

On the Issue of Recognizing a State as a Legal Entity: Past and Present

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Abstract: The article discusses the problem of empowering state with a status of a legal person. A system of views on the state in historical and comparative perspective is analyzed. A scientific approach is suggested and discussed, according to which the state under certain historical conditions is given the status of a legal entity of public law. The methodology of a theoretical construction of a state as a legal entity is investigated, while the social and the corporate aspects of the state are allowed for consideration at the same time. A series of approaches to the legal nature of a state as a legal personality is analyzed. A viewpoint is rationalized that the state as a legal entity is considered a single entity having dual standing: public law and private law ones. Conclusions are drawn about the need to further develop scientific perceptions on legal status of a state in Russian jurisprudence. The debatable nature of the doctrine of a state as a legal entity is stated. The article emphasizes the need to introduce the aforementioned doctrine into current legislation, while specifying the conditions for its introduction.

Key words: State • Legal personality of state • Foreign doctrine • Legal entity of public law

INTRODUCTION

The necessity of introduction of the institution of legal entity of public law into the Russian law is one of the most urgent problems of modern domestic jurisprudence. Creating the rule of law in Russia today, the need for harmonization of domestic law with the settings of the countries of the Anglo-Saxon legal family on the one hand and the countries of the Roman-Germanic legal family on the other hand, led to the relevance of the analysis of the status of the state as a legal entity of public law [1, 2].

It should be noted in this regard that the issue of a legal entity in the spheres of public administrative law is reflected in studies by J. Dewey [3], G. Vedel and P. Delvolve' [4], A. Delblond [5], C. Pereira da Silva [6], S. Guterman [7], Fr. Ferrara [8], P. Grossiand and L. Hooper [9]. All these works are devoted to the definition of a notion of a public legal entity under a common law concept.

Vesting the state with the authority of a public person is a special technical legal technique that is used almost in all countries of the Roman-Germanic legal family [10]. Historically, for the first time the issue of the need to regard the state as a legal entity was raised in Germany by W. Albrecht in his book "Die Gewere, als Grundlage des Altern Deutschen Sachenrechts, 1828" [11]. Subsequently, this idea was supported by K. Gerber, who indicated in his book "Grundzüge eines Systems des deutschen Staatsrechts, 1865" [12] that a necessary prerequisite of the very construction of public law is the concept of the state as a legal entity. By means of a state the people "rise" to the level of the legal entity, which differs from other legal entities by its superiority. This superiority stems from higher rights that the "res publica" possesses as a whole. These rights are based on the imperious will of the state, the essence of which is expressed in domination and is designated as *auctoritas rei publicae* (power of the common cause). Returning to

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modern environment, it should be noted that the state in its unity should be characterized as a legal entity, though not in the general sense, peculiar to private law, but as a potentior, a special entity possessing the attributes of power, the authority and duties of which correspond to the rights of citizens.

The legal construction of the priority of the *res publica* over the interests of individuals was developed in the work of O. Gierke “Das deutsche Genossenschaftsrecht, 1868-1913” [13]. Since a man is by nature a social creature, it leads to the natural emergence of association expressing the common interests of all, specifying the private interests of each. Later the social functions of the former community were transferred to the state authorities, but the state did not destroy the association. Along with the remains of the former free unions, new partnerships emerged: patrimonial, ministerial, vassal and liege, city, estate that took up the defense of the interests of the people they united before the state, expressing the common interests. This was the new type of community uniting both those who dominated and those who were dominated. Thus, the state is a legal entity needing a series of organs for its operation and development, through which it acts and expresses will and for the proper operation of which it is responsible to individuals. This theory has not yet lost its relevance.

It must be emphasized that the need of vesting the state with a status of legal entity was shared by many Russian authors at the turn of XX century: I.A. Ilyin (“Theory of Law and State”, 1915), F. Kokoshkin (“Russian State Law”, 1908), N. Esmen (“General foundations of constitutional law”, 1914). For example, I.A. Ilyin proceeded from the fact that the state is an alliance organized by people and acting according to legal norms; being a collective subject of law (legal entity). The state is not an institution that serves the needs of others, but a corporation, which includes those for which it exists, having a public law nature. The basic authority of such a corporation is the authority to rule. In other words, the state is a union empowered to rule over its members, to create legal norms and decrees for them, manage them and judge them. Hence the relationships between the state and its members are public law relations, in which the state comes to rule by authority and the citizens are to owe a duty to obey.

MATERIALS AND METHODS

It should be noted that this study is due to the requirements of a strictly legal methodological approach:

to reach an understanding of the state as a certain legal configuration of its two components: the subject of rights and duties [14]. The development of a theoretical construction of the state as a legal entity in view of its social base and corporate organization allows considering the society itself as a basis of the *res publica* and focus on the representative nature of this institution. This approach allows determining the two important points: a) the ability to represent the state as an organized publicum corpus (public institution), normatively regulated in its activities, b) the interpretation of the state as a subject of legal liability, which helps to think over the issues of higher guarantees of freedom and rights of human individuals. The author's interpretation of submission of public authorities to law aims at understanding the substance of the relationship of power and law. The latter is only possible between the personalized subjects of law and assumes definition of the responsibilities of the state, without resorting to *fiscus*.

The Main Part: Many researchers rightly inquire: if the state is to be recognized a legal entity of public law, would this assumption allow representing the state as a separate legal entity, identified neither with the leaders that rule it, nor with the officials who serve it, nor with citizens who engage with it in a legal relationship? If the answer is “yes”, such identification correlates to some extent with the statement of the institutional inconsistency of the state [15].

In this regard, a significant conclusion by E. Orellana should be recognized, [16], that the prevailing doctrine of the Roman-Germanic legal family recognizes and accepts the characterization of a state as a “legal entity”, based on the fact that there is a unity of individuals who compose it and there is a continuity in time, despite the constant change of its constituent members. We should also note that if the legal corporation (alliance) is not indicated directly, then at the doctrinal level it is derived from the content of constitutions of these countries. However, the recognition of the above provision on the primacy of the state in the civil codes leads to the issue of the nature of the “entity” *res publica* (“public cause”), i.e. whether the state has a unified, publicly legal nature, or, conversely, whether it is antinomic and dual [17].

The foreign authors have adopted two approaches in solving this issue. G. Jellinek (“System der subjektiven Öffentlichen Rechte”, 1892) sees the dual nature in the state: public-legal and private-legal [18]. This approach is based on the theory of “*fiscus*” (treasury): first, they relate to the distinction between “fictitious person”, falling within the scope of the law and the potentate being

outside law; secondly, they define the distinction between “acts of administration” and “acts of power”. The meaning of the second distinction is to indicate the scope of the administrative and private law: administrative law applies to “acts of power” and private law-to “acts of administration”.

From the standpoint of the above theory, the “legal entity” of the state “bifurcates”. On the one hand, the treasury is identified with the state (the subject of civil law), participating as an individual in private-legal property relations and legal activities. On the other hand, treasury is opposed to the state (the subject of public authority), ruling over citizens and organizations, dictating the law to them. Thus, treasury looks like an entity different from the state, but its creation is a product of the state’s will. There is an inherent contradiction: state-treasury as the subject of private law carrying out their economic interest is subject to the general rules of law together with the citizens.

This legal paradigm was reflected in the jurisprudence of some states. For instance, the High Court of Justice in Mexico in one of its judgments pointed out: “The state as a political body of the nation manifests itself in relationships with individuals in two different forms: as a sovereign entity, designed to ensure the general welfare by establishing legal provisions, compliance with which is mandatory and as a legal formation of private law-the owner of the property necessary for the exercise of its functions, coming in this form into a civil relationship with other owners. In this second form, the state acts as a legal entity capable of acquiring rights and incurring obligations and enjoying all the facilities that are available to individuals to protect their rights...” [19, p. 473].

In the interpretation of “legal entity” of the state the modern legal science in the Roman-Germanic countries relies on the idea that the state as a public authority and a treasury is one and the same body, one and the same legal entity. Accordingly, all the acts of the state should be seen as the actions of one and the same entity, which has various bodies and manifestations. The state, as the subject of its own public and private rights, is a single legal entity. The *fiscus* (treasury) is represented by only one party of this “entity” [20].

The idea of the duality of “legal entity” of the state was subjected to serious and legitimate criticism, because it led logically to unacceptable consequences. For example, the state as a public authority could not be held responsible for acts and actions taken by the state as a private entity and vice versa [21].

Modern Russian literature also ascertains the fact that the state (i.e. the subjects of the Russian Federation,

municipalities) are in their legal nature “legal entities” of public law being a subtype of legal entities and can be vested with legal personality. It is noted that the civil legal personality (like any other branch personality) is not a constitutional feature of a legal entity as a generic term, but a specific feature distinguishing the legal entity-a subject of civil legal relations-from the legal entity-a subject of public relations [22].

This, as a rule, draws to the conclusion that legal position of public law entities is often characterized by a predominance of public legal existence over civil legal existence, because in case of loss of civil legal existence the legal entity of public law, previously possessing it, retains its own organizational legal form, the purpose of creation and activity. The rejection of this feature in modern Russian law is a major obstacle to the full realization of civil legal existence by public legal entities for the effective management of their property [23].

The formation of the full rule of law implies under modern conditions the recognition of the state and public administration as subjects of law, with legal personality, capable of having rights and obligations, obeying the applicable law. All this allows for the establishment of relations between subjects of power and individuals as legally significant relationships both in the private and public law. The recognition of these entities as legal entities of public law in Russia is an imperative of our era and an evidence of the development of the constitutional provisions on the legal nature of the Russian state.

The theory of a single legal personality of the state comes from the fact that it may operate, like other public entities, being regulated not only by public law but also by private law [24]. This does not mean that the state loses its sole legal nature. This is just an evidence that the state operates in various legal areas as a legal entity of public law, endowed with a sole will; regulated in organizational and functional aspects by constitutional and administrative laws. Entering the civil relations, it does not lose its dominant character of the state and its uniform public will does not change its nature [25].

CONCLUSIONS

In modern conditions the issue of the state as a single entity, having a dual legal capacity-public law and private law-is highly relevant and plays an important part in revealing the nature of the legal entity. This theory, despite strong criticism, continues to exert considerable influence on the development of legislation and jurisprudence in most foreign countries, including Russia. Assessing the contribution of this theory in the

disclosure of the legal nature of the state as a legal entity, we should recognize its great heuristic value for the Russian legal science. This can be seen in the following positions:

- Implementing its private legal capacity, the state carries out not its private interest, but always its public interest, which is the basis of its existence as a legal entity and determines its behavior, by whatever rules of law it is regulated-either public or private;
- The state carries out actions, regulated not only by public law, but also by private law;
- All acts of the state should be seen as the actions of one and the same entity, which has various bodies and manifestations. It is endowed with a sole will, guided by constitutional and administrative laws and engaging in civil relations, it does not lose its nature of the state as the focus of power;
- Understanding the relationship between power and law is only possible between personalized legal subjects, therefore, it involves determining the responsibility of the state in its status of a legal entity.

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