

# CIVIL LAW ON JURIDICAL FACT OF THE HAWAIIAN STATE AND THE CONSEQUENTIAL JURIDICAL ACT BY THE PERMANENT COURT OF ARBITRATION

FEDERICO LENZERINI\*

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## ***Juridical Facts***

In the civil law tradition, a *juridical fact* (or *legal fact*) is a fact (or event) – determined either by natural occurrences or by humans – which produces consequences that are relevant according to law. Such consequences are defined *juridical effects* (or *legal effects*), and consist in the establishment, modification or extinction of rights, legal situations or *juridical* (or *legal*) *relationships* (*privity*). Reversing the order of the reasoning, among the multifaceted natural or social facts occurring in the world a fact is *juridical* when it is *legally relevant*, i.e. determines the production of *legal effects* per effect of a *legal* (*juridical*) *rule* (*provision*). In technical terms, it is actually the legal rule which produces legal effects, while the juridical fact is to be considered as the *condition* for the production of the effects. In practical terms, however, it is the juridical fact which activates a reaction by the law and makes the production of the effects concretely possible. At the same time, no fact can be considered as “juridical” without a legal rule attributing this quality to it.<sup>1</sup>

Both *rights*, *powers* or *obligations* – held by/binding a person or another subject of law (in international law, a State, an international organization, a people, or any other entity to which international law attributes legal personality) – may arise from a juridical fact.

Sometimes a juridical fact determines the production of legal effects irrespective of the action of a person or another subject of law. In other terms, in some cases legal effects are automatically produced by a(n *inactive*) juridical fact – only by virtue of the mere existence of the latter – without any need of an action by a legal subject. “Inactive juridical facts are events which occur more or less spontaneously, but still have legal effects because a certain reaction is regarded to be necessary to deal with the newly arisen circumstances”.<sup>2</sup> Inactive juridical facts may be based on an occasional situation, a quality of a person or a thing, or the course of time.<sup>3</sup>

## ***Juridical Acts***

In other cases, however, the legal effects arising from a juridical fact only exist *potentially*, and, in order to concretely come into existence they need to be activated through a behaviour by a subject of law, which may consist of either an action or a passive behaviour. The legal effects may arise from either an *operational act* – i.e. a behaviour to which the law attributes legally-relevant effects for the sole ground of its existence, “although the acting [subject] had no intention to create this legal

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\* Professor of International Law and Human Rights, University of Siena (Italy), Department of Political and International Sciences. Professor at the LL.M. Program on Intercultural Human Rights, St. Thomas University School of Law, Miami, FL, USA.

<sup>1</sup> See Lech Morawski, “Law, Fact and Legal Language”, (1999) 18 *Law and Philosophy* 461, at 463.

<sup>2</sup> See “Legal System of Civil Law in the Netherlands”, available at <<http://www.dutchcivillaw.com/content/legalsystem022aa.htm>> (accessed on 4 December 2021).

<sup>3</sup> *Ibidem*.

effect”<sup>4</sup> – or an act that a subject of law performs intentionally, “because he[/she/it] knows that the law will respond to it by acknowledging the conception of a particular legal effect. The act is explicitly [and voluntarily] chosen to let this legal effect arise”.<sup>5</sup> In order to better comprehend this line of reasoning, one may consider the example of adverse possession,<sup>6</sup> which is determined by the juridical fact that a given span of time has passed during which the thing has continuously been in the possession without being claimed by its owner. However, in order for the possessor to effectively acquire the right to property, it is usually necessary to activate a legal action before the competent authority aimed at obtaining its legal recognition. In this and other similar cases a subject of law intentionally performs an act “to set the law in motion” with the purpose of producing a desired juridical effect. The legal subject concerned knows that, through performing such an act, the wanted juridical effect will be produced as a consequence of the existence of a juridical fact. Acts that are intentionally performed by a subject of law with the purpose of producing a desired legal effect are defined as *juridical acts* (or *legal acts*). It follows that an act consequential to a juridical fact (i.e. having the purpose of producing a given juridical effect in consequence of the existence of a juridical fact) is called *juridical* (or *legal*) *act*. The entitlement to perform a *juridical act* is the effect of a *power* attributed by the *juridical fact* to the legal subject concerned. The most evident difference between *juridical facts* and *juridical acts* is that, while the former “produce legal consequences regardless of a [person]’s will and capacity”, the latter “are licit volitional acts – in the form of a manifestation of will – that are intended to produce legal consequences”.<sup>7</sup>

### ***Effects of Juridical Acts on Third Parties***

One legal subject may only perform a juridical act unilaterally when it falls within her/his/its own legal sphere, but an unilateral juridical act may produce effects for other legal subjects as well. For instance, in private law unilateral juridical acts exist which produce juridical effects on third parties – for instance a will or a promise to donate a sum of money. Usually, unilateral juridical acts start to produce their effects from the moment when they are known by the beneficiary, and from that moment their withdrawal is precluded, unless otherwise provided for by applicable law (depending on the specific act concerned).

Similarly, bilateral or plurilateral juridical acts influencing the life of third parties are also provided by law – e.g. a contract in favour of third parties or a trust, typical of the common law tradition. Then, of course, the beneficiary of such acts may decide to refuse the benefits (if any) arising from them; however, if such benefits are not refused, said acts will definitely produce their effects, and may only be withdrawn within the limits established by law. Juridical acts also include the laws and regulations adopted by national parliaments, administrative acts, and, more in general, all acts determining – i.e. creating, modifying or abrogating – legal effects. *Acts of the judiciary* (judgments, orders, decrees, etc.) are also included in the concept of juridical acts. For instance, a judgment recognizing natural filiation produces the effects of filiation – with *retroactive effects* – “transform[ing] the [juridical] fact of procreation (in itself insufficient to create a legal relationship)

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<sup>4</sup> Ibidem.

<sup>5</sup> Ibidem.

<sup>6</sup> Adverse possession refers to a legal principle – in force in many countries, especially of civil law – according to which a subject of law is granted property title over another subject’s property by keeping continuous possession of it for a given (legally defined) period of time, on the condition that the title over the property is not claimed by the owner throughout the whole duration of that period of time.

<sup>7</sup> See Nikolaos A. Davrados, “A Louisiana Theory of Juridical Acts” (2020) 80 *Louisiana Law Review* 1119, at 1273.

into a state of filiation (recognized child) that is relevant to the law”.<sup>8</sup> In this case, a juridical act of the judge actually leads to the recognition of a legal state – productive of a number of juridical effects, including *ex tunc* – arising from the juridical fact of the natural filiation. This is a perfect example of a juridical fact (exactly the natural filiation) whose legal effects exist *potentially*, and are activated by the juridical act represented by the judge’s decision.

***The Juridical Act of the Permanent Court of Arbitration (PCA) Recognizing the Juridical Fact of the Statehood of the Hawaiian Kingdom and the Council of Regency as its government***

According to the *PCA Arbitration Rules*,<sup>9</sup> disputes included within the competence of the PCA include the following instances:

- disputes between two or more States;
- disputes between two parties of which only one is a State (i.e., disputes between a State and a private entity);
- disputes between a State and an international organization;
- disputes between two or more international organizations;
- disputes between an international organization and a private entity.

It is evident that, in order for a dispute to fall within the competence of the PCA, it is *always* necessary that either a State or an international organization are involved in the controversy. The case of *Larsen v. Hawaiian Kingdom*<sup>10</sup> was qualified by the PCA as a dispute between a State (The Hawaiian Kingdom) and a Private entity (Lance Paul Larsen).<sup>11</sup> In particular, the Hawaiian Kingdom was qualified as a non-Contracting Power under Article 47 of the 1907 Convention for the Pacific Settlement of International Disputes.<sup>12</sup> In addition, since the PCA allowed the Council of Regency to represent the Hawaiian Kingdom in the arbitration, it also implicitly recognized the former as the government of the latter.<sup>13</sup>

According to a civil law perspective, the juridical act of the International Bureau of the PCA instituting the arbitration in the case of *Larsen v. Hawaiian Kingdom* may be compared – *mutatis mutandis* – to a juridical act of a domestic judge recognizing a juridical fact (e.g. *filiation*) which is productive of certain legal effects arising from it according to law. Said legal effects may include, depending on applicable law, the power to stand before a court with the purpose of invoking certain rights. In the context of the *Larsen* arbitration, the juridical fact recognized by the PCA in favour of the Hawaiian Kingdom was its quality of *State* under international law. Among the legal effects produced by such a juridical fact, the entitlement of the Hawaiian Kingdom to be part of an international arbitration under the auspices of the PCA was included, since the existence of said juridical fact actually represented an indispensable condition for the Hawaiian Kingdom to be admitted in the *Larsen* arbitration, *vis-à-vis* a private entity (Lance Paul Larsen). Consequently, the

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<sup>8</sup> See Armando Cecatiello, “Recognition of the natural child”, available at <<https://www.cecatiello.it/en/riconoscimento-del-figlio-naturale-2/>> (accessed on 4 December 2021).

<sup>9</sup> The *PCA Arbitration Rules 2012* (available at <<https://docs.pca-cpa.org/2015/11/PCA-Arbitration-Rules-2012.pdf>>, accessed on 5 December 2021) constitute a consolidation of the following set of PCA procedural rules: the *Optional Rules for Arbitrating Disputes between Two States (1992)*; the *Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993)*; the *Optional Rules for Arbitration Between International Organizations and States (1996)*; and the *Optional Rules for Arbitration Between International Organizations and Private Parties (1996)*.

<sup>10</sup> Case number 1999-01.

<sup>11</sup> See <<https://pca-cpa.org/en/cases/35/>> (accessed on 5 December 2021).

<sup>12</sup> Available at <<https://docs.pca-cpa.org/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf>> (accessed on 5 December 2021).

<sup>13</sup> See Declaration of Professor Federico Lenzerini [ECF 55-2].

International Bureau of the PCA carried out the juridical act consisting in establishing the arbitral tribunal as an effect of the recognition of the juridical fact in point. Likewise, e.g., the recognition of the juridical fact of filiation by a domestic judge, also the recognition of the Hawaiian Kingdom as a State had in principle retroactive effects, in the sense that the Hawaiian Kingdom did *not* acquire the condition of State per effect of the PCA's juridical act. Rather, the Hawaiian Kingdom's Statehood was a juridical fact that the PCA recognized as *pre-existing* to its juridical act.

***The Effects of the Juridical Act of the PCA Recognizing the Juridical Fact of the Continued Existence of the Hawaiian Kingdom as a State and the Council of Regency as its government***

At the time of the establishment of the *Larsen* arbitral tribunal by the PCA, the latter had 88 contracting parties.<sup>14</sup> One may safely assume that the PCA's juridical act consisting in the recognition of the juridical fact of the Hawaiian Kingdom as a State, through the institution of the *Larsen* arbitration, reflected a view shared by all such parties, on account of the fact that the decision of the International Bureau of the PCA was not followed by any complaints by any of them. In particular, it is especially meaningful that there was "no evidence that the United States, being a Contracting State [indirectly concerned by the *Larsen* arbitration], protested the International Bureau's recognition of the Hawaiian Kingdom as a State in accordance with Article 47".<sup>15</sup> On the contrary, the United States appeared to provide its acquiescence to the establishment of the arbitration, as it entered into an agreement with the Council of Regency of the Hawaiian Kingdom to access all records and pleadings of the dispute.

Under international law, the juridical act of the PCA recognizing the juridical fact of the Hawaiian Kingdom as a State may reasonably be considered as an important manifestation of – contextually – State practice and *opinio juris*, in support of the assumption according to which the Hawaiian Kingdom is actually – and has never ceased to be – a sovereign and independent State pursuant to customary international law. As noted a few lines above, it may be convincingly held that the PCA contracting parties actually agreed with the recognition of the juridical fact of the Hawaiian Kingdom as a State carried out by the International Bureau. In fact, in international law, *acquiescence* "concerns a consent tacitly conveyed by a State, unilaterally, through silence or inaction, in circumstances such that a response expressing disagreement or objection in relation to the conduct of another State [or an international institution] would be called for".<sup>16</sup> The case in discussion is evidently a situation in the context of which, in the event that any of the PCA contracting parties would have disagreed with the recognition of the continued existence of the Hawaiian Kingdom as a State by the International Bureau through its juridical act, an explicit reaction would have been necessary. Since they "did not do so [...] thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset*".<sup>17</sup>

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<sup>14</sup> See <<https://pca-cpa.org/en/about/introduction/contracting-parties/>> (accessed on 5 December 2021).

<sup>15</sup> See David Keanu Sai, "The Royal Commission of Inquiry", in David Keanu Sai (ed.), *The Royal Commission of Inquiry: Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom* (Honolulu 2020) 12, at 25.

<sup>16</sup> See Nuno Sérgio Marques Antunes, "Acquiescence", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2006), at para. 2.

<sup>17</sup> See International Court of Justice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6, at 23.