STUDIES AND COMMENTS

State formation and recognition in international law

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Abstract
The following study intends to analyse the evolution of theories regarding the recognition of states in international law. Whereas the Montevideo Criteria contains the legal requirements for statehood, recognition is largely dependent on the political will of the other states. The question faced by the contemporary international community is whether a state is held to recognise another if it meets the said requirements. While the Constitutive Theory insists that a state could only exist as an international legal person if it is recognised by previously-established states, the Declarative Theory rejects such a discretionary process. While the common practice among states was argued to be somewhere in the middle of these two theories, the declarative conception is much closer to the current model followed by the international community as it is also enshrined in the rules contained in the Montevideo Convention and reiterated by the Badinter Commission.

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JEL Classification: K10, K33, K39.

1. Introduction

States play a primordial role in the structure of legal relationships that are commenced, modified or extinguished at an international level. In the field of international relations, the means by which states act and interact should be governed by principles such as sovereignty and equality. In reality, some states decide to act in a way dictated by geopolitical dynamics, that is, the power or influence held and through which their interests could be enforced at regional or global level. Thus, depending on each state's interests, massive inconsistencies can exist between the strategies that are carried out. One of the most elementary instruments used in diplomacy is, for these reasons, the mechanism of recognition.

State recognition has an important place in international law, being a unilateral act through which the very existence of a state and its status as a subject of international law are acknowledged. Only the states, as primary subjects of international law, are subject to this procedure, as international organizations are

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founded and act in a rather distinct manner.[3] An international legal person is capable of having rights and duties under international law, and states, in particular, can wield virtually any right and be held to fulfill any duty to which it has agreed. Without recognition, a state's capability to enter relations with another state is greatly limited due to its isolation from the international community.

Two opposing theories have been developed to explain and order the admission of states into the international community. First, the Constitutive Theory embraces the opinion that any state completes its formation through recognition by other states. Recognition is thus seen as a requirement for statehood, but no state can be forced to recognize another. This discretionary nature of state recognition arguably turned the international community into an elite club of nations lead by the Great Powers. Second, the Declarative Theory came as a response to the constitutive conception, ruling out the necessity of international recognition as a condition for statehood, and introducing unbiased standards codified as the Montevideo Criteria.

2. Statehood and sovereignty

Statehood designates the feature of an entity that exists in the international community and respects the Montevideo Criteria. In an attempt at defining the legal and political notion of *state*, the Convention signed at Montevideo in 1933 established that a state must consist of "(a) a defined territory; (b) a permanent population; (c) a government; and (d) the capacity to enter into relations with other states".

The concept of *sovereignty* describes the supreme political authority that wields power inside and upon a given territory and the population that inhabits it, while also being able to enter into relations with other sovereign and independent states, independently of any exterior influence.[4] For this reason, the latter two conditions imposed by the Montevideo Criteria are, in fact, two sides of the same coin, correspondingly internal and external sovereignty. Thus, a state has to establish and maintain the legal (rule of law) and political order (democracy) on an internal level, while in the international community it can exercise rights and fulfil duties, as any other international legal person and in accordance with international treaty provisions.

Although the Montevideo Criteria were agreed between American states, and not by the entire international community, this definition of statehood was only formally recognised as it was already observed prior to the 1933 Convention. Similar criteria were used by the Badinter Committee (the Arbitration Commission of the Conference on Yugoslavia) in 1991 when it concluded: "that the state is commonly defined as a community which consists of a territory and a population

[3] Florica Braşoveanu, *Drept internaţional public*, vol. I, Pro Universitaria, Bucharest, 2013, p. 67.

[4] For a thorough analysis of this concept, see A. Murphy, A. Stoica, *Sovereignty: Constitutional and Historical Aspects*, in „Bulletin of the Transilvania University of Braşov. Series VII: Social Sciences. Law", no. 2 (2015), pp. 219-226.

subject to an organized political authority; that such a state is characterized by sovereignty".[5]

3. Types of recognition in international law

Although recognition is primarily applicable to states, certain circumstances exist when these international legal subjects can choose to use particular forms of recognition in relation to various political reasons. In this regard, many forms can be distinguished depending on the chosen criteria. From a strictly legal point of view, recognition could be either legal (*de jure*) or factual (*de facto*). At the same time, recognition can be *express* or *tacit*. Nonetheless, states practice limited types of recognition as well, such as *government* or *diplomatic* recognition, respectively.

3.1 *De jure* and *de facto* recognition

Throughout history, there have been cases where a great number of states refused to *de jure* recognise a particular country on ideological grounds.[6] Nonetheless, such a state gained *de facto* recognition and thus established relations with other states. An example would be the Soviet Union, which was established in 1917, *de facto* recognised by the UK Government in 1921, but not formally (*de jure*) recognised until 1927.[7]

Another example is the Republic of China (Taiwan) and its dispute with the People's Republic of China. In this case, Taiwan enjoyed worldwide recognition and held a seat as a permanent member of the UN Security Council until 1971, when UN member states ceased to *de jure* recognise the Republic of China and recognised the People's Republic of China (only *de facto* recognised until then) instead.[8]

3.2 Express and tacit recognition

Existing states can choose to recognise a new state either explicitly, through an official declaration, or tacitly, by any means from which it can be implied that the new state would be treated as any other international legal person. For instance, a tacit type of recognition could be in the form of sending a diplomatic mission (with the acceptance of credentials) or even signing a bilateral

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[5] *Ibidem*, p. 220; for an analysis of these opinions, see Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, in "The European Journal of International Law", Vol. 3 (1992), pp. 178-185.

[6] F. Braşoveanu, *op. cit.*, p. 67.

[7] Malcolm Nathan Shaw, *International Law*, 5th edition, Cambridge University Press, 2003, p. 382.

[8] Yana Zuo, „Self-Identification, Recognition and Conflicts: The Evolution of Taiwan's Identity 1949-2008", in Thomas Lindemann, Erik Ringmar, *International Politics of Recognition* (Abingdon: Routledge, 2016), pp. 153-154.

treaty.[9] However, not all bilateral treaties imply recognition and neither do multilateral treaties. In fact, the United Nations Charter is a prime example, in that many of its signatories do not recognise all other members, so the process of implied recognition should be studied on a case by case basis.[10]

3.3 Government recognition

In cases of internal conflict or disturbances (civil war, revolution or a *coup d'état*), the international community can find itself in the position to recognize the authority of a faction or entity over a previously-recognised state. This type of recognition concerns not the state itself, as it was already recognised as an international legal subject, but the government and its power within the given state's territory. A particular problem arises in the case of governments-in-exile, which are only *de jure* recognised as such, while in fact the territory and population of the state are under the authority of another entity.[11]

When a state recognises a certain government, in doing so it expresses its will to treat that particular entity as the sole political authority of the respective state.[12] Once a certain state is governed by an entity that is realistically considered to be capable of maintaining stability in terms of being supported by a clear majority of the population and also exerting control over most of the state's territory, it should be granted recognition. However, such a practice was discontinued in recent times, with the governments of the United Kingdom, Australia, Canada and several civil law countries across Europe cited as examples.[13]

3.4 Diplomatic recognition

In some cases, state recognition can be independent of full-fledged diplomatic relations, which usually refers exclusively to the bilateral ties between two countries. In other words, if a state cannot be granted full formal recognition by the international community, its relations with individual states can be either interrupted or resumed due to diverse reasons. An example could also be the case Taiwan, which lost its UN membership and is no longer recognised *de jure* by the international community. Notwithstanding, Taiwan continues to meet the criteria

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[9] L. Oppenheim, *International Law. A Treatise*, vol. I – *Peace* (Clark: The Lawbook Exchange, 2005), pp. 135-136.

[10] Malcolm Nathan Shaw, *op.cit.*, p. 386.

[11] Although the Soviet Union occupied and annexed the Baltic States of Lithuania, Latvia, and Estonia, the international community refused to recognised their belonging to the USSR. As a consequence, their statehood was considered to have been merely interrupted in 1940 and only resumed with the dissolution of the USSR in 1991. For this reason, the Baltic States are considered to be the continuing states of their interwar counterparts rather than successor states of the Soviet Union.

[12] Malcolm Nathan Shaw, *op.cit.*, p. 377.

[13] *Ibidem*, p. 381.

for statehood as established at Montevideo and enjoys *de facto* recognition through cultural and trade relations with other states. However, the People's Republic of China wields greater economic influence on the world stage and has thus conditioned its diplomatic relations with other states by the immediate termination of any formal recognition or diplomatic mission of these states in the case of Taiwan.[14]

3.5 Withdrawal of recognition

One particular issue in terms of recognition would be its withdrawal. It has been argued that such a feat would be much easier accomplished in cases of factual recognition rather than full-fledged, *de jure* recognition.[15] In this regard, the withdrawal of recognition is, at least in the circumstance of *de jure* recognition, an exceptional event that can occur whenever a state considers that such an action is appropriate.[16]

4. Constitutive theory of statehood

State recognition has been initially founded on the Constitutive Theory of Statehood, of which its essence could be traced back as early as 1815, at the Peace Congress of Vienna; the final act of this congress recognised only 39 sovereign states in Europe, and it also established that any future state could be recognised as such only through the acceptance of prior existing states.[17] The reason for such a distinction between the already established states and any future claim of statehood was argued to reside in the „historical longevity” of the former.[18]

According to this theory, a state is considered to be a legal international person only if it is recognised as sovereign by other states. In this respect, L.F.L. Oppenheim considered that “International Law does not say that a State is not in existence as long as it isn't recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law”.[19] Such constitutive views were also found in the works of Hegel, which claimed that every state “is sovereign and autonomous against its neighbours, [being] entitled in the first place and without qualification to be sovereign from their point of view, i.e. to be recognized by them as sovereign”, while also admitting that “recognition […] is conditional on the neighbouring state’s judgement and will”.[20]

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[14] Yana Zuo, *op.cit.*, pp. 153-154.
[15] Malcolm Nathan Shaw, *op.cit.*, p. 388.
[16] *Ibidem*, pp. 389-390.
[17] Kalevi Jaakko Holsti, *Taming the Sovereigns: Institutional Change in International Politics*, Cambridge University Press, 2004, pp. 128-129.
[18] *Ibidem*, p. 129.
[19] L. Oppenheim, *op.cit.*, p. 135.
[20] G.W.F. Hegel, *Elements of the Philosophy of Right*, Oxford University Press, 2000, §331, *apud* James Crawford, “Recognition in International Law: An Introduction to the Paperback Edition

On the other hand, this discretionary prerogative should have its limitations. Kelsen was of the opinion that "a state violates international law and thus infringes upon the rights of other states if it recognizes as a state a community which does not fulfill the requirements of international law".[21] However, the opposite of this could also be possible: a state refusing to recognise another even if it does fulfill the criterion for statehood. For this reason, Lauterpacht proposed that states have a legal duty to recognise one another when the conditions of statehood exist[22], although Kelsen denied the notion of any such duty.[23]

The weaknesses of this theory include the case in which recognition of a particular state is not unanimous. In this instance, a rigid application of the constitutive principle would mean that the respective state would not be a subject of International Law, which in turn would hold back its capacity to assume rights and obligations in the resemblance of other states that are recognised. However, Lauterpacht considered that the constitutive theory "deduces the legal existence of new States from the will of those already established."[24] In the absence of a body responsible for observing and subsequently declaring that a certain state meets the conditions for statehood, Lauterpacht believed that the already established states are ought to „administer the law of nations", without being „entitled to serve exclusively" their national interests.[25]

In addition to this, eurocentrism was perceived to be a key feature of such recognitions, as early diplomatic and trade contacts with some Asian countries such as China, Japan, Siam or Persia involved a *de facto* acknowledgment of their sovereignty, but full-fledged relations and recognition were only granted upon meeting a certain „standard of civilization".[26] On the other hand, as the *Pax Britannica* and *Splendid Isolation* doctrine began to fade in favour of a more American-led international community, the constitutive theory inevitably followed suit.

2013", in Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, 2013, p. xxxi.

[21] Hans Kelsen, *Principles of International Law*, Rinehart, 1952, 70, *apud* Adel Safty, Th*e Cyprus Question: Diplomacy and International Law*, iUniverse, 2011, pp. 191-192.

[22] Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, 1947, pp. 12-24, 73, *apud* Gérard Kreijen, *State Failure, Sovereignty and Effectiveness*, Martinus Nijhoff Publishers, 2004, 15; Hersch Lauterpacht, *Recognition of States in International Law*, in Yale Journal of Law (1944), vol. 53, no. 3, p. 385.

[23] Hans Kelsen, *Recognition in International Law*, in American Journal of International Law (1941), pp. 609-610, *apud* Krystyna Marek, *Identity and Continuity of States in Public International Law*, Librairie Droz, Geneva, 1968, p. 154.

[24] Hersch Lauterpacht, *op. cit.* (*Recognition in International Law)*, p. 38, *apud* Thomas D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, Praeger Publishing, Westport, 1999, p. 2.

[25] Hersch Lauterpacht, *op. cit.* (*Recognition of States in International Law*), p. 385.

[26] Kalevi Jaakko Holsti, *op.cit*., p. 129.

5. Declarative theory of statehood

While the constitutive theory gained ground and dominated international law since 1815, it only lasted until the shift in geopolitical dynamics that marked the beginning of the 20th century. At the end of the previous century, a great number of European nations became independent – Germany, Italy, Romania – and the First World War (1914-1918) led to the further emergence of sovereign states in Europe – Poland, Yugoslavia, Czechoslovakia – with the establishment of British or French mandates in some areas after the partition of multinational empires such as Austria-Hungary or the Ottoman Empire. However, the speech delivered by US President Woodrow Wilson on his Fourteen Points propagated the concept of self-determination, with direct consequences for the international order.

In Wilson's conception, the lack of self-determination has been at the centre of Europe's turbulent history. The Great Powers, such as Britain and Austria, have previously resisted any attempt to partition the Ottoman Empire, fearing that the resulting independent states would be small and too fragile, potentially easy targets for annexation and could, thus, undermine the long-established international order based on the balance of power.[27] The Wilson doctrine has arguably marked the end of *Pax Britannica* and paved the way for greater US influence on the world stage.

In response to these changes, the constitutive theory lost its pre-eminence in favour of a new conception – the declarative theory of statehood. While the constitutive theorists claimed that recognition is a requirement for statehood, the declarative conception established by the 1933 Convention of Montevideo challenged such an idea; according to article 3 of this treaty, statehood does not depend on recognition by other states. The declaratory model argues that a state does not obtain international legal personality through the consent of others, so therefore the recognition of a state signifies nothing more than the admission of a factual situation.[28]

While the common practice among states was argued to be somewhere in the middle of these two theories, the declarative conception is much closer to the current model[29] followed by the international community as it is also enshrined in the rules contained in the Montevideo Convention and reiterated by the Badinter Commission.

6. Conclusions

It has been recently argued that the ongoing contradiction between the constitutive and declarative theories should not be of as much interest as the

[27] Henry Kissinger, *Diplomaţia*, All Publishing House, Bucharest, 2010, pp. 191-192.
[28] Malcolm Nathan Shaw, *op.cit.*, p. 369.
[29] *Ibidem.*

applicability of international law on matters such as state recognition.[30] In this regard, Oppenheim pointed out – as early as the beginning of the 20th century – that recognition depends more on the foreign policy of states rather than the rules of international law.[31] Nonetheless, as international law traces its sources to the treaties signed by states with the intention of protecting their interests, this is sufficient reason to assert that national interests are definitely at the foundation of such legal rules.

However, international rules could be solely applied if an international and independent organ is invested with the power to declare which state meets the requirements for statehood and which does not. Such a body should be in no circumstances bound by the will of another international authority, although its membership and scrutiny would be dependent on such an entity. One solution to overcome this problem would be to provide a legal mechanism for the selection of its members. Its independence should be guaranteed by means of some system of checks and balances with the UN Assembly or Security Council.

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[30] Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, 2010, p. 249.

[31] L. Oppenheim, *op.cit.*, p. 136.

12. Malcolm Nathan Shaw, International Law, 5th edition, Cambridge University Press, 2003;
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