MODERN TRENDS AND POLITICAL BACKGROUND IN THEORY OF STATE RECOGNITION

Natalia SEVOSTIANOVA,
First Deputy Minister of Justice of Ukraine,
PhD, Department of International Law and International Relations
National University «Odessa Law Academy»

Summary

This article is devoted to analysis of two notions of International law: secession and recognition of States. Two competing theories of State recognition are studied, namely: «declaratory» theory and «constitutive» theory. These both theories of recognition are analyzed with regard to modern development in international relations and theory of International law. The degree of discretion that States have while granting or withholding recognition to newly emerged States is studied as well as political background of such decisions. Attention is paid to issue of status of newly formed units prior to their recognition by international community.

Key words: recognition of state, secession, declaratory theory, constitutive theory, territorial integrity, statehood.

Аннотация

Эта статья посвящена анализу двух понятий в международном праве: сецессии и признанию государств. Две конкурентные теории признания государств изучены в данной статье: декларативная и конститутивная теории. Обе рассмотрены в этой работе в соответствии с развитием международных отношений и теории международного права. Далее проанализирована степень усмотрения, которую имеют государства при принятии решения предоставить или нет признание государству, а также политическое основание при принятии таких решений. Внимание в статье уделено вопросу статуса сформировавшегося объединения до его признания как государства международным сообществом.

Ключевые слова: признание государств, сецессия, декларативная теория, конститутивная теория, территориальная целостность, государственность.

International relations never exist in a static condition as inter-States communication is highly dynamic. Some events on international political scene or in sphere of international trade could rapidly influence vectors of cooperation between States. Development of States occurs with regard to changes in external policy and internal matters' regulation. Notwithstanding States' constant development, some events in social and political life of a State could cause issue of conflict over its existing territorial borders. Moreover, sometimes those internal and external events could provoke secession processes in a particular State as well as to create conditions for establishment of new State on world map.

Problematic issue. There is a precondition for each emerging State to pass a recognition test and to comply with statehood requirements. In this regard two following question arise: (1) which function States perform while deciding whether or not to grant recognition to community that seceded from a sovereign State? Is there actually any direct obligation on States to immediately grant recognition to a newly emerging State if last complied with statehood elements? To answer these two questions – two notions of International law shall be studied. The first one is secession itself and second one is recognition.

Actuality of research. The issue of statehood could be considered as a core concept in International law. One of main political developments and at same time source of conflicts of last century is emergence of new States. However, the theory of recognition of newly emerged State is not clearly defined. The matter of recognition always causes a lot of discussion in international community and highly depends on factual background in each particular case. Recognition of new State means creation of new participant of international relations as well as changes in economic and political development. That is why this issue is of high importance for world order. Hence, study of theory of recognition of newly emerged State and prior practice on this matter is actual topic due to last development on world map.

Prior studies on this issue. Issues of statehood and recognition of newly emerged State are influenced by developments in modern international relations and sometimes have a political reasoning. These notions have been studied during XX century till the modern times and still haven't reached unique criteria and definition in theory of International law. Theoretical research and characteristics of recognition, statehood and secession could be found in the works of I. Brownlie, H. Lauterpacht, L. Oppenheim, W. Worster and other scholars.

Purpose and task of research. Recognition and secession are closely linked [1, p. 94] with each other and shall be analyzed mutually. The purpose of this paper is to study links between these two categories «recognition» and «secession». The other point of this research is to analyze whether recognition itself serves other functions in modern International law apart its primary one and whether it could be used by States to gain their own goals. Further this paper studies recognition as so-called «the next step' that had to be taken by States since seceded community complied with statehood criteria. Before starting study of secession phenomenon analysis of secession itself shall be done. Particularly, it is necessary to study whether secession could be considered as a lawful method of self-determination that complies with standards of International law.

A declaration that particular community fulfills conditions of statehood as required by international law means recognition of such a community as a State. In this case other States have an obligation to grant a proper recognition to this State. Hence, it is to States that already exist to recognize or not particular community as a State [2, p. 385].

Issue of recognition of new States always raises matter of factual analysis since each case of emergence

of new State is based on particular circumstances that should be carefully studied. Assessment of facts is much easier from a historical distance. Nobody questions today recognition of Spanish colonial empire in Latin America, or independence of Greece from Ottoman rule. At time when these events occurred they were among most controversial political issues. The principle of legitimacy – as understood at that time – had to give way to independence of new states. Therefore, it is necessary to recognize that «facts» and «policy matters» concerning dissolution of states, emergence of new states and recognition of latter contain more than facts per se: they also contained an important contextual dimension and it is necessary to make an effort to understand it as completely as possible [3, p. 66].

Since end of decolonization existing boundaries of States have become a worldwide recognized constanta. It means that any attempt to redraw boundaries could be characterized as a violation of principle of territorial integrity. Nowadays the principle of territorial integrity may be considered as a peremptory norm. Moreover, if there is a case that newly emerged State seceded from territory of other sovereign State and third State will grant recognition to this newly emerged one without consent of State from territory of which secession occurred, it could be considered as a violation of international law [1, p. 94-95].

International law protects States' territorial integrity whereas it prescribes certain limits to such protection. There are two limitations: first one is possibility for Security Council Action according to Chapter VII of UN Charter [4]. The Security Council in order to maintain or restore international peace and security may use forceful measures in territories of States involved in a conflict. The second limit relates to act of State that was taken as a respond to an armed attack. In this case territorial integrity would not be violated if State were acting in self-defense under Article 51 of UN Charter [4].

From the mentioned above limitations there is no direct stipulation that violation of territorial integrity could be justified by exercise of right to self-determination. Whether any community has a lawful right to secede from State since such secession in any case will influence existing borders of later? If the answer is «no' to this question, consequently no recognition may be granted by other State as in opposite case such a recognition will be in violation of International law.

Secession often means instability and threat to security and established world order, this concept remains not clearly defined in International law from two points. The first one is terminological and second one is a procedural regulation since there is no guidance on what shall be done in case of secession. After new State has emerged at some point it will lead to a necessity for such State to enter into inter-States relations and to become a subject of International law. However, to participate in international relations it is necessary for State to be recognized by other subjects of International law. It prominently evidences a close link and interaction between these two concepts «secession» and «recognition».

Phenomenon of recognition itself is not most clearly defined category in International law whereas it is highly important one as it influences international relations and municipal order [5, p. 367]. It is often a case that decision on recognition depends on political reasoning rather than on purely legal background [5, p. 368]. It is urged that recognition is result of a decision taken not in execution of a legal duty, but in pursuance of exigencies of national interest [6, p. 1]. Recognition is a statement by an international legal person as to status in international law of another real or alleged international legal person or of the validity of a particular factual situation. Brownlie writes, «the typical act of recognition has two legal functions. First, the determination of statehood, a question of law: such individual determination may have evidential effect before a tribunal. Secondly, act is a condition of establishment of formal, optional, and bilateral relations, including diplomatic relations» [7, p. 89]. It constitutes participation in international legal process generally and at same time plays important role within context of bilateral relations and domestically [5, p. 368].

There is a variety of options on how an entity may be recognized as. For example, such an entity may be recognized as a full sovereign State, or as effective authority within a specific area or as a subordinate authority to another State [8, p. 23], [9, p. 675]. The existence of informal bilateral relations does not constitute an acknowledgement of recognition. In addition, state practice demonstrates that, with respect to interaction between recognizing states and unrecognized entities, participation in negotiations, establishment of unofficial representation, accession to multilateral treaties, and membership in international organizations do not imply recognition [7, p. 93]. Even though an entity may possess characteristics to qualify for statehood, there is no guarantee that states will officially recognize it. States are not legally obligated to publicly recognize other states. «Recognition is, as practice of most states shows, much more question of policy than of law» [10, p. 149-151]. As a result, an entity with a population, defined territory, government, and capacity to enter into international relations may be recognized as a state by certain members of international community, but not by others.

Two competing theories of state recognition exist. The fist theory is «declaratory» one which is becoming more and more substituted by «constitutive» theory. The constitutive theory was often used in practice during nineteenth century when new states were only recognized following consensus from current members of international community. According to this theory recognition of an entity as a State is not automatic. A State exists only as a State when it is recognized as such. At same time other States have a considerable discretion to recognize such newly proclaimed State or not. And in legal sense only after recognition by those other states does new state exist [11]. The constitutive theory maintains that it is act of recognition by other States that creates a new State and endows it with legal personality and not process by which it actually obtained independence. Hence, new States are established in international community as fully fledged subjects of international law by virtue of will and consent of already existing States [12, p. 17].

According to «constitutive» theory» newly formed entity that is unrecognized by other States may not be considered as a subject to obligations acceptably imposed on States by International law. Consequently, it means that this

unrecognized unit will be free from any restrains that are imposed on States as subjects of International law. Such situation is dangerous due to its uncertainty that could stimulate disorder processes. Moreover, some States may refrain from granting recognition to newly formed entity while others may recognize it. This situation undoubtedly will lead to high level of political disagreements and tensions [5, p. 369]. Scholars supported constitutive theory, and begin to reexamine this theory, considering whether it provides a firmer foundation for determination of statehood status [13, p. 108-109] Critics of constitutive theory argue that it is relatively discretionary, because «a new state will «exist' as to those states which recognize it, while not existing as to those states which do not» [14, p. 266].

There are two elements of recognition theory: the first element is whether new state exists before recognition by other states; and second element is degree of discretion that states have to grant or withhold recognition. Lauterpacht observed two elements when he stated: «The constitutive theory culminates in two assertions: first is that, prior to recognition, community in question possesses neither rights nor obligations which international law associates with full statehood; second is that recognition is a matter of absolute political discretion as distinguished from a legal duty owed to community concerned» [15, p. 25].

This separation is significant because two aspects of theories, although often matched in their classic constitutive/ declaratory arrangement, are sometimes mixed. Different authors do not necessarily follow classic models. Lauterpacht himself embraced constitutive theory in sense that new State did not exist until recognized, but he also insisted on declaratory theory in sense that existing States did not have discretion to refuse to recognize a new State. The classification into constitutive and declaratory theories not always becomes reasonable as it is necessary to analyze firstly how very status of statehood is conceived in different ways, and, second, how role of State discretion and consent in forming legitimate international law is also differently conceived [16, p. 115-171].

The second theory of recognition is declaratory one. This theory better replies to realities [17, p. 88]. According to this theory newly emerged State becomes a subject of International law not upon consent of other States but rather due to factual circumstances. Declaratory theory adheres to supremacy of State [5, p. 369].

In reality the situation of recognition reaches middle of these two theories. Looking at practical application of these theories of recognition in its two cases Permanent Court of International Justice, predecessor to International Court of Justice, applied constitutive theory. The first case is Lighthouses case, where effectiveness was disregarded for fiction of continued sovereignty of Turkish Sultan [18], and Rights of Nationals of United States of America in Morocco case, regarding continued sovereignty of Morocco although under French Protectorate [19].

Also the International Criminal Tribunal for former Yugoslavia, the International Court of Justice's neighbor in Hague is also supportive of constitutive theory. In the Čelebići case, I.C.T.Y. held that conflict within former Yugoslavia was only of an international nature after international recognition of independent statehood of Croatia and Bosnia and Herzegovina [20]. In the Tadić case also at I.C.T.Y., Judge Li, in a separate opinion, criticized majority for applying constitutive theory. Judge Li argued that conflict should have been seen as international from moment of Slovenia's and Croatia's declarations of independence, not because of recognition by others [21].

Nowadays recognition has gained political background. If the particular State does not recognize other one, later is rarely contend that such unrecognized entity is devoid of powers and obligations before international law and exists in a legal vacuum [5, p. 370]. During last few decades recognition of newly emerged States has changed its primary goal for which it was created. Nowadays non-recognition is more widely used by the States as a method to show their disapproval of particular territorial changes [1, p. 94-95]. Non-recognition also serves now as an instrument that shows geopolitical strategies of States. However, it is important to mention, that if State was not recognized by other States it would not seem in law as evidence against statehood itself [5, p. 371]. Non-recognition of State does not mean that such State has no responsibility under International law, especially if such recognition was not granted due to political reasons [5, p. 370].

There are situations where existence of emerged States was blocked by other, more powerful States. Also there cases when States, that had no more factual qualification as such, were maintained as essentially legal fictions by international community. This suggests that recognition both constitutes and maintains legal personality of other States whose reality would suggest that they no longer existed [22, p. 78]. In any case, legal issues arising from dissolution of states, emergence of new states and recognition of latter require a thorough understanding of relevant facts. It is necessary to emphasize importance of circumstantial dimensions of issues, given that views on pertinent facts usually diverge, at least during policy making stage [3, p. 66].

Self-determination sometimes considered as a reason for secession movement. However, the question arises: whether law on self-determination prescribes any rules or guidelines on legitimacy of secession itself. The right to self-determination is a fundamental principle of International law [23, p. 380] and is incorporated in Article 1 (2) UN Charter [4]. Authoritative interpretation of that principle has been given in Friendly Relations Declaration, [24] annexed to General Assembly Resolution 2625. Namely, this declaration stipulates that «all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has duty to respect this right in accordance with provisions of Charter» [24]. However, it is widely accepted and interpreted in such a way that right to self-determination may not be used to violate the territorial integrity of the State. The Friendly Relations Declaration further prescribes that principle of self-determination may not be «construed as authorizing or encouraging any action which would dismember or impair, totally or in part, territorial integrity or political unity

of sovereign and independent States» as long as States respect principle of equal rights and self-determination in relation to minority groups [24]. Hence, the right of self-determination may be exercised within an existing State by granting autonomy within that State, but it does not proclaim or encourage complete secession from that State. From this analysis right to self-determination seems to be limited to its realization within internal borders of State in different forms of autonomy.

Turning back to earlier examples of secession as a means of new State's emergence, legitimacy of secession was authorized only when right to self-determination was exercised for purpose of decolonization [25, p. 332]. In any other circumstances it is highly questionable whether to right to self-determination can legitimately lead to a right to secession. According to concept of «remedial secession» a «people» may resort to external self-determination under extreme circumstances, especially when state renders an internal self-determination impossible through discriminatory politics [26, p. 42].

Weighting everything up, nowadays recognition of a State as a new participant of international relations and subject of International law refers to dialogue between existing States. A decision of a particular State to recognize or refuse recognition to emerged State is based on political reasonability and geopolitical goals. However, modern States and existing IGOs adhered to achievements of International law and have a good understanding of its role in granting stability and peace in each region of world. That is why refusal to grant recognition to a new State without any adequate reason could be considered as a manipulation of existing doctrine of recognition which could question existing international order. Consequently, when issues of recognition arises balancing of interest and wide long lasting discussion will have place. It serves for State as an instrument to balance their political own goals and legal reasoning as well as to guaranty compliance with International law and stability in international relations. While decision of a particular State to grant or withhold recognition to another state is influenced by political issues, there is a set of rules and established practice in International law in this sphere. These «standards of recognition» form a mechanism and precondition for elimination of controversies when issue of recognition of newly emerged State arises. It grants and maintains stability for international community as well as adherence to International law.

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