

QUESTION NO 02

POLITIVE AND NATURAL SCHOOL OF THOUGHT AND ITS RELATION WITH INTERNATIONAL LAW

~~INTRODUCTION~~

INTRODUCTION

Various jurists tried to explained the bases of International law. In this regard, two major school of thoughts evolved who tried to explain the bases of International law, the positivist and Naturalist school of thought. The naturalist school of thought argue that morality is the bases of law. On the other hand, the positivist school of thought argues that consent is not the morality is the bases of law. In other words, state willingness provides the bases of International law. Hence positivist school of thought tries to synthesise both school of thought by considering naturalist school of thought as a separate source of International law. In modern times, both school of thought have their own implications.

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NATURALIST SCHOOL OF THOUGHT

- 1- Naturalists considered divine law as a natural law.
- 2- Divine law or natural law was considered as supreme law according to naturalists.
- 3- The jurists of 18th century modernized this concept, and according to them, all those principles which are accepted as moral values were considered as supreme law.
- 4- So morality became the basis of international law according to naturalists.
- 5- All the actions which have moral acceptability were considered as justified as per naturalist school of thought.

CRITICISM

Lack of consensus among proponents of positivist school of thought is major drawback of this school of thought. There are differential views of naturalists on questions like moral values and defining attributes of morality.

POSITIVIST SCHOOL OF THOUGHT

1- positivist school of thought considers state consent as defining base of International Law.

2- Consent not the morality is base of International Law.

3- Only those laws are binding which are consented by the states

4- According to positivist, law is followed due to *Pacta sunt servanda* (Moral obligations to follow and fulfill the promises).

CRITICISM

Article 2(6) of UN Charter says that states which are non-signatory shall follow international law for security and international peace. Thus these states must have to follow international law even without their consent. Thus Article 2(6) UN Charter contradicts with with principle of consent. Likewise, *pacta sunt servanda* is also based on morality, leading to criticism by naturalists over positivists

RELATION OF THESE SCHOOL OF THOUGHTS WITH INTERNATIONAL LAW

Both school of thoughts
have implication in modern international
law as:

(a) NATURALISTS

Morality is one
of major factors leading to
implementation of international law.
The following of non customary
international law depends upon
sweet will of states i.e.
moral values.

b) POSITIVIST

Positivism and
consent of state is key
factor in international law. All
the law making treaties
as well as treaty contracts
requires consent of the states
to become binding in nature.

QUESTION NO 06

SOURCES OF INTERNATIONAL LAW ACCORDING TO ARTICLE 38 (1) OF STATUTES OF ICT

According to Article 38 (1) of statutes of ICT, following are the sources of international law

- 1 → Treaties
- 2 → Customs
- 3 → Principles of law followed in civilized nations
- 4 → Decisions of Arbitral and judicial tribunals
- 5 → Opinions of jurists

TREATIES

According to Vienna convention of treaties, treaty is an agreement by which states enter establish or try to establish relationship between them. A treaty can be;

1- LAW MAKING TREATY

* Law making treaties play the same role in international law as the legislations in domestic laws.

* UN charter is example of law making treaties.

1- TREATY CONTRACTS

1. Treaty contracts are entered upon by two or more countries by bilateral consents.

2- Treaty contracts are binding in nature unless their non binding status is specified in treaty.

C- Customs

1- Customs are practices of states for a period of time.

2- Long duration is not necessary for a custom to become a law.

3- Generality of practices is not required.

4- Customs are binding in nature.

5- Customs differs usage in a sense that usages are non binding in nature.

PRINCIPLES OF LAW IN CIVILISED NATIONS

Principles established by laws of civilized nations also provide a source of International Law. Examples are Res judicata and Estoppel.

2- DECISIONS OF JUDICIAL AND ARBITRAL TRIBUNALS

i) DECISIONS OF JUDICIAL TRIBUNAL AS SOURCE OF INTERNATIONAL LAW

1- Judicial ~~of~~ tribunals decisions are major sources to define International law

2- Name of Forum is International Court of Justice (ICJ)

3- Decisions of ICJ are binding in nature and hence are sources of International law.

4- ICJ strictly follows the law.

5- It is not ~~in~~ necessary for ICJ to follow doctrine of precedent.

6- It parties agree before the decisions of ICJ, they can settle their dispute by themselves (Ex- aequo et bono)

7- Parties must refer their case to ICJ for decision

ii) DECISIONS OF ARBITRAL TRIBUNALS AS SOURCE OF INTERNATIONAL LAW

1- Decisions of Arbitral Tribunal are other source of International law.

2- Name of forum is permanent

Court of Justice.

3. Judge is called Arbitrator.

4. Arbitrator is appointed by consent of both parties.

5. Decision of Arbitrator is called Award.

6. Award is binding upon the parties.

7. Arbitrator may offer political solutions apart from law, i.e. it is not necessary for arbitrator to follow the law.

5- JURISTIC WORK

It is another important source of International Law. Jurist opinion is considered as a source of International Law.

JUS COGENS

Jus Cogens represents the set of laws which are superior and above any law. No law can ~~act above~~ be made so even laws in practice are declared null and void if they are conflicting with Jus Cogen. Thus Jus Cogen act as independent source of law. Human rights and slavery abolishing laws

Date: _____

9

are examples of jus cogens

UNILATERAL DECLARATIONS OF TREATY

According to Vienna convention of treaty, treaty is an agreement which involves consent of states, hence unilateral declaration of treaty is not a source of law due to lack of consent of other states involved. UN charter is an exception by virtue of Article 2(6).

QUESTION NO 03

ROLE OF RECOGNITION IN THE COMMENCEMENT OF LEGAL EXISTENCE

INTRODUCTION

Recognition is a concept in international law associated with legal existence and status of a state. Rights and duties of a state are associated with recognition. Whether recognition is essential for legal existence and rights of a state gets its rights and obligations without recognition is debated by two schools

of thoughts in international law. The debate led to two theories about recognition.

COMMENCEMENT OF LEGAL EXISTENCE OF STATE IN LIGHT OF CONSTITUTIVE THEORY

This theory argues that legal existence of state is associated with recognition.

(i) LEGAL EXISTENCE AFTER RECOGNITION

This theory argues that state commences to exist once they ~~are~~ are recognized by the states who consider that they possess the elements of statehood.

(ii) GRANT OF RECOGNITION IS COMPULSORY IF STATES FULFIL ELEMENTS OF STATEHOOD

This theory argues that states are bound to recognize the state which fulfill the elements of statehood. It is legal duty of a state to recognize state fulfilling the elements of statehood.

Date: _____

(11)

DECLARATIVE THEORY AND COMMENCEMENT OF LEGAL EXISTANCE OF A STATE

According to declarative theory, a state gets its legal existence once it fulfills the elements of statehood and recognition is not a pre-requisite for legal existence of a state.

(i) STATES GET LEGAL EXISTANCE BY FULLFILLING ELEMENTS OF STATEHOOD

According to this theory, states commence to exist legally once they fulfill the attributes of statehood.

(ii) RECOGNITION AS MERE DECLARATION

According to this school of thought recognition of state is mere declaration that it possess the attributes of statehood.

(iii) RECOGNITION DEPENDS UPON SWEET WILL OF A STATE

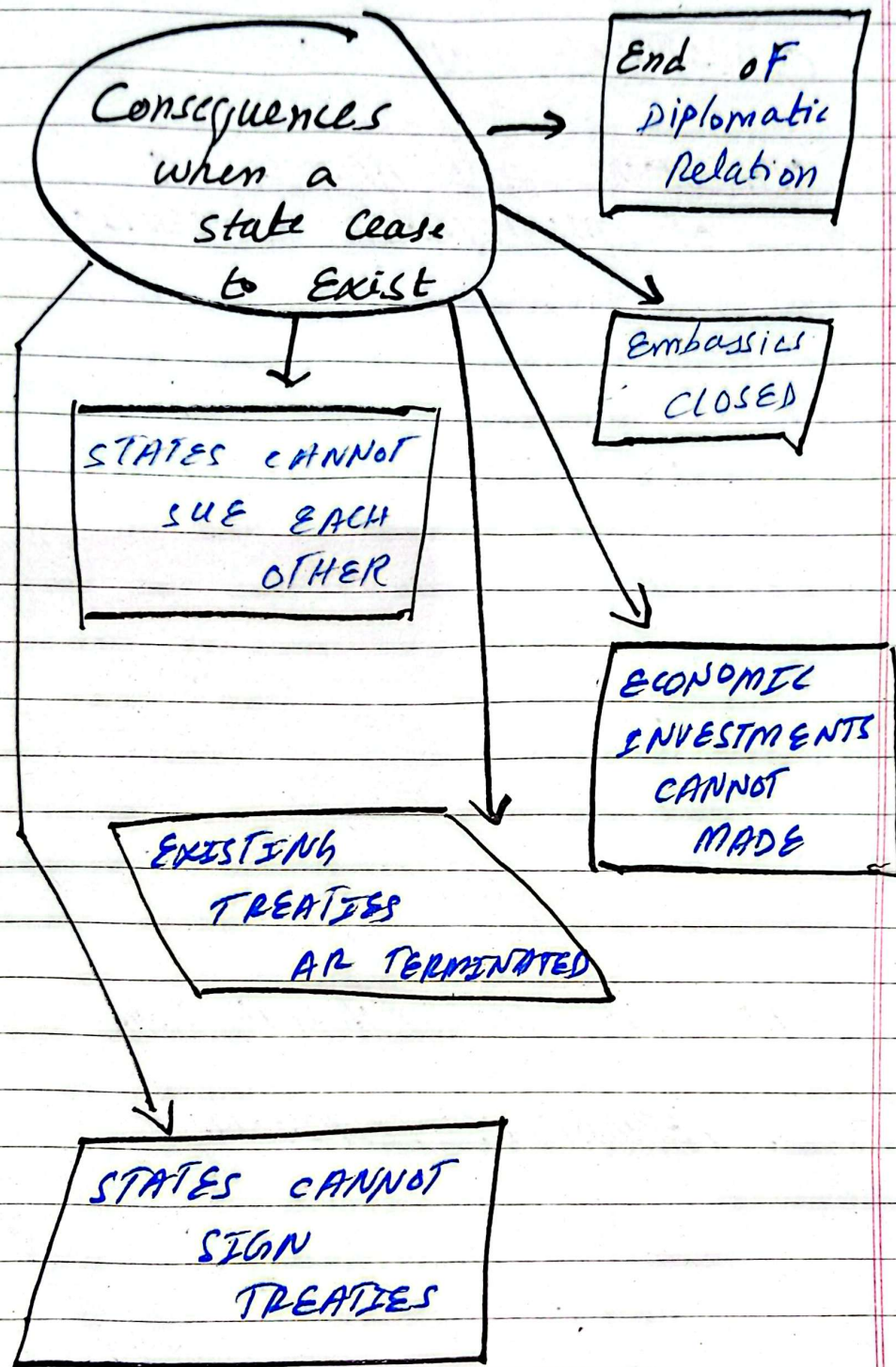
According to declaratory theory, recognition is dependent on sweet will of a state.

EXAMPLE FACTOR:**NON-RECOGNITION OF
PEOPLE REPUBLIC OF
CHINA AND COMMENCEMENT
OF ITS LEGAL EXISTANCE**

When communist revolution overthrew the Chinese government, it created a government in exile and China was run by people republic of China. People Republic of China was not given recognition until the late 1970s. But it had legal existence and it carried out its rights and duties at international level. This is an example of implication of declaratory theory of recognition.

**CONSEQUENCE ARISE WHEN A
STATE CEASE TO ~~BE~~ EXIST**

When a state cease to exist, the consequence which arise are termination of bilateral trade between the state. Any sort of **treaties** that existed between two state come to an end. Diplomatic relations and economic investments are ended.



QUESTION NO 04

STATEHOOD AND ARTICLE 1 OF MONTEVEDIO CONVENTION

According to Article 1 of Montevideo convention, there are 4 four major elements of statehood

1- Permanent territory

2- Permanent Population

3- Government

4 Ability to enter in diplomatic relations with other states.

Only an ^{entity} ~~state~~ can be act as a state if it has four above attributes of statehood

ANALYSIS IN MODERN TIME

1- PERMANENT TERRITORY

Permanent territory in modern times a prerequisite for state, without it a state cannot be established

EXAMPLE FACTOR:

INSURGENT CANNOT BE
CALLED A STATE

For example
insurgent cannot be called as

Date: _____

(15)

state because they don't
control a permanent territory

2- TRIBES IN AFRICA

Likewise tribes existing
in Africa cannot be considered
as state because they do not
have permanent territory.

3- PERMANENT POPULATION

Similarly, permanent
population is also important without
it a state cannot be
called as a state.

EXAMPLE FACTORS

1- ORGANIZATION CANNOT BE CALLED AS STATES

Similarly,
the organizations like UN and
SCO cannot be called as
a state because they lack
the permanent population.

2- NO STATES IN SPACE

Likewise,
there are no states in space
due to this attribute.

3- GOVERNMENT

Similarly, government is also another important factor without which a state cannot exist.

4- ABILITY TO ENTER IN RELATION ~~CASES~~ WITH OTHER STATES

Similarly, the ability to enter in relations with other tribes is another important attribute without which an entity cannot be considered as state.

EXAMPLES: INSURGENTS AND LOCAL TRIBES

Insurgent and local tribes cannot be considered as state because they don't have ability to enter in relations with other state.

CONCLUSION

In a nutshell, all the attributes provided by Article 1 of Montevideo convention are still valid in modern times and an entity cannot be called as a state even in absence of a single attribute defined in Montevideo convention.