

THE INTERNATIONAL STATUS OF TAIWAN IN THE EMERGING NEW LEGAL ORDER: LEGAL AND POLITICAL CONTEMPLATION

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Abstract

While gazing at the world map it appears as if the entire world is immaculately cleft into separate boundary, with each boundary representing a defined territorial entity, called State. But under this tidy partite surface, the concept of statehood is veiled in many ambiguities. One such state is Taiwan. It is accorded the status of a *de facto* state inspite of having met almost all the pre-requisites required under the international law to be called as an independent state, that is, inspite of having a defined territory; a permanent population and a government, it is still not considered as a separate recognized independent state. The researcher in this paper will attempt to bring out the evolution of Taiwan's statehood; how declaratory or constitutive theories of international law have affected the legal status of the Taiwan and how these theories negatively affects *de jure* recognition of the Taiwan. In order to do so, researcher will be looking into *Treaty of Shimonoseki*, *Instrument of Surrender of Japan*, *Cairo Declaration*, *Potsdam Declaration*, *Treaty of Taipei*, *San Francisco Peace Treaty*, *United Nations Charter* etc. This paper will be based on doctrinal research method, whereby the researcher will analyse, extrapolate, reconstruct and compare the information gathered from the various literatures revolving around this area and will attempt to clarify the factual circumstances surrounding Taiwan.

Keywords: *Statehood, de facto and de jure recognition, treaties and declarations.*

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INTRODUCTION

The biggest problem in international law and politics in the western Pacific is the anomalous status of Taiwan and thus its future, has been very much in the debate. There are a wide diversity of views revolving around it, some more realistic and lucid than others. The issue today is not which government that is whether Republic of China (ROC) or People's Republic of China (PRC) governs and represents China but how Taiwan can participate in the international community alongside the PRC. For some authors this is a matter of recognising a separate Statehood that already exists by virtue of the de facto exercise of sovereignty in Taiwan. By some others authors view it as a goal of Taiwan to get independence from China because of its own public position and the lack of any explicit claim to Statehood¹.

EVOLUTION OF CHINA

Early Taiwan in 1623 was colonised by the Dutch and its population consisted of Austronesian people. From 1661-1683 the Kingdom of Tungning which was the first Han Chinese government ruled Taiwan. Taiwan was ruled by the Qing Dynasty as a prefecture from 1683-1875. In 1875, Qing Dynasty divided the island into two prefectures and subsequently after 10 years that is in 1885 the island was made into a separate Chinese province to speed up development in the region².

From 1894-1895 the First Sino-Japanese War was fought between the Qing Empire of China and the Empire of Japan. The war ended with the success of Japan and failure of Qing Empire. Thus, subsequently in 1895 Taiwan was ceded by the Qing Dynasty to Japan in perpetuity by signing the *Treaty of Shimonoseki*. By the terms of the treaty, China was obliged to recognize the independence of Korea, over which it had traditionally held suzerainty; to cede Taiwan, the Pescadores Islands, and the Liaodong (south Manchurian) Peninsula to Japan; to pay an indemnity to Japan; and to open the ports of Shashi, Chongqing, Suzhou, and Hangzhou to Japanese trade³. This was the first time that the regional dominance in East Asia shifted from China to Japan⁴. However Japanese rule over Taiwan lasted for around 50 years that is from 1895 to the conclusion of World War II in 1945 which lead to the miserable defeat of Japan and Nazi Germany. Thus with the conclusion of world war II, Japanese troops in Taiwan surrendered to the Republic of China, putting Taiwan back to, under the control of Chinese government by signing Japanese Instrument of Surrender.⁵

In freeing Taiwan from the control of Japan the Cairo Declaration of 1943 and Potsdam Declaration played an indispensable role. Cairo Declaration was the result of Cairo Conference held from November 22–26, 1943, in Cairo, Egypt, that outlined

¹ A. E. Boyle, *The International and Comparative Law Quarterly*, Vol. 47, No. 4 (Oct, 1998), p. 965.

² Republic of China, Government Information Office, *A Brief Introduction to Taiwan: The Economy*, http://www.gio.gov.tw/taiwan-website/5-gp/brief/info04_8.html, as seen on 5th October, 2015.

³ <http://www.britannica.com/event/Treaty-of-Shimonoseki>, as seen on 31st October, 2015.

⁴ *Taiwan Yearbook 2007, History (2007)*, <http://www.gio.gov.tw/taiwanwebsite/5-gp/yearbook/03history.htm>, as seen on 10th October, 2015.

⁵ http://www.archives.gov/exhibits/featured_documents/japanese_surrender_document/, as seen on 15th October, 2015.

the Allied position against Japan during World War-II and made decisions about post war Asia⁶. In the conference Allies' decided to continue deploying military force in Japan until Japan unconditionally surrenders. The main clauses of the Cairo Declaration was that the three great allies, i.e. United States of America(USA), United Kingdom (UK) and Republic of China (ROC) will fight the ongoing world war-II to restrain and punish the aggression of Japan. Also to strip off Japan from all the islands in the Pacific which it had seized and occupied since the beginning of the First World War in 1914. It also aimed to make provisions for ROC to restore all the territories Japan has stolen from the Chinese.⁷

Potsdam Declaration⁸ was a proclamation defining terms for Japanese Surrender during World War-II. It was in the form of an issued the document, which outlined the terms of surrender for the Empire of Japan as agreed upon at the Potsdam Conference. This ultimatum stated that, if Japan did not surrender, it would face prompt and utter destruction.

According to the Cairo Declaration, Potsdam Proclamation, and Japanese Instrument of Surrender, the United States of America and the United Kingdom pledged along with Japan that Taiwan would be restored to the ROC. Therefore, following the victory of the Allies in World War II, from October 25, 1945 the ROC government began exercising its sovereignty over Taiwan, declaring the restoration of Taiwan as an integral part of the ROC's territory, and restoring ROC citizenship to the people of Taiwan. Thereby ROC conducted elections and an effective provincial government was established.

All these three documents above mentioned documents are embodied in the third volume of *Treaties and Other International Agreements of the United States of America 1776–1949* published in 1969 by the U.S. Department of State. United States of America considers these three documents as operative, legally binding treaties and valid even today.

STATEHOOD THEORY: CONSTITUTIVE V. DECLARATORY

The question- whether a state comes into being by fact or by recognition from other established states, leads to emergence of two theories⁹.

Constitutive theory holds that an entity has to be legitimised as such by other states in order to be a state while declaratory theory considers the existence of a state as a question of fact and not of law. It is believed that before twentieth century, the constitutive theory of statehood prevailed over declaratory theory of statehood, however during twentieth century, declaratory theory over powered it. The classical application of the declaratory theory was demonstrated in the Montevideo Convention on Rights & Duty of States.¹⁰ Although it is regional treaty the Montevideo Convention is regarded as a reinstatement of Customary

⁶ *Life*: Noel F. Busch, "Alexander Kirk," August 13, 1945, as seen on 25th October, 2015.

⁷ Churchill, Winston Spencer (1951). *The Second World War: Closing The Ring*. Houghton Mifflin Company, Boston, p. 642.

⁸ <http://www.ndl.go.jp/constitution/e/etc/c06.html>, as seen on 30th October, 2015.

⁹ P.K. Menon, *The Law Of Recognition In International Law: Basic Principles* 23 (1994).

¹⁰ Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097.

International Law as it codified existing legal norms on Statehood. Article 1 of the Convention sets out Four criteria for statehood: The states as a person of International law should possess the following qualification¹¹:-

- (a) Permanent population
- (b) Defined Territory
- (c) Government
- (d) Capacity to enter into relation with other states.

According to declarative theory of statehood if an entity satisfies the above four criteria, it becomes state, and the political existence of such a state is independent of recognition by the other states.

It is wrangled by number of Taiwan politicians that Taiwan is an independent state as it satisfies all the above mentioned four criteria¹².

Permanent Population

The existence of a permanent population is conspicuous and there is no specification of a minimum number of inhabitants. Taiwan has a population of nearly 23 million since 1949 when more than 1 million mainlanders arrived in Taiwan; the Taiwanese population has been stable overtime. Thus it is generally contested that Taiwan satisfies the first criteria.

Defined Territory

A defined territory desideratum as a particular territorial base upon which to operate. However, there is no indispensability in international law for defined and settled boundaries. A state may be recognised as a legal person even though part of its territory is in dispute as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is incontrovertible and is controlled by the government of the alleged state¹³.

Taiwan encompasses a well defined territory consisting of the island of Taiwan itself and dozens of smaller islands in the Taiwan 's straits. There are few better geographical arrangements than a good-sized island. Taiwan's boundaries has been clear over the centuries. Although Taiwan sovereignty over this territory has been challenged by the PRC which maintains that China's entire territory encompasses both Mainland China and Taiwan, as explained above this challenge does not necessarily indicate that Taiwan fails in the requirement that it maintains a stable territory.

A Government

¹¹ D.J. Harris, Cases and Materials on International Law, 7th Revised Ed. (25 June 2010), Sweet & Maxwell.

¹² Victor Hao Li, The Status Of Taiwan, Asian Affairs, Vol. 16, No. 3, Symposium: Relations Between the Chinese Mainland and Taiwan: Problems and Prospects for Reunification (Fall, 1989), pp. 167-171

¹³ Malcom M. Shaw, 6th Ed., p. 199, Cambridge Publishers.

For a political society to function reasonably effectively it needs some form of government or central control? The government of the entity must exercise effective power over its territory and citizens, the government must actually be independent of any other state. However, this is not a precondition for recognition as an independent country. It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs¹⁴.

Taiwan satisfies the criteria because for more than half a century, Taiwan has been under the governance of ROC. The PRC has never ruled over Taiwan. Since 1991, the ROC has undergone a series of constitutional reforms, although the territory of ROC has been untouched, these reforms effectively withdraw its claim over mainland China. According to these reforms, Taiwan governmental body would represent Taiwan people only.¹⁵

The Capacity to Enter Into Relations with Other States

Although this criteria is clearly controversial, from pure declaratory vie, its implication is clear. Taking into consideration, Article 3 and Article 6 of the Montevideo Convention, which clearly state the existence of state is independent of recognition by the other states, these criteria shall not be interpreted as to require states to be recognised by other states in order to engage in diplomatic relations.

In this sense, these criteria constitute no obstacle for Taiwan to claim its statehood; Taiwan need not seek permission from other governments in dealing with the world. If not for the political obstruction posed by the PRC government, Taiwan could well enter into relations with any states as it wishes. The diplomatic relations over 20 countries are evidence that Taiwan has independent diplomatic capacity among nations.

The key point affecting status of Taiwan has been that both the governments that is ROC and PRC claims to represent the whole of China. Till today no claim as such is made claiming separate statehood for Taiwan and this is also one of the reasons that Taiwan never made a declaration for its independence. Total lack of recognition of Taiwan as a separate independent state merely reinforces this point¹⁶. However, even if Taiwan would have declared its independence, whether as the ROC or as PRC, it would still not have iron out the issue of Taiwan's international status. A state becomes a full player in the international system only when it gets recognition from other states. A declaration of independence by Taiwan would not substantially increase the number of countries that recognized the government but it might actually harm relationships with a number of friendly states that now entertain informal but close relations with it.

This clearly points out that states base their decisions primarily on policy considerations rather than legal principles. In this regard, it is crystal clear that the law of recognition is a

¹⁴ Malcom M. Shaw, 6th Ed., p. 200, Cambridge Publishers.

¹⁵ The significance of Taiwan's Constitutional reforms, <http://www.gio.gov.tw/> , as seen on 2nd November, 2015.

¹⁶ Malcom M. Shaw, 6th Ed., p. 234, Cambridge Publishers.

highly politicized part of international law. This may partially explain why the question of recognition of states and the governments has neither in theory nor in practise been solved satisfactorily. In practice, because of the discretionary nature of recognition, a state acts legally in not granting recognition to an entity which in fact possesses all the necessary qualifications of statehood or to a government which in fact have effective control over the alleged states population and territory.

UN AND STATEHOOD THEORY

The UN's influence on International Law can be seen in almost every aspect of relations amongst states. Example Vienna Convention on Diplomatic relations (1961) and Vienna Convention on Consular relations (1963) constitute the cornerstone of rules guiding day to day inter-state relations.

In terms of Human Rights protection, Charter of United Nations, UDHR, ICCPR, and Convention against Genocide etc. would has now an impressive array of conventions protecting the rights of all people, children, women and minorities. The recognition and protection of human rights fundamentally changes the traditional notion of state and sovereignty.

The Montevideo Convention on the Rights and Duties of State was signed in 1933. Since then international relations and state practices have undergone changes. Among them the creation of UN and the emergence of a large number of new states after the Second World War have significantly reshaped contemporary international law.

UN redefined Statehood

Statehood must be understood in the context of international laws which provide for rights and obligations a state enjoys and bears. As an international organisation which is designed to facilitate international security, economic development and human rights issues, UN has vastly expanded the existing body of international law. It is estimated that UN has helped to conclude more than 500 unilateral treaties and agreements. These treaties have formed the basis of primary laws governing relations¹⁷.

In the area of international trade, the UN Commission on International Trade Law has developed a number of Conventions, model laws, rules and legal guidelines to harmonise international trade. Example UNCITRAL Model Law on International Commercial Arbitration (1985).

In sum, the influence of the UN on each state has been sweeping and profound. The UN has fundamentally changed people's understanding of states and their rights and duties. A state which has all the rights and privileges and obligations as a member of UN is called a state. It means it has admitted to UN. In this sense, statehood begins only after admittance to the UN.

¹⁷ Ralph N. Clough, The Emerging New International Legal Order In The Western Pacific: The Status Of Taiwan, The Journal of East Asian Affairs, Vol. 8, No. 1 (Winter/Spring 1994), pp. 225-237.

The practice of admission to the UN virtually discards the declaratory theory of statehood.

Article 4 of UN Charter deals with membership to UN. Applying the declaratory theory of statehood, to be admitted as a UN member, an entity has to satisfy the criteria mentioned in Montevideo Convention.

They should also accept the obligations of Charter as a member of UN. But, neither of the above conclusions is true. This can be easily proved using Rhodesia situation where it had experienced great difficulty in getting a membership to UN

The case of Southern Rhodesia's¹⁸ unilateral independence from the British Empire indicates that even if an entity satisfies all the requirements of effectiveness, it could be rejected UN admission.

South Rhodesia and Northern Rhodesia were both British Colonies before independence. In 1964, Northern Rhodesia remained a British Colony governed under the white dominated Smith administration. On 11th November 1965, the Smith Administration unilaterally announced the independence of Southern Rhodesia from Britain. The Britain government this an act of rebellion. At that time, Smith Administration was an effective government. But UN Security Council rejected Southern Rhodesia recognition and refrained from rendering any assistance to it.

It was not until 1980 when the British government granted its independence that Southern Rhodesia became a member of the UN under the name of Zimbabwe.

The UN has always been unwilling to accept unilateral independence¹⁹.

New Constitutive Theory of statehood based on the UN's collective recognition mechanism

According to James Crawford²⁰, of states in existence in 1945, only Switzerland and the Vatican city are not UN members. Of more than 140 states which have come into existence since 1945, only Kiribati, Nauru, Tonga and Tuvalu all joined the UN and in 2002 Switzerland also became a full member. Today, it is fair to say an entity can claim to be a state only after it has become a member of UN.

When a state applies to join UN, accordingly to the UN Charter, the UN should decide whether the applicant is able and willing to carry out the obligations stated in the charter. Such decision is made by General Assembly upon the recommendation of Security Council. Once an entity has been admitted as a member of the UN, it conclusively becomes a state.

¹⁸ <http://speeches.empireclub.org/61140/data>, as seen on 29th October, 2015.

¹⁹ McWilliam, Michael (January 2003), Zimbabwe and the Commonwealth, *The Round Table: The Commonwealth Journal of International Affairs* (Newtonabbey, Northern Ireland: *The Round Table*) 92 (368): 89–98.

²⁰ James Crawford, *The Creation Of States In International Law*, Oxford University Press 2005.

Therefore, UN in effect has undertaken the effect suggested by Lauterpact²¹. UN provides a collective recognition mechanism for new state²².

Jurisdiction- the ICJ's jurisdiction is based on the consent of parties. A state is able to consent to the ICJ jurisdiction by special agreement, by treaties and conventions or by recognition of the courts compulsory jurisdiction. According to Article 36(1) of ICJ statute, the Court's jurisdiction includes all cases referred by state parties, usually in the form of special agreement for the specific purpose of submitting the dispute and indicating the subject of the dispute as well as the parties involved.

In authors view despite the fact that country is not a party to the ICJ statute, based on Article 36(1) of the ICJ Statute, Taiwan may accept the ICJ's jurisdiction by concluding treaties or conventions that require that disputes that arises from the agreements to be subject to the ICJ's jurisdiction.

The FCN (Friendship Commerce and Navigation) treaty, meets the requirement of 'treaties and conventions in force' under article 36(1) of the ICJ Statute, may enable Taiwan to resort to the ICJ. The other way of conferring jurisdiction on the ICJ is based on Article 36(2) of the ICJ Statute under which a state may accept the courts compulsory jurisdiction. However, it is unlikely that Taiwan would become a party to the ICJ Statute because of Chinese pressure.

CONCLUSION

As one of the greatest human achievements in the 20th century, the UN has fundamentally reshaped the structure of international relations. It is fair to say that UN membership has become the synonym of statehood. The only way to become a state is to follow the collective recognition procedure and to be admitted to the UN.

To be admitted to the UN, Taiwan first has to get the recommendation of the UN Security Council of which China is a permanent member. According to section 27 of the UN Charter, the Security Council's decision on all substantive matters require the affirmative votes of 9 members. A veto by permanent member would prevent the adoption of a proposal, even if it has received the required number of affirmative votes. Therefore, without the consent of the Chinese government, it is impossible for Taiwan to be admitted to the UN. Further Article 1 of Montevideo Convention is no more enough to grant the status of state though it forms the prime base for essentials of statehood. This is the reason that till today the status of Taiwan has been considered as unsettled.

Even if Taiwan declares its independence, it cannot act as an independent entity until other state recognises it as a separate state and enters into contact with it. No other state would be freely willing to openly recognise Taiwan as an independent state as that would mean that recognising state going against China which is an emerging superpower.

²¹ H. Lauterpacht, *Recognition in International Law*, Cambridge University Press 1947.

²² Ti-Chiang Chen, *the International Law of Recognition*, L.C. Green Ed., New York: Frederick A. Praeger, Inc., 1951).

The best policy to prevent Taiwan's secession is to continue China's peaceful development strategy and keep an active role in the international community.