Book Review


Drop the word theory in a classroom filled with law students and what results is probably an eerie and deafening silence. Theory stands for difficult, inaccessible and often incomprehensible vagueness. As the nominal opposite of practice, theory is usually deemed to be of little immediate relevance, or any relevance at all.

This is, of course, seriously mistaken. While it is true that few things in life can be so painful as having to read bad theory, it is also true, as Kant already knew, that there is nothing so practical as good theory. In particular lawyers with academic ambitions would do well to overcome their fear of theory: even if they are reluctant (understandably perhaps) to adopt any particular theoretical perspective lock, stock and barrel, still an awareness of the various theories that exist might help improve the quality of their work.

Had David Rač’s study on the role of self-determination in the contemporary law on statehood been presented two or three decades ago, it would undoubtedly have been heralded as a most erudite and thoughtful contribution to legal scholarship. In fact, it ought still to be so heralded, for there is much of value in the almost 500 pages of this near-monumental work. Yet, its considerable merits notwithstanding (these will be discussed below), on the whole Rač’s work fails to convince, and this finds its cause most likely in the author’s reluctance to engage with theory.

As it is, Rač’s study demonstrates, by default, just how useful an awareness of the grander theories could have been. Had he been aware of MacCormick and Weinberger’s institutional theory of law, he would most likely have refrained from relying too much on simple distinctions between fact and law. Had he been aware of the so-called Kantian theory (which, admittedly, is neither very Kantian nor very theoretical), he would most likely have had a greater sensitivity to some of the potential political fall-out of his approach. And had he been conversant with critical legal studies, he would have realized that some of his argument on recognition in particular would have been incoherent. Most of all, as international legal theory (regardless of which school one looks at) is almost by definition concerned with the relationship between law and politics, a greater theoretical awareness would probably have rendered him less keen on trying to take the politics out of politics.

Most international lawyers, if pressed, would presumably gladly acknowledge that in their ideal world, law would be liberated from political concerns and considerations. Might would no longer make right; instead, law would be autonomous, or at least enjoying a relative autonomy.
Raič takes this approach to extremes, in that he aims to carve out a niche for the law, isolated from politics, concerning not just one but two topics, and two of the more heavily politicized ones at that.¹ Raič, in what is a heroic effort, aims to achieve a double whammy: he aspires to come up with a legal theory of statehood, which includes a legal approach to recognition (free from politics) as well as a legal approach to self-determination (free from politics).

Raič’s main thesis goes as follows. Traditionally, statehood would come about based purely on considerations of effectiveness. If an entity would consist of a population, a territory, and an effective government, it would be a State, both empirically and legally. Recognition, in this scheme, would play merely a declaratory role: it would turn statehood into legal personality.² This, however, so the thesis continues, is no longer absolutely true: in recent times, the law on statehood has become supplemented by the law on self-determination. In some cases where effectiveness was found wanting, the lack of effectiveness has been compensated for by a reliance on the right of external self-determination, and more generally, an entity aspiring to statehood nowadays must meet not just the traditional criteria of effectiveness, but also the modern criteria of legality. This holds good in some settings of decolonization, but is also visible in other situations such as in particular the situations of Bangladesh and Croatia.

Raič has produced a bold and interesting thesis, which at least in broad outline, seems intuitively plausible. Clearly, it might be conceded, traditional reliance on effectiveness cannot explain all situations; equally clearly, it would seem that in some cases external self-determination can be identified as having an influence on recognition policies and, moreover, Raič’s construction has the distinct advantage of getting rid of the ever-problematic categories of de jure and de facto recognition: in his approach, there quite simply is no room for de facto recognition. Still, in the move from the intuitive plausibility of a seemingly appealing hypothesis to its demonstration, a few fundamental issues present themselves.

Quite central to the way Raič elaborates his thesis is his reliance on the declaratory theory of recognition (after all, the constitutive theory bows more overtly to the demands of politics), yet his attempt to establish it as the only sound theory on recognition is less than fully convincing. This is so for a number of reasons.

One is, that somehow Raič’s strongest argument in favour of the declaratory theory appears to be the circumstance that its counterpart, the constitutive theory, is fraught with problems. Raič identifies many of these problems, and does so convincingly, but still: dismissal of theory A does not imply that therefore theory B must be correct.

Second, he misses the point that still each State has to decide for itself whether or not to recognize an entity as a fellow-State, which might mean that the theories collapse into each other: recognition by A may not constitute B objectively, but it

¹ Admittedly, he never does so explicitly; what follows is my interpretation of what he set out to do.

² Much of the first part of the book (on statehood) is occupied by a discussion of recognition, and understandably so perhaps: recognition is by far the most volatile element of traditional conceptions of statehood, far more so than territory or population.