

The Implementation of Sovereignty Theory on the Interest of Malaysia in the History of Spratly Island's Disputes

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Abstract

The Spratly Islands become dispute objects by several countries including Malaysia, China, Taiwan, Vietnam, Philippines, Brunei, Indonesia, United States, Japan, and Russia. The problem is how the role of sovereignty may affect the provisions of international law and United Nations Convention on The Law of the Sea 1982 (UNCLOS 1982). Research shows that in the Spratly Islands dispute, the expanded way that is often used is occupation. Occupation shows a mastery of a territory that is not under the sovereignty of any country, which could be a newly discovered terra nullius. Possession shall be made by the state, effectively and should fulfil the requirement to make the area as part of national sovereignty. Some of the findings have to be equipped with the juridical means to effectively control for a long time. However, it has not been found in United Nations Convention on The Law of the Sea 1982 (UNCLOS 1982) or how long a period of time that is required to meet the occupation requirements. Thus, the sovereignty is one of barriers to uphold international law. Therefore, a political solution is one of the effective methods of resolving international disputes, because there will eventually give rise numbers of international covenant, which will bind the parties.

Keywords: Sovereignty, Malaysia, Spratly Islands, Disputes

1. Introduction

At the present, South China Sea dispute is still a major problem in Southeast Asia. South China Sea is an area worth of economic, political and strategic. This area is a very important either because of geographical potential as business ships, oil and gas tankers routing as well as potential sources of natural gas and oil, so that the South China Sea is surrounded either by potential disputes or potential cooperations (Coker, 1996).

One of the regions as the object of the dispute in the South China Sea are the Spratly Islands. For decades, Malaysia, China, Taiwan, Vietnam, Philippines, Brunei and Indonesia have involved a dispute over the Spratly Islands. Besides these countries, there are other countries outside of the South China Sea get involved into the disputes, which are the United States, Japan and Russia (Coker, 1996).

Spratly Islands dispute is not just limited to the issues of sovereign over ownership of the islands, but also mixed with the problem of sovereign rights over the continental shelf and the EEZ, not only political but also legal issues including international maritime law, including the problem of the use of new technology to the seabed exploration. Therefore, in answering some of these problems, we should probably look for either background, the history of the Spratly Islands, laws or theories those are related to national sovereignty, territorial waters, as well as other theories relating to Spratly Islands dispute. One theory that may be used in responding to and be supportive in resolving problems arising in Spratly Islands is the theory of the sovereignty.

2. Research Method

This research is used the method of doctrinal approach (Yakin, 1992). Doctrinal research is conducted through literature review, the review of library materials. At least, that is included in the doctrinal approach is legal history, comparative law and legal philosophy, in other words, look at the legal provisions of the doctrinal aspects (Zahraa, 1998; Yakin, 1992). According to Mahdi Zahraa, legal research is the study of a new, rigorous, systematic, and investigative research to the facts of data or theoretical concepts of the principles and rules of specific legal issues to the goal of making the discovery, revision and improvement of concepts, theories, principles and the concerned application (Zahraa, 1998).

3. Sovereignty Theory

International law is the law that governs the interaction between sovereign nations (International Public Law) and the rights and obligations of sovereign states against citizens of other sovereign nations (Private International Law). Since there is no body of international law making, it was built progressively through international agreements, charters, compromises, conventions, memoranda, protocols, treaties and tribunals.

International law can not be separated from the state. The convention sets out the definition, rights and duties of statehood. Most well-known is article 1 Montevideo Convention 1933, which sets out the four criteria for statehood that have sometimes been recognized as an accurate statement of customary international law: The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. On the other

hand, a state or nation can only function based on sovereignty, which is internally created in the form of supremacy of government institutions and externally in the form of national supremacy as a subject of international law (Shaw, 1991). Thus, the basic concept of the occurrence of a nation's sovereignty as the supreme power is limited by the country's territory, so the state has the highest power in the regional border (Oppenheim, 1955). According to Oppenheim, without the region with specific boundaries, a state can not be considered as a subject of international law (Oppenheim, 1955). In this context, the definition of state or nation can not be separated from the basic concept of the nation as a geographical unity with its own sovereignty and jurisdiction. Thus, the territory of the state is the most fundamental concept in international law, to show the supreme authority in the state and the exclusive regional boundaries.

The important role of the national territory in international law can be proved in the sovereignty of territorial integrity, which is established in various international instruments. For example is in the form of prohibition to intervene on the internal problems of another state. However, this territorial sovereignty is still a key concept in international law and has spawned numerous provisions of national territory. In international law, the acquisition and loss of national territory will create an impact on the states's sovereignty over the territory. Therefore, international law does not only fix the acquisition or loss of the state's territory, but more important is the impact of the law on the sovereignty of the state and the people in the area. Establishment of a state is inseparable from the concept of sovereignty inherent in the state. Sovereignty is an important element in a state; the state is an organization of power, which is a tool to achieve a common goal.

Sovereignty is an integral part of the elements of the state, and some even argue that the provisions of the sovereignty may have been around for a while before the concept of the nation itself (Isywara, 1964). Sovereignty can be as one of the basic principles of international law; sovereignty has also been defined as the right to exercise the functions of the territory to the exclusion of other states (Katter, 2003).

According J.J. Rousseau, the concept of sovereignty is citizenship and based on the wishes of the people in the form of public laws. Therefore, according to him, the concept of sovereignty has four attributes, namely (D'Entrevés, 1967):

- a. Unity;
- b. Indivisibilité;
- c. Inalienabilité;
- d. imprescriptibilité.

Unity means spirit and the will of the public, which is a union between the right to govern and the right to object rule. People is united, then the state is also united in itself. The concept of sovereignty is also united and can not be divided (indivisible). If a King has sovereignty, then he is the only holder of the highest authority in the state, if the (public) people have sovereignty, then the people are only supreme authority. Thus, the rule can not be delivered or given to other parties (inalienable). Sovereignty belongs to every nation as a union of nature hereditary. So, the rule can not be changing (imprescriptible) (D'Entrevés, 1967).

Rousseau said that sovereignty is in the hands of the people and will remain in the hands of the people. That means, the sovereignty is absolute, timeless, must be singular and indivisible. The sovereign has power to make laws and the law is the command of the sovereign, which was in the hands of the king at his time.

In some clarification on national sovereignty in international law, it can be concluded that national sovereignty can be one that prevents enforcement of the provisions of international law, including international law of the sea. However, a state has sovereignty only in its territory, whereas it out of its territory, it will be on the sovereignty of other countries.

Referring to the above theories, the sovereignty of nations also appears in the Spratly Islands dispute, so that the countries in dispute are difficult to resolve the dispute through diplomatic ways, which is through negotiation, mediation, conciliation and others. So at the end, the disputes will be settled by international court, which would require a long time.

The sovereignty is self-esteem of a nation; when the sovereignty of a nation is distracted by another country, then that country is usually defend its sovereignty in earnest even through the war though. Moreover, sovereign nation has the right to expand its territory, whether land or sea area but not in conflict with international law. From the practice, there are several ways for a country to be able to expand its territory; through occupation, annexation, accretion, prescription, cession and plebiscite (Mrosovsky, 2008; Katter, 2003). Further explanation can be described as follows:

4. Territorial Possession Ways According to International Law

a. Occupation

Occupation (Katter, 2003; Lohmeyer, 2008) shows a mastery of a territory that is not under the sovereignty of any country, which could be a newly discovered terra nullius. Possession shall be made by the state and not by one person, effectively and should fulfil the requirement to make the area as part of national sovereignty. It should be shown by a symbolic act that shows a mastery of the area, for example, by setting out flags or through

a proclamation. Discovery alone is not strong enough to show the country's sovereignty, as this is considered only as an information effect. Some of the findings have to be equipped with the juridical means to effectively control for a long time. However, it has not been found in international law of the sea or how long a period of time that is required to meet the occupation requirements.

Occupational problems are very difficult to prove that a country has done an occupation on the island, as a sovereign nation in implementing at least should set out the flag, build the lighthouse and implement the provisions of its nation on the island. State sovereignty over its territory is located on either facts or legal situation, so that an area can be considered to be under the sovereignty of a particular country (Kusumaatmadja, 2003). Thus, in a dispute between the two countries relating to the ownership of a territory, the arguments that will be used as consideration by the Court is the law of one of the parties, which is considered the most powerful. For example, in the dispute of ownership of Pulau Sipadan and Pulau Ligitan between Indonesia and Malaysia, as both parties have not considered the legal arguments are strong, the Court must find another principle that considered having a sovereignty, that the occupation is effectively with evidence of implementation ([http://www.icj-cij.org/docket/files/102/10570 .pdf](http://www.icj-cij.org/docket/files/102/10570.pdf)).

b. *Annexation*

Annexation or conquest is a way of ownership of a territory by force or war. However, the war must end first to be described as an invasion has occurred (Katter, 2003). This can be done in three ways, namely through conquest, through the cessation of hostilities, when the dispute parties refrain themselves from acts of war and live together safely and should make a fair deal (Lohmeyer, 2008).

At this time, this way is prohibited to be used by international law. But the conquest can be done only for the purpose of decolonization or free themselves from colonial rule. Colonized countries or colonies can use a weapon to get its independence when the occupying country refuses to grant independence. This action is also referred to as a war of liberation (Lohmeyer, 2008).

c. *Accretion*

Accretion is a way to acquire a new territory through the natural process (geographical process). This principle does not cause many problems on the ownership of a country's territory. Through this process, a newly land or territory is formed and become part of previous territory. For example, the formation of islands at the mouth of the lake or the reversal of a lake that causes soil to be dry, which is passed by water before. For example, this can be seen in a new volcanic island, which appeared in Japanese territorial waters of Iwo Jima. The island is further considered as Japanese territory (Malcom N, 2003).

d. *Prescription*

Prescription is the possession of a territory by a nation that has been sitting for a long period of time and with the knowledge of their owners. Prescription is different from occupation. The occupation does not need a long possession to recognize rights over the area, while the prescription requires a long time to be able to set a new state (Lohmeyer, 2008;).

Prescription in international law, can be defined as the acquisition of sovereignty over the territory continuously and no interruption of sovereignty over it. This is in accordance with international law. Therefore prescription in international law having the same rational basis as a prescription. As to the time required to develop a prescription usually depends on the facts.

e. *Cession*

Cession is the transfer of territory in the peaceful time, from a country to another, and last in a peace treaty after the war is ended (Ketter, 2003). The transfer is usually done in the form of diversion agreement from the colony to the sovereignty of indigenous representation. One important principle in cession is that the submitted right of removal shall not exceed the rights possessed by the owner. Cession can also occur in other forms, such as the purchase of Alaska by the United States from Russia in 1867 or Australia get right to the number of external territories through the submission of England. Cession can also take place through barter or giving territory without compensation (S. Bartole, Veronika Bilkova and Anne Peters, 2014; Ketter, 2003).

f. *Plebiscite*

Plebiscite is the transfer of a region through people's choice, followed by a general election, referendum, or other means chosen by the people. Indonesia to acquire and ultimately losing East Timor in this way.

From above various principles of country's territorial expansion, relevant to the Spratly Islands dispute, the legal aspects of the dispute can be involved under the principles of international law and the international law of the sea. Principles such as occupation, annexation, accretion, prescription, cession and plebiscite also occur in the Spratly Islands dispute. While such disputes might not be resolved only on the basis of legal principles, but will at least give some thought in view of Spratly Islands dispute. Of the six territorial possessions, occupation is dominant in the Spratly Islands dispute (Hurwitt, 1993).

However, to see a legitimate claim or not to be claimed by a country is very difficult. There are two difficult things in claiming an island based on principles of international law. First, the effective occupation and control of an island or more does not mean to claim the whole archipelago under the principles of international law

(Hurwitt, 1993). In addition, only regarded as *res nullius* (Djalal, 1999) territory, which is subject to be occupied, the islands that have been claimed by another country, can not be claimed in accordance with the principles of international law (Hurwitt, 1993).

5. Territorial Sovereignty at Sea Region

Some countries that are in dispute in the Spratly Islands leverage to claim sovereignty over the islands in the Spratly Islands. Some countries also use the provisions in UNCLOS 1982. There are several sovereignty of state provided in UNCLOS 1982, namely:

- a. Being under the full sovereignty of internal waters or archipilegic waters, territorial waters and straits used for international navigation (Article 2 and Article 34 UNCLOS 1982);
- b. The state has a special and limited sovereign of the contiguous zone (Article 33 UNCLOS 1982);
- c. State has exclusive sovereignty to exploit its natural resources in the exclusive economic zone and the continental shelf (Article 55-83 UNCLOS 1982);
- d. The sovereignty under a special procedure, that is an international seabed region in the ocean (Article 76 UNCLOS 1982);
- e. The regions that are not under the sovereign of any country, namely the high seas (Article 87, 88 and 95 UNCLOS 1982).

Provisions of the sovereignty and jurisdiction of the sea as a whole began to be done by the four conventions of Geneva 1958, which is provided for the territorial waters and contiguous zone, fishing and conservation of biological resources in the high seas and the continental shelf. Until around 1970, these four conventions are still considered sufficient to regulate all human activities at sea.

From the theory of sovereignty and the ways of obtaining the expansion territory of a state, it can be concluded that nations assume that sovereignty of state is the highest and there is no higher sovereignty and do not recognize the sovereignty of other countries. However, the sovereignty of a country will end if it had entered into border country, or sovereignty of a country will also end if it enters into the high seas. Referring to the above, it can be concluded that the sovereignty of a nation be one obstacle in the enforcement of international law, including international law of the sea.

Basically, there are many disputes can be submitted and can most likely be resolved by an international court. But because one or both countries do not submit it to the court, the court has no power to process it. In this case, the legal basis for the court to perform its jurisdiction is the consensus of the dispute parties.

6. Sovereignty of Malaysia in the Spratly Islands

Spratly Islands dispute has a long history journey. History shows that, mastery of these islands have involved English, French, Japanese, Chinese, Vietnamese, then Malaysia, Brunei, the Philippines and Taiwan. Territorial disputes in the South China Sea is not only limited to the problem of sovereignty over the title, but also mixed with the problem of sovereign rights over the continental shelf and the EEZ as well as concerning their use of new technologies in the construction of the deep sea, which penetrates sovereignty.

Some countries that are already doing their claims to the Spratly Islands are China, Malaysia, Brunei, the Philippines, Taiwan and Vietnam. Each one of them had a history of Spratly Islands claims by each version.

Malaysia began to enter into the Spratly Islands dispute in December 1979 (Hurwitt, 1993). Malaysia has also issued an official map in which listed eleven coral reefs and cays in the southeastern part of the island as a territorial region of Malaysia. Malaysian claims against several countries including China, Taiwan, Vietnam, and the Philippines (Hurwitt, 1993). While Vietnam and the Philippines protest openly, while China lodged an objection to the Government of Malaysia through diplomatic channels only.

Between May and August 1983, Kuala Lumpur sent troops to the Swallow Reef, which is the largest part of the Spratly Islands that are claimed by Malaysia. This action does not get people's attention. Although modest, the objections from China, which only confirms its claim to sovereignty over the Spratly Islands including the Swallow Reef in general and not condemn Malaysia in particular cases. In November 1986, Kuala Lumpur forward platoon to two other reefs in the Spratly Islands (Hurwitt, 1993).

Until 1990, Malaysia is reported has possessed the top four coral reefs and cays in the Spratly Islands and has been installed beacons navigation on two other parts of the Spratly Islands. As for the other part of the Islands is now occupied by Vietnam, while Louisa Reef (where Malaysia has built a beacon there) are also claimed by Brunei. In addition to military problems and the presence of navigation, Malaysia has also opened a fifteen-room resort on Swallow Reef, where it hopes to build and expand tourism (Hurwitt, 1993). Although Brunei maintains no presence in the islands, it is generally thought to have claimed six of the Spratly Islands.

According to Haller-Trost, Brunei claims starting in 1958, which is an extension of the English border, including the continental shelf. Malaysia and Brunei have established the territorial sea of the two based on the continental shelf, causing the overlapping claims area includes Louisa Reef (Hurwitt, 1993).

7. Conclusion

In Spratly Islands dispute, the way that is often used is the way of occupation. Occupation shows a mastery of a territory that is not under the sovereignty of any country, which could be a newly discovered terra nullius. Possession shall be made by the state, effectively and should fulfil the requirement to make the area as part of national sovereignty. Some of the findings have to be equipped with the juridical means to effectively control for a long time. However, it has not been found in United Nations Convention on The Law of the Sea 1982 (UNCLOS 1982) or how long a period of time that is required to meet the occupation requirements.

Moreover, if the reference to the basics of history to resolve the Spratly Islands dispute, it will bring a nation's sovereignty. This can be seen with many different perspectives in studying the islands in the Spratly Islands for their country. Each country has its stories of their history in claiming the islands in the Spratly Islands. Therefore, it is not excessive, that if it is linked to the theory discussed above that is the theory of sovereignty. Sovereignty is also one of the things that can hinder the enforcement of international law, including international law of the sea.

Thus, for each country assumes the highest sovereign and not acknowledge other provisions of other countries, then the sovereignty become one barrier to uphold international law. Therefore, according to researchers, a political solution is one of the most effective methods of resolving international disputes, because there will eventually rise to various international agreements that will bind the parties.

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