THE CONCEPT OF STATE – APPLICATION AND ANALYSIS OF VARIOUS THEORIES

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Abstract: This paper studies the evolution of theories on recognition of states. The recent question of the political status of Islamic States of Iraq and the Levant and other terrorist organisation who claim to have established a state poses a question as to what exactly determines the political status of a claimant state. The paper is divided into four main parts and the relevant examples are studied under each part. First, it studies the declaratory theory on the recognition of states. This theory lays down four requirements, on fulfillment of which it qualifies as a state. However, this theory does not hold true in today’s scenario globalized and interdependent world. The example of Taiwan is given to support this argument. Second, the constitutive theory is studied which contends that the recognition by states determines the status of a claimant state. However, this theory is unviable as it reduces the process to highly political one. Third, in order to rectify the above two conflicting theories, the theory given by John Dugard on the role played by United Nations in recognition of states and the theory of Remedial Secession, which argues that a right to secede from the dominant state exists to a minority group which is exploited by the government in power, are studied. Lastly, there is holistic appraisal of the above theories mentioned with regard to the current political scenario.

Keywords: Constitutive theory, declaratory theory, ISIS, European Union

Introduction

States are sovereign entities that comprise a territory, population, legal framework, cohesive force and institution. Despite the active involvement of non-State actors in the international platform such as NGOs and international organisations, states hold primacy since the signing of the treaty of Peace of Westphalia in 1648. Traditional legal theory holds that the state is the primary actor on the international stage and that each state possesses equal sovereign powers. All states contain the attribute of sovereignty through which it maintains its standing with other nations. A recognition as a state enables it to enter into treaties, agreements with other nations. It can also make representation and have full participation before international organisations such as the International Court of Justice and the United Nations Organisation. Hans Kelsen defined a State as a legal creature composed of “a legal system exercising control over a territory and a people.”

However, there are many theories regarding the basis for recognition as a ‘state’. In a conflict ridden world where the legal and political status of many countries are in question such as Taiwan, Somaliland, Libya, Palestine, Tibet, Hong Kong to name a few, this paper seeks to understand the evolution of various theories and its standing.

The paper also considers the status of ISIS and other terrorist organisations, who claim to have established a state through the means of force. This paper seeks to analyse such claims and similar claims of other nations, whose political status is in dispute. It also studies the trend as well as the role played by other states in deciding the above question.

The project is divided in the following manner: I. Declaratory Theory, II. Constitutive Theory, III. Other theories and IV. Conclusion: 1. The Contribution of Thomas Worster, 2. The political status of ISIS.

I. Declaratory theory

A. An Introduction to the Declaratory Theory

The classical application of the declaratory theory is derived from the Montevideo Convention on Right and Duty of States. The Montevideo Convention despite being a regional treaty is regarded as a reiteration of customary international law as it codified the existing legal norms on statehood. In Article 1, the Convention sets out the four criteria for statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. It is believed that before the 20th century, the Constitutive theory of statehood prevailed over declaratory theory. However, during the 20th century, the declaratory theory gained the upper hand. Once an entity satisfies the above four criteria it becomes a state and further, according to Article 3 the political existence of a state is independent of recognition by the other states. It thereby rejects the constitutive theory of recognition.

3 SD. J HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 99 (Sweet & Maxwell, 2004).
1. A Permanent Population

A permanent population refers to a stable community within the defined territory of the state, and does not require a population to reside for a minimum amount of time in one place or a minimum number of inhabitants. The permanent population requirement only implies the need for a stable community and it is the physical existence of a state. Hence, territories such as Nauru with a population less than ten thousand people fulfil this criterion.

2. A Defined Territory

States are territorial entities which must sustain a permanent population. It need not be precisely delimited and defined nor is there a minimum requirement as to the size of the territory. Similarly, even claims by other states to the entire territory of an entity do not necessarily weaken its claims to statehood.

3. A Government

To be considered a state, the government of an entity must exercise effective power over its territory and population. It must have a capacity to establish and maintain a legal order. The government must not be a puppet of any other state and must be free from direct orders and control by other governments.

4. The Capacity to Enter into Relations with Other States

This criterion is highly controversial. However, from the declaratory view, its implication is clear. In light of Article 3 and 6 of the Convention, this criterion should not be interpreted as to require a state to be recognized by other states in order to engage in diplomatic relations with them. Rather, it merely requires an entity to be able to engage in the dealings and ties ordinarily undertaken among states and that it should not be subordinate to another government while conducting those relations.

B. Application of the Declaratory Theory

In order to understand the application of the declaratory theory, the example of Taiwan can be taken.

After the end of World War II, the Chinese Civil War resumed between the Chinese Nationalists and the Chinese Communist Party, led by Mao Zedong and the Nationalist army were defeated in the year 1949, following which the Communists founded the People’s Republic of China (PRC). The Nationalist Party evacuated their government to Taiwan and made Taipei the temporary capital of the Republic of China (ROC). The political status of Taiwan is disputed as The PRC claims that the ROC government is illegitimate, and in 1971 the seat of ROC in the United Nations was replaced by PRC.

China has refused to maintain diplomatic relations with any country that validates the claim of Taiwan and further, Taiwan participates in Olympic Games as “Chinese Taipei”. China has legislated an Anti-Secession Law that authorises it to use force if Taiwan will secede from China.

First, Taiwan has a population of approximately 23 million and when the Nationalist Party, along with 2 million people shifted from China to Taiwan, they added to the existing 6 million there. Second, Taiwan’s boundary is clear and consists of the Island of Taiwan along with the boundaries. The fact that there is a claim of China over the region does not disqualify Taiwan from this point. Moreover, it is pertinent to note that PRC does not have an effective control over this region. Third, Taiwan is ruled by the ROC and like mentioned above, has never been ruled by PRC. And fourth, Taiwan has diplomatic relations with twenty one nations who are members of the United Nations and the Holy See. It also maintains unofficial relations with many countries through unofficial commercial entities such as Taipei Economic and Cultural Representative Offices.

Hence, Liu Yulin concluded that Taiwan fulfills the objective requirements of the Montevideo Convention. Despite this, it is still unrecognized as a State in the United Nations.

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II. Constitutive theory

1. Introduction to the theory

There are two international law theories of recognition of states. The Declaratory theory holds that recognition by other States is not what directly determines whether or not a territory is a state. Instead, the territory must fulfil four criteria of statehood listed in the 1933 Montevideo Convention on the Rights and Duties of States, which are a permanent population, a defined territory, a government and a capacity to enter into relations with states.

In practice, however, if a territory is not recognized by States, it lacks the capacity to enter into relations with them, and thus becomes a pseudo-State. Without external recognition, the regimes are more likely to fail, because they have fewer resources at their disposal, fewer opportunities for trade and monetary exchange, less potential influence in governmental organizations and less legal claims to their territories and populations than recognized states.

Although the declaratory theory prevailed until the 1990s, the recent emergence of new states has bolstered the constitutive theory. Recognition, in effect, created new States from the ex-Soviet Union and Yugoslavia. Although doubts existed about whether post-Soviet and former-Yugoslavia territories fulfilled the declaratory theory’s criteria, widespread recognition by other states determined their status. Non-recognition often reflects a realization by states that a territory has failed to fulfil the four traditional criteria of statehood.

The main distinction between the two is that constitutive theory regards recognition and legitimacy by the international community as a constitutive factor for statehood. While the declaratory theory considers recognition by other states only as a symbolic act of expressing goodwill, which does not affect the legal status of a State and considers the question of existence of a State as a question of fact and not as question of law. However, the constitutive theory requires a state to be legitimised by other states.

2. Application of the theory

There have been other circumstances in which states have been recognized even though it failed to fulfil the requirements of Montevideo Convention. They have been deemed to emerge through international processes, such as in the course of decolonization as seen in the case of the Democratic Republic of Congo in 1960, which was barely efficient and controlled very little territory outside the capital. Similarly, in 1975, Angola became independent while there were three different liberation movements that controlled different parts of the national territory.

Further, when Yugoslavia was dissolved, there was the recognition of Croatia and Bosnia-Herzegovina. They were granted membership in 1992, even though there were large portions of their population and territory over which their governments had no control. The government of Bosnia controlled less than half of its national territory when the state was recognized.

Therefore, it can be concluded from the above examples that the objective theory of statehood is insufficient. This inconsistency is further highlighted by Thomas Worster, who gives the example of two sub-units of former S.F.R. Yugoslavia, Montenegro and Kosovo. Montenegro voted for severance with Serbia in a referendum in 2006 and Kosovo declared its independence in 2008. However, while Montenegro’s recognition as a State and membership to the United Nations has been smooth, Kosovo’s has been tumultuous. Hence, this theory faces the drawback of inconsistency and being political rather legal in its decisions.

III. Other theories

Several attempts have been made to synthesize the two theories. Lauterpacht suggested that the constitutive theory should be applied for the notion that the new state begins its existence upon recognition by other states and the declaratory theory for the notion that states’ discretion in recognizing the new state was constrained. However, three other theories that explain the recognition of states are studied under this Part, which are: 1. John Dugard’s U.N. Membership and 2. The concept of Remedial Succession.

1. The Concept Given by John Dugard

15 Ibid.
This concept is given by John Dugard in his new book *Recognition and the United Nations* has argued that the law of recognition of a State has gone through changes due to United Nations.

He argues that due to declaratory theory, the requirements in essence deal only with the effectiveness of the entity claiming to be a state, while the nature of its government, its policies or how it has come into being which show the ‘quality’ aspect is ignored. There are however indications that these requirements have recently been supplemented by others that are more concerned with the ‘quality’ of statehood. He also states that due to the constitutive theory, the effect of recognition (by existing states) on the statehood of new candidates has been controversial as states regard recognition as a ‘high political act’. He is also of the opinion that serious problem would be created if the political and subjective judgment of one state is permitted to determine the rights and duties of another. The United Nations is regarded as an agent for the collective recognition of states.

Dugard states that the Manchuria incident and the Stimson doctrine of 1932 provoked a negative response of the international community to the Japanese invasion of Manchuria. Further, the United States and League of Nations had refused to recognize the invasion. In this regard, he made two observations: *First*, the traditional law of recognition, according to which each state has an absolute discretion to grant or withhold recognition of a territory as a State, was seriously undermined by the collectivization of recognition through the League. *Second*, the requirements for statehood includes in addition to the Montevideo Convention the gaining of independence through peaceful means and in accordance with the principle of self-determination and basic human rights, and not through racist policies.

Dugard seeks to bring a framework of legal principle that is free from the prison of power politics. The crucial argument is that statehood can no longer be determined by the traditional Montevideo conventions only. He substantiates his argument with the examples of Rhodesia and the Turkish Republic of Northern Cyprus TBVC countries which meet the Montevideo requirements, but fall short of the new ones.

An act in violation of jus cogens is illegal, null and void ab initio and has a disqualifying effect. The norms of jus cogens are therefore not additional criteria for statehood but ‘sanctions’ that result in the nullity of the aspirant state.

Similarly, Liu Yulin argues that the UN is a better solution due to the changing concept of statehood. The globalization world makes it impractical for a state to stay outside of international community. Of the more than 140 states which have come into existence since 1945, only Kiribati, Nauru, Tonga and Tuvalu have not sought UN admission. All the above-mentioned states (except Switzerland) became members of the UN by the end of 20th century, and in 2002, Switzerland became a full member as well. It was, hence, concluded that an entity can claim to be a state only after it has become a member of the UN.

2. **Concept of Remedial Succession**

The right of self-determination was given to colonies. Even in the context of separate colonial territories, unilateral secession was an exception. Outside the colonial context, the United Nations has been extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it seeks secession. Hence, as held by the League of Nations in the case of *Aland Islands Question*, “international law does not recognize the right of national groups to separate themselves from the state of which they form part by the simple expression of a wish.”

However, the International Court of Justice was presented with the question of whether “remedial secession” can be granted in a case to a territory which was systematically discriminated by the dominant force of the State.

The Serbs had engaged systematically in the practice of ethnic cleansing within Serb-dominated territories in Croatia and Bosnia. Members of other ethnic groups were driven out from the territory in order to create ethnically-pure territory that could be assimilated to a Greater Serbia. This was also a part of the plan to keep Kosovo intact. As the resolution to authorise use of force against Serbia was vetoed by Russia and China, a

18 Id.
19 Id.
21 Supra note 9
24 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. (July 22)
bomading campaign was conducted by the NATO in 1999. Upon withdrawal by Serbia, the Security Council issued Resolution 1224 which gave autonomy to Kosovo for administrative purpose.

The Government of Kosovo passed a resolution of independence, with no settlement between Serbia and Kosovo. The question referred to the ICJ by the General Assembly was whether the right to remedial secession was actually present to Kosovo. However, the ICJ failed to respond to all these questions and instead simply indicated that the international community's members disagree about all these issues and thus that the Court cannot resolve them.

The concept of remedial succession is available when a minority group is denied meaningful access to the government to pursue their political, economic, social and cultural development. The parent state should negotiate for possible secession.

In a paper by Dimitrios Lalos, it is argued that Somaliland should be given the right to remedial succession, as it fulfills the four requirements of Declaratory theory, as it exhibits the ability to enter into relations with other states, received delegations, entered into agreement. The government of Somaliland has shown it can control internal policies. However, even though Somaliland has struggled to establish diplomatic ties, this inability does not limit its capacity to enter into relations.

Secondly, the paper argues that Somaliland's situation differs markedly from the process envisioned in Reference re Secession of Quebec, as the channels of negotiation were open in that case. While, in Somaliland these channels are completely unavailable as Somalia is torn in violence. The Somalian government has failed to maintain public functions and has not afforded protection. Hence, remedial secession would allow the people of Somaliland to recognize the political, social, and economic rights they have been denied since 1969.

The author concludes that when a minority region has met the requirements for recognition under declaratory theory, and the parent state is unable to negotiate for secession, the minority region should be permitted to seek equal rights and self-determination through remedial secession.

**Conclusion**

On application of various theories mentioned above, different conclusions can be reached. For example, on the status of Tibet while one author vehemently argues that Tibet is a State, the other denies the same. Similarly, while some scholars regard declaratory as the most important theory that should be applied to determine recognition of a state, another set of scholars give importance to Constitutive Theory.

The inherent contradictions in the state practice in identification of States have been explained by Thomas Worster. Thomas Worster made many important observations on attempt of synthesis of declaratory and constitutive theory by John Dugard, Lauterpacht and Thomas Grant and states that such resolution is not possible. He rejects that the discretion of states can be curbed by limited discretion, as the question as to how to limit discretion arises. He rejects the combinations of the two theories, on the basis that the two aspects each have, in turn, two possible sub-choices that are irreconcilable. He points out the irony in the two: “the classic declaratory theory says that a state is not a purely legal entity since it exists prior to recognition, yet other states' right to recognize the state is constrained by the criteria of law and not subject to politics. The classic constitutive theory says that the state exists only upon recognition since it is a purely legal creation of rights and obligations, yet the other states have no constraints on them in law in recognizing the purported state.”

This is supported by the fact that states use a mix of the two theories, conveniently to justify their political outcomes. He concludes that due to a natural relationship between law and politics the two inherently contradictory theories are not stationed as enemies that cancel each other out. Rather, they are stationed as parts of a process such that two mutually destructive theories are present in a single system. Worster also stresses that

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26 Ibid
31 Supra note 32.
33 Supra note 10
34 Supra note 14.
the relationship between law and politics, is such that the force of politics has legitimised existence of a new state. The best example that supports his claim is the People’s Republic of China, which came into existence by force, and was eventually recognised in 1971.

Further, as Robert Delahunty observes if the U.S. Government had applied the Montevideo Convention tests of legal "statehood" had been applied in a neutral manner based on facts, the result would be different as “Kuwait (arguably), Estonia, Latvia, Lithuania, Guinea-Bissau, the Ukraine, and Byelorussia did not, in fact, meet the tests of statehood at the relevant times. On the other hand, Manchukuo (arguably), Southern Rhodesia, and Turkish Cyprus did, in fact, meet those tests.”

This particular observation also holds importance as the political and legal status of ISIS has been in debate recently. An Arbitration Commission, established by the European Community-sponsored Conference on Yugoslavia, opined that the Socialist Federation of the Republic of Yugoslavia (SFRY) had dissolved as a state on the grounds that in the case of a federal-type State the existence of the State implies that the federal organs represent the components of the Federation and wield effective power, and that the essential organs of the SFRY no longer meet those criteria.

Worster points out that lending support to a failed state, or a nearly failed state, by continuing to act as if it effectively existed when the government in fact only controls a fraction of the territory, either by financial or military support to enable the previous State to regain its former existence, could also be interpreted as an endorsement of the constitutive theory because it denies the reality of the situation and strives to set up a functioning state for the territory. He further states that as the remains of the former state will collapse the moment the international support is withdrawn, it is said to have no independent existence. It is, hence, the declaratory theory in form, but the constitutive theory in substance.

If this theory is applied, it would derecognize Syria and Iraq as well. However, the stance taken today is different, precisely for the above reason, it would lead to a domino effect of non-recognition of many existing states which would divide the stability of the world. Also, it would also lead to worsening of the situation at the ground level as persecutors or oppressors may no longer be subject to international legal liability for their acts if there is no pretence of statehood. Hence, the United Nations upholds the state personality of Afghanistan, Syria, Iraq, Democratic Republic of Congo and other violence ridden areas.

Another, important discussion is if the European Union constitutes as a state. However, it does not qualify as a sovereign. The European Committee (EC) has no power, except for those powers which have been specifically attributed to it by the Treaties. Each time the EC acts, such as signing of a treaty or amending of a provision it must do so on the basis of a specific Treaty provision which gives it the corresponding power, and this requirement is strictly controlled by the Court of Justice. But, the member states vest some of their sovereign features in the EU. Hence, the EU is more than an international organisation but is less than a State.

Therefore, the current changing scenario requires a dynamic application of theories as to determine the political and legal status of a nation and an organisation.

37 Ibid.
38 Ibid.