatively, the perpetual legal continuity of a recognized State requires that it be bound by, and responsible for, the acts of its government.[357] Similarly, a recognized government is bound by, and responsible for, the acts of its predecessors.[358] These principles apply to the acts of a recognized government.[359] They also apply to the acts of a non-recognized government which, thereafter, is accorded international recognition.[360] They further apply, to a limited extent, to the acts of a government which, although never accorded international recognition, has succeeded in establishing itself in power.[361] They even are applicable, in yet a lesser degree, to the acts of a government which neither succeeded in establishing itself in power, nor ever was accorded international recognition.[362] Their application, in the latter two situations, might be described as representative recognition. For, it depends upon the extent to which the *de facto* power can be deemed to be acting as the representative of the recognized government.

Thus, international recognition, although retroactive in effect, validating all the actions of the newly recognized government from the actual commencement of its existence,[363] cannot operate to nullify any actions properly taken, prior to such recognition, by the

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[356] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Union of Soviet Socialist Republics v. National City Bank, 41 F. Supp. 353 (S.D.N.Y. 1941); *cf.* Steingut v. Guaranty Trust Co., 58 F. Supp. 623 (S.D.N.Y. 1944), holding that, where the claim sued upon belonged originally to the Russo-Asiatic Bank, rather than to the formerly-recognized government of Russia, the latter could not have sued upon the claim during the period of non-recognition of the U.S.S.R.; that the statute of limitations does not start to run until there exists someone capable of enforcing the claim; and that, therefore, the Soviet Government, which acquired the claim by confiscation during the period of its non-recognition, was not barred by the statute of limitations from suing thereon, since it could not have brought suit until recognized.

[357] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; The King of the Two Sicilies v. Willcox, 1 Sim. (n.s.) *301 (1851); Silvanie, *Responsibility of States for Acts of Insurgent Governments,* 33 AM. J. INT'L L. 78 (1939); Stinson, *Recognition of De Facto Governments and the Responsibility of States,* 9 MINN. L. REV. 1 (1924).

[358] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; *see also* Guaranty Trust Co. v. United States, 304 U.S. 126 (1938).

[359] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Civil Air Transp. Inc. v. Central Air Transp. Corp., [1952] 2 All E.R. 733 (P.C.), *aff'd,* [1953] A.C. 70; Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v. Boguslawski, [1953] A.C. 11, *aff'g,* [1950] 2 All E.R. 355 (C.A.); Stinson, *supra* note 357.

[360] Silvanie, *supra* note 357. *See also* cases cited note 363, *infra.*

[361] The King of the Two Sicilies v. Willcox, 1 Sim. (n.s.) *301 (1851); D. O'CONNELL, *supra* note 270, at 99-102; Silvanie, *supra* note 357; Stinson, *supra* note 357.

[362] United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819); D. O'CONNELL, *supra* note 270, at 99-102; Silvanie, *supra* note 357.

[363] Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Underhill v. Hernandez, 168 U.S. 250 (1897); Yucatan v. Argumendo, 92 Misc. 547, 157 N.Y.S. 219 (Sup. Ct. 1915); Luther v. James Sagor & Co., [1921] 3 K.B. 532 (C.A.).

previously recognized government on behalf of the State.[364] Nor can the newly recognized government, by its unilateral action subsequent to recognition, nullify, or disclaim responsibility for, acts of its recognized predecessor — at least insofar as these acts affect non-related States, or their subjects.[365] Provided that the prior government is recognized before it is supplanted, its status when these acts occur is irrelevant to the operation of the rule.[366]

Moreover, the acts of a successfully established, but *never-recognized,* government, affecting non-related States or their subjects, are binding upon the State and its successor recognized government.[367]

The extent to which a State, and its recognized government, are bound by, and responsible for, the acts of a prior government, which failed either to establish itself or to receive recognition, is more difficult to determine. The problem has been presented in two contexts. On the one hand, it is raised in the courts of the parent State. On the other, it arises in the courts of non-related States.

(1) Attitude of the Parent State

The United States courts, for instance, in the post-Civil War era, gave legal effect to numerous acts of the seceded States, as distinguished from the Confederacy. Although their reasoning, in many cases, was based only impliedly upon the principle of legal continuity of the State,[368] in many others it was based expressly upon this principle.[369]

(a) Legal Continuity of the State by Implication — Necessity

The reasoning of this approach appears to be that (1) every State must have a government to preserve order, and to perform certain other indispensable governmental functions; (2) the su-

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[364] Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Civil Air Transp. Inc. v. Central Air Transp. Corp., [1953] A.C. 70; Gdynia Ameryka Linie Zeglugowe Spolka Akcyjna v. Boguslawski, [1953] A.C. 11. However, actions of the previously recognized government, which affect persons or property then situate under the control of the newly recognized government, are nullified by subsequent recognition of the latter government. *Id.*

[365] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; Silvanie, *supra* note 357.

[366] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch. D. 348; Republic of Peru v. Peruvian Guano Co., [1887] 36 Ch. D. 489; Silvanie, *supra* note 357.

[367] Silvanie, *supra* note 357; Stinson, *supra* note 357; *Arbitration Between Great Britain and Costa Rica, Opinion and Award of William H. Taft, Sole Arbitrator,* 18 AM. J. INT'L L. 147 (1924).

[368] Baldy v. Hunter, 170 U.S. 388 (1897); Williams v. Bruffy, 96 U.S. 176 (1877); Delmas v. Ins. Co., 81 U.S. (14 Wall.) 661 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868); Mauran v. Ins. Co., 73 U.S. (6 Wall.) 1 (1867). *See also* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[369] *See, e.g.,* Ketchum v. Buckley, 99 U.S. 188 (1878); Keith v. Clark, 97 U.S. 454 (1878); Williams v. Bruffy, 96 U.S. 176 (1877); United States v. Ins. Cos., 89 U.S. (22 Wall.) 99 (1874).

premacy of insurgents or invaders, over the territory occupied by them, necessitates the obedience of its occupants to acts and decrees not hostile to the legitimate government; (3) therefore, to the extent only that a non-recognized government performs these indispensable governmental functions, which the legitimate government is unable to perform, its acts must be given the same force and effect as if performed by the legitimate government.

Thus, the United States Supreme Court indicated that it would give legal effect to those rebel acts and decrees relating to the preservation of order; maintenance of police regulations; prosecution of crimes; protection of property; enforcement of contracts; celebration of marriages; settlement of estates; transfer and descent of property; and related matters.[370] Specifically it did, in fact, give effect to the issuance of currency;[371] investment by a guardian, of Confederate funds of his ward, in Confederate bonds;[372] and the imposition of customs duties.[373] In this connection, the United States Supreme Court stated:

> To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. . . . But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible. . . .
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> They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection.[374]

This approach of the United States Supreme Court was adopted as one of the bases of decision in *Madzimbamuto v. Lardner-Burke; Baron v. Ayre*.[375] These cases, arising before the Crown appointed and authorized High Court of Rhodesia, involved the legality of the acts of the non-recognized government of Southern Rhodesia in detaining plaintiffs without trial. Consequently, they involved the legality of the non-recognized government itself, in view of its unilateral abandonment of its status as a British colony. Although declaring illegal the Rhodesian government of Ian Smith, and the

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[370] Baldy v. Hunter, 170 U.S. 388 (1897).

[371] Delmas v. Ins. Co., 81 U.S. (14 Wall.) 661 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1868).

[372] Baldy v. Hunter, 170 U.S. 388 (1897). *Contra,* Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873) (where the funds invested were non-Confederate in origin).

[373] United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[374] Thorington v. Smith, 75 U.S. (8 Wall.) 1, 11-12, (1868). *See also* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[375] N.Y. Times, Sept. 10, 1966 § 1, at 1, cols. 2-3, *id.* at 10, cols. 4-6; Welsh, *The Constitutional Case in Southern Rhodesia,* 83 LAW Q. REV. 64 (1967).

1965 Constitution enacted by it, the High Court ruled that legal effect must be given to "such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order."[376]

Uniformly, however, legal effect has been denied to acts and decrees, of the insurgent or invading government, which were hostile to the interest of the legitimate government.[377] Moreover, legal effect has been denied to the creation, by an insurgent government, of courts not existing under the legitimate government.[378]

(b) Express Application of the Doctrine of Legal Continuity of the State

The United States Supreme Court held, expressly, in a number of cases, that the existence of rebellion did not cause the States to cease to be States, nor their citizens to cease to be citizens of the Union;[379] that the seceded States, during and after the rebellion, continued to be the same political organizations, possessing the same laws and form of government, as prior thereto;[380] and that, therefore, all acts of the seceded States, during the period of rebellion, were valid and binding upon the State thereafter, except when done in aid of the rebellion, or in conflict with the Constitution or laws of the United States.[381] The distinction is exemplified by two types of situations. On the one hand, for example, secession was considered to be incapable of affecting the jurisdiction of the courts of the seceded States, or their power to render valid judgments.[382] On the other hand, confiscation, by the rebels, of the property of loyal citizens, uniformly was denied legal effect.[383]

This basis of decision also was adopted by the High Court of Rhodesia, as an additional ground of decision in *Madzimbamuto v.*

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[376] N.Y. Times, Sept. 10, 1966, § 1, at 1, col. 3.

[377] Ford v. Surget, 97 U.S. 594 (1878); Dewing v. Perdicaries, 96 U.S. 193 (1877); Williams v. Bruffy, 96 U.S. 176 (1877); Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1872); Texas v. White, 74 U.S. (7 Wall.) 700 (1868). *See also* United States v. Rice, 17 U.S. (4 Wheat.) 246 (1819).

[378] Hickman v. Jones, 76 U.S. (9 Wall.) 197 (1869). *See also* Dewing v. Perdicaries, 96 U.S. 193 (1877).

[379] Keith v. Clark, 97 U.S. 454 (1878); Texas v. White, 74 U.S. (7 Wall.) 700 (1868).

[380] Keith v. Clark, 97 U.S. 454 (1878); Williams v. Bruffy, 96 U.S. 176 (1877); Sprott v. United States, 87 U.S. (20 Wall.) 459 (1874); Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873).

[381] Keith v. Clark, 97 U.S. 454 (1878).

[382] Horn v. Lockhart, 84 U.S. (17 Wall.) 570 (1873); White v. Cannon, 73 U.S. (6 Wall.) 443 (1867).

[383] Dewing v. Perdicaries, 96 U.S. 193 (1877); Williams v. Bruffy, 96 U.S. 176 (1877); Legal Tender Cases (Knox v. Lee and Parker v. Davis), 79 U.S. (12 Wall.) 457 (1870).

Lardner-Burke; Baron v. Ayre.[384] The court specifically rested its holding on that in *Texas v. White,*[385] to the effect that, notwithstanding its secession, Texas never ceased to be a State of the Union. The question remains, however, whether the particular acts of the non-recognized Rhodesian government, complained of in the instant case, are required to be recognized by the parent State, even under the theories advanced in this case.[386]

(2) Attitude of Non-Related States

Non-related States, moreover, have taken a narrower view of the acts of insurgents for which the parent State is responsible, or by which it is bound.

Prior to 1927, the view generally was taken that unsuccessful insurgents, being in no sense agents of the State, could not bind the State, or render it liable for their acts.[387] Necessity, however, required that certain exceptions be made to this rule. Thus, the legitimate government was not permitted to enforce a second payment of taxes or customs duties previously collected by the unsuccessful insurgents.[388] Moreover, provided that it receives the benefit thereof, the State is liable to pay for property seized by the rebels,[389] and, possibly, is bound by a contract made by the rebels with foreigners.[390] And, in order for the State to recover property, acquired by the rebels after the commencement of the rebellion, and impressed by them with the character of public property, it must recognize the authority of the rebels to that extent, and assume the burdens connected with the property.[391]

The General Claims Commission of 1927, in determining the liability of Mexico for acts of the unsuccessful Huerta administration, expanded the area of State responsibility. Consequently, the State further was considered to be bound by all acts of government routine performed by the unsuccessful rebels.[392] Included in this category are the "sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and

[384] Welsh, *supra* note 375, at 81-83.

[385] 74 U.S. (7 Wall.) 700 (1868).

[386] Welsh, *supra* note 375.

[387] Silvanie, *supra* note 357.

[388] *Id. See also* RALSTON & DOYLE, VENEZUELAN ARBITRATIONS OF 1903, Guastini Case, 730 (1904).

[389] RALSTON & DOYLE, VENEZUELAN ARBITRATIONS OF 1903, Mazzei Case, 693 (1904).

[390] Peru v. Dreyfus Bros. & Co., [1888] 38 Ch.D. 348.

[391] The King of the Two Sicilies v. Willcox, [1851] 1 Sim. (n.s.) *301; United States v. McRae, [1869] L.R. 8 Eq. 68.

[392] Cook v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 22 AM. J. INT'L L. 189 (1928); Davies v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 21 AM. J. INT'L L. 777 (1927); United States *ex rel.* Hopkins v. United Mexican States (General Claims Comm'n, U.S. and Mexico, 1926), 21 AM. J. INT'L L. 160 (1927); Silvanie, *supra* note 357.

telegraph are government services), the sale of railroad tickets (where railroads are operated by the government), the registration of births, deaths, and marriages, . . . many rulings by the police, and the collection of several types of taxes."[393] Acts of the rebel government, in its personal character, however, did not bind the State, except to the extent that it benefitted thereby.[394] Included among the acts classified as personal, are the borrowing of money, purchase of war materials, and the forcible taking of property.[395]

More recently, two West German courts had occasion to disagree about the status of currency printed in West Germany for the illegal government of Rhodesia. The Frankfort public prosecutor had ordered the currency to be impounded. A civil court upheld his action, on the ground that the currency, bearing the signature of a member of the illegal government, was forged, and had not been ordered by an authorized official.[396] A criminal court, however, ruled that the currency was not forged.[397]

b. Attributing Legal Effects to the Acts of Non-Recognized Governments — A Proposed Standard.

The express and implied principles of continuity of the State operate in essentially the same manner, when applied to the acts of a non-recognized, usurping government. That is to say, each one establishes a standard of representative recognition.[398] Both principles consider the *de facto* power to have legal capacity only as a conservator for the recognized government, exercising purely ministerial powers. Hence, they attribute legal effect only to acts performed by it in its representative capacity. Correlatively, they deny legal effect to all acts performed by it on its own behalf, as an entity distinct from the recognized government.

Since the standard of representative recognition attributes legal effect only to those acts performed by the *de facto* power as the representative, in law, of the recognized government, its application, *ipso facto,* cannot constitute recognition of the *de facto* power as an independent government. Hence, it neither can affront the

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393 United States *ex rel.* Hopkins v. United Mexican States (General Claims Comm'n, U.S. and Mexico, 1926), 21 AM. J. INT'L L. 160 (1927).

394 United States *ex rel.* Hopkins v. United Mexican States (General Claims Comm'n, U.S. and Mexico, 1926), 21 AM. J. INT'L L. 160, (1927); Davies v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 21 AM. J. INT'L L. 777 (1927); Cook v. Mexico (General Claims Comm'n, U.S. and Mexico, 1927), 22 AM. J. INT'L L. 189 (1928); Silvanie, *supra* note 357.

395 Silvanie, *supra* note 357.

396 N.Y. Times, Dec. 23, 1966, § 1, at 3, col. 4.

397 *Id.*

398 Although the principle of representation is explicit only in "continuity of the State," it is implicit in the doctrine of "necessity," which, therefore, can be discussed in these terms.

recognized government, nor subvert a policy of non-recognition. Consequently, this standard properly is applicable in undetermined non-recognition situations. It accords with the reasoning upon which the constitutive theory of recognition is based. It is, however, narrower in scope than the objective realities theory of recognition.

The standard of representative recognition, like that of objective realities, gives legal effect to all acts of governmental routine performed by the *de facto* power. It would, therefore, give legal effect to the execution, by officials of the non-recognized regime, of such documents as birth certificates, powers of attorney, and affidavits. Both standards, moreover, would give effect to laws "necessary to peace and good order among citizens" and to the ordinary conduct of their daily life. Laws of this type include those relating to status, personality, wills, descent and distribution, transfer of property, contracts, injuries to persons and property, and currency regulation.

At this point, the standards diverge. In the first place, it is possible that representative recognition warrants giving legal effect only to those laws which substantially conform, with respect to their form, content and enforcement, to their counterparts existing under the recognized government. The objective realities theory contains no such limitation. The latter theory, for example, would view corporations, created by an unrecognized, but effective government, as having legal existence, irrespective of the conformity of the incorporation laws to those of the recognized government.[399] Yet, those cases which based their acknowledgment of the legal existence of such corporations on the former theory, predicated their decisions on the continued existence of the incorporation laws of the recognized government,[400] or on laws substantially similar thereto.[401] Thus, the English courts recently gave legal effect to acts of the non-recognized East German government, on the theory that it had performed these acts as the representative of the U.S.S.R.; the latter being recognized by England as the *de jure* government of East Germany.[402]

Secondly, the objective realities theory gives legal effect to confiscations, by the *de facto* power, of property within its control

[399] Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

[400] Dahan & Dorra Bros. v. Tchoureff, Case No. 34 (Egypt Ct. App. 1st. Chamber, June 1936) *reprinted in* 1935-1937 LAUTERPACHT, ANN. DIG. & REPORTS OF PUBLIC INT'L LAW CASES at 115. *See also* Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.); Greig, *The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law*, 83 LAW Q. REV. 96 (1967).

[401] United States v. Insurance Cos., 89 U.S. (22 Wall.) 99 (1874).

[402] Carl-Zeiss-Stiftung v. Rayner & Keeler, Ltd. (No. 2), [1966] 3 W.L.R. 125 (H.L.).

at the time of the confiscation.[403] Representative recognition, however, denies legal effect to such confiscations, unless, perhaps, compensation is paid therefor.[404]

Thirdly, the objective realities theory conceivably might permit the *de facto* power, or its creatures, to maintain an action in the courts of the non-recognizing State.[405] Representative recognition, however, precludes this derogation of the rights of the recognized government.

The limitations of representative recognition, as compared to the objective realities theory, do not appear, however, to be so onerous as to constitute a denial of individual justice. Moreover, use of the standard of representative recognition eliminates the possibility that the consequences of legality of statehood or government will be attributed to non-recognition situations which public policy bars from being characterized as legal. For, representative recognition gives legal effect to the acts of a non-recognized State or government by treating them as the acts of a recognized State or government, rather than as the acts of an entity distinct from the recognized State or government. This is in conformity with the operation of the *de facto* public officer doctrine, which treats a purported public officer as *de facto* only if he assumes to act under lawful appointment and in a lawful manner. Otherwise, he is treated as a usurper.

5. Legal Illegality in International Law — A Recapitulation

Legal illegality manifests itself, in international law, as the attribution of the consequences of legality of statehood or government to non-recognized international entities. Assuming that this attribution is determined by a standard of representative recognition, it is possible to classify the juridical constructions of statehood and government, as required by the doctrine of relative recognition.

All recognized States and governments are juridical constructions of the first degree: For, attribution to them of the consequences of legality is barrable by no one. Non-recognized international entities, to which the standard of representative recognition is applicable, are classifiable as juridical constructions of the third degree. For, the attribution to them, of the consequences of legality of statehood or government, can be barred only by a limited num-

[403] M. Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933).

[404] Williams v. Bruffy, 96 U.S. 176 (1877); Legal Tender Cases (Knox v. Lee and Parker v. Davis), 79 U.S. (12 Wall.) 457 (1870).

[405] Bank of China v. Wells Fargo Bank & Union Trust Co., 92 F. Supp. 920 (N.D. Cal. 1950), *remanded for reconsideration,* 190 F.2d 1010 (9th Cir. 1951), *subsequent decision on remand,* 104 F. Supp. 59 (N.D. Cal. 1952); Upright v. Mercury Business Mach. Co., 13 App. Div. 2d 36, 213 N.Y.S.2d 417 (1961).

ber of persons, and only in a limited manner. To wit, it can be barred by directive of the political department of the forum, or by unilateral action of the judiciary of the forum.

Relative recognition, therefore, is as functional in the sphere of international law, as it is in the sphere of municipal law. It eliminates the paradox of legal illegality from both spheres of law.