

Recognition of statehood

- Extracts -

The two competing theories of state recognition: Constitutive and Declarative theories

According to the Constitutive theory of statehood, a state is a subject of international law if, and only if, it is recognized as sovereign by other states. Because of this, new states cannot immediately become part of the international community or be bound by international law, and recognized nations do not have to respect international law in their dealings with them. The most compelling argument against the constitutive theory is that it leads to a relativity of the state as a subject of international law. States are not relative subjects of international law created by other states like international organizations. The idea of one state deciding upon another state's personality in international law is at odds with the fundamental principle of the sovereign equality of states. The Constitutive theory is indeed an expression of an outdated, positivist view of international law as purely consensual system, where legal relations can only arise with the consent of those concerned.

By contrast, according to the Declarative theory, an entity's statehood is independent of its recognition by other states. This is stated in Article 2 of the Montevideo Convention on the Rights and Duties of States (1933). More specifically, the Declarative theory, as stated in Article 1 of the aforementioned Convention, identifies the state as a person in international law if it meets the following criteria: 1) a defined territory, 2) a permanent population, 3) a government and 4) a capacity to enter into relations with other states.

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*Are the Conditions of Statehood Sufficient? An Argument in Favor
of Popular Sovereignty as an Additional Condition of Statehood*

Law, Politics, and the Conception of the State in State Recognition Theory

I. Introduction

The competing theories of state recognition and their failings actively demonstrate that recognition of a state does not have any normative content per se, but rather, that the rules of state recognition, although legal rules, are legal vehicles for political choices. We have the dilemma of concurrently wanting the right cases to result in independent states while prohibiting the wrong ones from becoming so, and so we sail between political choices, using the language of law. The state is

neither truly free to recognize another entity nor entirely bound. Differing cases require different legal criteria and different legal results. This flexibility in state recognition theory though, while depriving the act of any inherent legal meaning, has value in its utility for establishing lawful relationships.

Whenever a state recognizes another, there are two questions that are addressed. The first question is how the nature of statehood is conceived, that is, whether it is purely a bundle of legal rights or whether it contemplates a pre-state, non-legal collectivity. The second question is the degree of discretion that states have in acting on the international plane and the source of the international legal system's legitimacy. Is the international legal system legitimate because states have constructed and consented to it or is it legitimate because it constrains state action?

This paper will argue that the reason we find it difficult to resolve the controversy over state recognition theory is because the international legal system translates political controversies into legal questions that can then be addressed through legal means. Legal actors, by announcing preference for one side of the question, often reveal certain legal and moral choices they are making about the nature of the state and the legitimacy of the international legal system. In the area of state recognition, no theory of recognition has extinguished competition because no political choice has gained universal acceptance. The predominant political choice is most frequently deliberate indeterminacy, a co-existence of mutually opposing arguments. This indeterminacy is most likely deliberate because it permits the underlying rationale for the legal actor's policies to change and evolve to suit the situation.

On June 28, 2006, the newly independent Republic of Montenegro was formally admitted to United Nations membership by vote of the General Assembly. This was followed by a number of states' recognition of the new state, as well as the new state's admission as a member of the Council of Europe on May 11, 2007. The creation of this new state appears rather uncontroversial. The public voted in a referendum for severance of its federation with Serbia, which was already tenuous at best. The former entity of the Socialist Federal Republic of Yugoslavia ("S.F.R. Yugoslavia") was already in a process of dissolution, and this step was perhaps the final step in this process. There was no larger public debate about theories of state recognition.

The new state of Montenegro, however, should not fool us into thinking that state recognition theory is settled, clear, or internally consistent. The striking case in point is the protracted discussion over the independence of Kosovo, culminating in the government of the autonomous region declaring its own independence less than two years later on February 17, 2008, and the referral of the entire question of the legality of its independence to the International Court of Justice ("I.C.J."). Aside from the formal distinction between Montenegro and Kosovo – that one is a constituent state of the former S.F.R. Yugoslavia and the other is an autonomous region within one of the constituent states – the substantive distinction is less clear. Both were sub-units of the former S.F.R. Yugoslavia with self-proclaimed unique ethnic identities. Both have enjoyed a large degree of autonomy since the dissolution of the S.F.R. Yugoslavia. Despite such substantive similarities, and notwithstanding U.N. Security Council Resolution 1244, there is a significant difference in the recognition each received: the case of Montenegro's recognition is not controversial, while the case of Kosovo is. It may be that the widespread recognition of Kosovo has spurred a "war of

recognitions”, the latest salvo of which is the movement within Russia to recognize the independence of South Ossetia and Abkhazia,¹ a diplomatic attack on Georgia’s territorial integrity.

The debate over statehood is dominated by two well-known competing theories: the declaratory and the constitutive theories. The constitutive theory provides that a state is only a state upon the political act of recognition by other states. The declaratory theory, on the other hand, opines that recognition is merely acknowledgement of the existing statehood status, and that the act of recognition does not confer status. Rather, statehood is acquired by satisfaction of objective criteria. Although many authors state that one or the other theory is confirmed by practice, the record does not bear this statement out; neither of these two theories satisfactorily describes the state of the law on the matter. Furthermore, on examination, the two theories can be broken down into aspects that inherently contradict each other or dissolve into each other. The theories in essence present two fundamentally different and irreconcilable views of international law. Because they describe the status of a state, the most significant legal actor in international law, the tensions between the two perspectives result in crucial differences in the creation, acquisition, and realization of rights and obligations under international law, not merely in the interpretation and settlement of rights. While the scholar or judge may consider one theory more legally correct than the other, the more important observation is seeing the choices that are being made regarding the nature of the state and the legitimacy of the international legal system in expressing support of and adherence to either of the two classic theories.

A. Declaratory Theory and its Criticisms

The declaratory theory looks to the purported state’s assertion of its sovereignty within the territory it exclusively controls to determine if it can access the international plane. Recognition should be automatic based on specified criteria because the status of statehood is based on fact, not on individual state discretion. The majority of contemporary scholars and commentators favor this theory.

However, there are criticisms of this theory. State practice may not support it. States also do not acquire international rights on the international plane until they are recognized. The fact that recognition vests recognized states with rights changes the expectations on the state and may encourage choices that are more conducive to peace. In addition, the declaratory theory may undermine the principle that international law is the law made by states. Even if the theory were not, in itself, objectionable on this ground and was followed unanimously by states, other difficulties with the theory include the selection of the criteria to apply, the instability and

¹ It is interesting, however, to note that at least twenty-five of the states that recognize Kosovo as a state have refused to recognize South Ossetia. The states recognizing Kosovo, but refusing to recognize South Ossetia, include Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Norway, Poland, Sweden, Turkey, the U.K., and the U.S. Also note that only Russia intends to recognize South Ossetia, yet it refuses to recognize Kosovo. Curiously enough, many of these same states have justified their positions against recognizing South Ossetia because such recognition would undermine Georgian sovereignty, independence and/or territorial integrity, which appear not to be legal constraints on the recognition of Kosovo.

unpredictable nature of competing versions of criteria, the application of those criteria, the hypocrisy in applying different criteria to different states, and the legitimacy of some proposed criteria. These issues may lead one to wonder whether the declaratory theory constrains the discretion of states to an appreciable degree.

B. Constitutive Theory and its Criticisms

The constitutive theory states that recognition is not automatic. Rather, it is based on the discretion of other states. Moreover, only upon recognition by those other states does the new state exist, at least in a legal sense. Some practice in contemporary situations may evidence the application of the constitutive theory rather than the declaratory. Numerous classical scholars have weighed in support of the constitutive theory. Many modern scholars are beginning to reexamine the constitutive theory, considering whether it provides a firmer foundation for the determination of statehood status.

The constitutive theory, however, also has its criticisms. Many states and scholars assert that the declaratory theory, not the constitutive theory, predominates in practice. There is no evidence to suggest that states regard unrecognized states as *terra nullius*. Thus, there must be some international legal personality in the territory concerned that does not lapse or that predates statehood. Regardless of international recognition, a purported state might exercise state authority over its residents without regard to the position of other states, even if the other states do not believe the purported state fulfills the criteria for statehood. From a theoretical point of view, the constitutive theory is not attractive in that it permits states to ignore the facts, i.e. the existence of a state, acting as such and acknowledged as such by the nationals and perhaps neighbors thereof. There is a need for the law to reflect facts, and any other conclusion results in the assignment of recognition to the purely political process rather than a justiciable rights-based process. This objection to the theory is compounded by the constitutive theory's subjective nature and potential inconsistency with other states' determinations, resulting in uncertainties about which entities may be universally regarded as states. Further, on an ethical level, it is questionable whether other, existing states should be the gatekeepers to the international plane. Some have argued that the declaratory theory emerged because of objections to the discretion of states, as well as a principled acknowledgment of the role of self-determination. Larger, more powerful states that are secure in their recognition may use recognition as a tool for their continued domination of other states.

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