NOTION OF STATES AS SUBJECTS OF THE INTERNATIONAL PUBLIC LAW IN THE GERMAN CONCEPT OF THE XVII-XIX CENTURIES

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The sphere of action of the international public law is determined by the composition of its subjects, the number of which has constantly extended since the second half of the XX century. The reasons of this phenomenon are as follows:

a) disintegration of the colonial system;

b) change of political regimes and refusal of the planned economy in the former socialist countries;

c) emergence of new international organizations;

d) formation of new integration associations on the basis of international agreements and new states as a result of armed confrontations of an international and not international character.

The reasons of the emergence, variety, specificity and structure of subjects of the international public law, their classification and correlation between themselves cause sharp discussions in scientific circles.

Whereas the Russian doctrine of international law domestic scientists (K.A. Bekyashev, G.M. Velyaminov, G.V Ignatenko, R.A. Kalamkaryan, Yu.M. Kolosov, V.I. Kuznetsov, I.I. Lukashuk, J.I. Migachyov, O.I. Tiunov, G.I. Tunkin, N.A. Ushakov, V.M. Shumilov and others) traditionally classify the subjects into two groups: principal (primary) and derivative (secondary) or generally recognized and atypical, their German colleagues (U. Wezel, L. Vildhaber, V.G. Vitsum, R. Geiger, G. Dam, J. Delbruk, K. Doring, K. Ipsen, O. Kimminih, J.P. Muller, J. von Munh, H. von Heinegg, M. Herdegen and others) adhere to another classification., where subjects of the international public law are subdivided into four groups: principal (primary), derivative (secondary), individuals and others (traditional and challenged).

According to the German concept of international law the principal subjects are states, the derivative subjects are international organizations; an independent group includes individuals, the group of others includes traditional subjects: the Holy See, the International Committee

of the Red Cross, the Maltese Order; the group of challenged subjects includes insurgent, belligerent parties and «stabilizing de facto regimes and also transnational enterprises.

The basic qualitative characteristic of a subject of the international public law as an element of the international system is its legal personality which assumes:

a) availability of rights and duties;

b) the right to establish international legal norms;

c) the right to participate in international relations;

d) ability to assume responsibility under international law.

In the theory of international law, irrespective of conceptual approaches of both Russian, and foreign scientists, states owing to their primary legal personality are principal subjects of the international public law. The analysis of dynamics of international relations and the scientific approach of German scientists of the XVII-XIX centuries to the notion of a state is the purpose of this article.

Doctrinal approaches to a state have been always marked with a set of contradictions depending on the criterion of classification. The polemic on the given question has a centuries-old history and originated long before the XVI century when the international law got its science contours.

Ancient Greek philosophers Platon and Aristotle, when investigating a state, considered *"correct" and "wrong"* (ochlocracy, tyranny, etc.) forms of government.[1] The development of these ideas has generated various approaches to the legal status of states giving a possibility of their participation (or nonparticipations) in international relations. In the XIX century, ideas of thinkers of the Ancient Greece transformed into the theory of the recognition of states.

Since the second half of the XVII century, intensity of international relations and emergence of the centers of the international life promoted development of the science of international law. Following the formation of new subjects and creation of new sources, legal institutes and branches of the international public law, and along with them — national schools of international law specialists which representatives have developed new concepts containing political-legal ideas of the concrete historical period were formed.

The German school of international law was formed in the XIX century and it is presented by such names as: E. de Vattel (1714-1776), G.V.F. Hegel (1770-1831), A.W. Heffter (1831-1883), R. von Ihering

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[1] See e. g.: *Platon*. The state. Coll. in 3 volumes. M., 1971. V. 3. P. I (in Russian).

(1818–1892), I. Kant (1724-1804), A. Lasson (1832-1917), F. von List (1851-1919), G.F. Martens (1756-1821), A. Merkel (1836-1896), I.J. Mozer (1701-1785), R. von Mohl (1799-1875), S. Pufendorf (1632-1694), H. Tomazy (1655-1728), H. Triepel (1868-1946), F. Zorn (1850-1928) and others.

Positions of the natural law theory (works of J. Boden,[2] T. Gobbs,[3] D. Lock,[4] J.J. Russo[5] about the essence of the public contract theory) as well as philosophic legal ideas of G. Grotius[6] have formed the theoretical basis for the investigation of the state as a subject of international law for philosophers and lawyers of Germany.

Among the first and most complete works on the above problem is the G. Grotius' study «On the law of war and peace» in which the author drew attention to the triad of any state: population, territory and power. «…two-fold objects are ordinary subordinated to the power: first, persons …, secondly, the space named territory», — the Dutch scholar noted.[7]

G. Grotius's ideas have been broadly spread abroad. Researchers, during a concrete historical period, depending on belonging to a certain ethnos and national culture, personal attitude to the external and internal policy carried out by public authorities, developed and transformed the legal idea from various positions. At such approach the majority of classifications had a discriminatory character that testified to the strength of the state which representative substantiated its foreign policy activity by the suggested concept.

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[2] See: *Boden J.* Six books about republic // Anthology of world political thought. M, 1991. V. I. P. 24-358 (in Russian). Jean Boden (1530-1596) was in the service of the king of France Henry III as a public prosecutor. Supporting the king in the polemic with the emperor of the Holy Roman Empire and the Pope, he was the first to suggest a scientific concept "sovereignty" which was based on the new theory of a state origin. Following repeated changes, J. Boden gave the modern form of the doctrine of sovereignty and in 1576 he stated it in his main work «Six books about republic». The author rejected the theory of a divine origin of the government and defended idea of a hereditary monarchy. Positions of its doctrine did not at all correspond to concepts of other people of the Western Europe, which were based on the idea of unity of all Christian states (res publica Christiana) with their complex system of secular and religious relations between the Emperor of the Holy Roman Empire and the Pope.

[3] *Gobbs T.* Leviafan, or the matter, form and power of an ecclesiastical and civil state. M., 1936. (in Russian).

[4] *Lock J.* Two treatises about government // Lock J. Coll. in 3 volumes. M., 1988. Vol. III. (in Russian).

[5] *Russo J. J.* On the public contract or principles of the political right. M., 1906. (in Russian).

[6] *Grotius G.* On the law of war and peace. Three books. M., 1994. (in Russian).

[7] *Grotius G.* Op. cit. P. 218. (in Russian).

In the XIX century the notions of subjects of the international public law in Germany, despite disagreements between scientists, represented a uniform picture. Out of the basic criteria of differentiation of states it is possible to single out the following:

- religious (F. List);[8]
- territorial-geographic (E. de Vattel, I.G.G. Justi and others);
- geopolitical (F. Zorn, M. Zeidel and others);
- “negative” (A. Merkel);
- culturological (R. Mohl);
- criterion of force (A.W. Heffter, M. Zeidel, R. Ihering, A. Merkel, F. Zorn and others),[9] including their forms of government.

The differentiation of states (with various changes and additions) according to the religion practiced by nations, i. e. Christian and not Christian was rather persistent in terms of duration. That discriminatory criterion remained till the XIX century

The attitude towards them changed after the establishment of a new type of the international legal order — the Vienna system (1815-1918). The specified approach was caused by the following reasons:

a) emergence of independent states on the American continent following the national-liberation revolutions and adoption of Christianity by those states;

b) recognition of Turkey, under the terms of the Paris peace treaty of 1856, as a uniform and independent state;

c) joining of Japan and China to the system of interstate relations.[10]

In parallel with a religious feature, the concept according to which states were differentiated by a territorial-geographic feature was broadly accepted. This idea which for the first time was put forward by G. Grotius was reflected in the works of German scientists E. de Vattel and I.G.G. Yusti. In the contemporary international law this concept is

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[8] Thus, for example, the states which adopted Islam as a dominating religion were excluded from the interstate dialogue for a long time.

[9] See more in detail: *Kashirkina A. A.* Conceptions of subjects of the international public law in the classical doctrine of the XVII-XIX centuries // Intern. Public and private law. 2003. № 1 (10). P. 49-54. (in Russian).

[10] Freundschaft-und Handelsvertrag zwischen China einerseits, den Staaten des Deutschen Zoll-und Handelsvereins, beiden Meklenburg, Hamburg, Lübeck, Bremen (jetz dem Deutschen Reich) anderseits vom 2. September 1861. In: *Strupp K.* Urkunden zur Geschichte des Völkerrechts. In 2 Bände. I. Gotha 1911. Vrlg. Friedrich Andreas Perthes A. G. S. 347-357. By the beginning of the work of the First peace conference in the Hague which took place in May-July 1899, Japan had already concluded treaties with the USA-1854, with Russia-1855, with the Great Britain-1902; and China-with the Great Britain in 1842, with France in 1858 and Germany in 1861.

not applied in its pure form, because it contradicts general principles of international law. However its ideological component discriminates states and is shown in the absolutization of regionalism, in foreign policy and external economic doctrines pursuing the aim of an intentional counteraction of integration processes in the world.

Emergence on the political map of the world of an increasing number of states[11] has promoted the establishment of diplomatic relations between them, and as a result — the development of the external relations law. The diplomatic practice considerably passed ahead of theoretical ideas of international law specialists. The science confronted a situation when concepts developed by scientists had a political coloring and had to «serve» the foreign policy of states, justifying thus illegal captures of foreign territories. For that reason the inequality of states and legality of a geopolitical repartition of the world became basic directions of development of the scientific-legal thought in the XIX century.

The *civilized (*or cultural-urological) approach to the classification of states served as a juridical legalization of discrimination.[12] The theory of gradation of states into "civilized" and "not civilized" suited politicians of the industrial states of Europe and USA.

That theory was broadly accepted in Germany what is proved by the analysis of scientific literature of the XIX-XX centuries.[13]

One of the founders of the doctrine of a dualistic nature of international law — G. Tripel, in his work «International law and internal

[11] Formation of the new states and increase of their quantity resulted in a considerable expansion of the geographical scope of the international system. Whereas at the Second «peace conference» in the Hague 44 states took part, shortly before the termination of the Second World War their representation increased to 60 states, and since 1945 to the middle of the 80s of the XX century the number of states in the international system increased more than twice. Dahm G. u. a. Op. cit. S. 9, 10.

[12] It is considered that the author of the idea of differentiation of the states on «civilized» and «not civilized" was the known Russian scientist, international law specialist F.F. Martens. Apparently it is not casual, that a similar approach was suggested by a person who was on diplomatic service as was the case of professor of the St.-Petersburg University F.F. Martens. See more in detail: *Martens F.F.* Contemporary international law of civilized nations. V.I. Vthe ed. SPb., 1909 (in Russian); Encyclopedic dictionary. V. XV A Koala — Concordia. F.A. Brokhause (Leipzig) ed. house, I.A. Efron (S-Petersburg). SPb., 1895. P. 736. (in Russian).

[13] See e. g.: *Stier-Somlo F.* Völkerrecht. In: Handwörterbuch der Rechtswissenschaft. Hrsg. Von Fritz Stier-Somlo und Alexander Elster. Walter de Gruyter und Co. Berlin und Leipzig, 1929. In 8 Bände. Band 6. S. 672-686; *Lasson A.* Prinzip und Zukunf des Völkerrechts. Berlin, 1871; *Zorn A.* Grundzüge einer allgemeinen Staatslehre. Leipzig, 1903 u. a.

law» (1899) noted: «… the concept of «international law» covers relations between higher and subordinate states, or between equal states».[14]

The well known scientist in the field of criminal law, who paid a special attention to the research of the fundamentals of a state and problems of international law professor F. List was a convinced supporter of the idea that only civilized states were subjects of international law.[15] Among criteria of civilized states he singled out the following: cultural-urological, religious, including a dominating pattern of ownership. «…The semi civilized states belong to the international legal dialogue only in those relations which are regulated by treaties with the cultural states»;[16] and further, during the interstate dialogue «with semi civilized states outside the relations regulated by treaties, and in the process of at all intercourses with not civilized states, the legal dialogue of cultural states is maintained only through the actual might of the latter, and is connected only with Christianity and humanity principles»,[17] — F. List noted. Speaking about such countries as Abyssinia, China, Liberia, Morocco, Persia, Siam he wrote, that those states were «close to the international legal dialogue, but they do not belong to it completely».[18]

In the second half of the XIX century the German school of international law developed a new direction in the classification of states which differentiated the countries as *"strong" and "weak"*. Representatives of the specified approach — A.V. Gefter,[19] A. Merkel[20] and others — justifying the military expansion of Germany and substantiating its participation in the world repartition, suggested to use a criterion of force for the gradation of states. Interpreting G. Grotius's doctrine on the law of a just war, they in their works scientifically proved a possibility of arbitrariness and lawlessness for the "sake" of their states in relation to other countries. Developing the theory of violence R. Iering, A. Lasson

[14] *Triepel H.* Völkerrecht und Landesrecht. Leipzig. Vrlg. von C. L. Hirschfeld, 1899. S. 20.
[15] List F v. Das Völkerrecht. Systematisch dargeschtelt. 12. bearb. Aufl. Berlin. Vrlg v. Julius Springer 1925. S. 2, 3, 85-94. That scientific work was very popular and during the lifetime of the scientist it sustained 11 editions. See more in detail: Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhunder. Hrsg. v. Michael Stolleis. Vrlg. C. H. Beck. München, 1995.
[16] *List F.* International law in a regular statement. Transl. from German. Yuriev, 1912. P. 6. (in Russian).
[17] *List F.* Op. cit. P. 7.
[18] Ibid. P. 8.
[19] *Heffter A.W.* Das europäische Völkerrecht der Gegenwart., 7. Aufl. Berlin, 1881. § 2. S. 22-26 u. flg.
[20] *Merkel A.* Recht und Macht in Schomoller's Jahrbuch's. 1881. S. 439 u. flg.

and F. Zorn transformed it into a *geopolitical concept of recognition* of states as subjects of international law.[21] That concept was substantiated in the scientific work of the well known German diplomat and lawyer R. Mohl «State law, international law and policy» (1860-1869). The author noted, that for the international community consisting of civilized states makes the decision to recognize another state as a subject of international law, that state should assume certain responsibilities before the community and the system of legal relations based on the internal law. The international community thus can pursue certain interests.[22]

Formation of such kind of theories in the science of international law among German lawyers was caused by specificities of the foreign policy carried out by the political leadership and by changes of the internal social and economic situation in the country. Germany of the period of 1850-1860 was characterized by the growth of the national consciousness connected with the beginning of economic transformation, accompanied by expansion of cities.[23] For a short period of time it became an industrial power. The economic life went on in the framework of the Customs union, releasing the country from foreign dependence.

Sweeping changes took place in the internal political life of the state. In 1862, O. Bismark was appointed prime minister of the Prussian government. In his aspirations to integrate the German nation he, by «iron and blood», strengthened the international authority of the state. Three victorious wars under the leadership of Prussia (in 1864 over Denmark, in 1866 over Austria and in 1871 over France), promoted the creation of the Second German empire and adoption on April 16, 1871, of the imperial constitution. During the days of Bismarck, in 1884 Germany began colonial captures in Africa (contemporary Cameroon, Namibia, Tanzania, and Togo) and on the Marshall islands in the Pacific ocean.[24] The main political principle of "the iron chancellor" was

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[21] See e. g.: Ihering R v. Der Kamf um's Recht. Leipzig, 1872; *Lasson A*. Das Kulturideal des Kriegs. Berlin, 1871; Zukunft des Völkerrechts. Berlin, 1871. B. I; *Zorn F.* Das Staatsrecht des Deutschen Reichs. Berlin, 1883. B. II.

[22] *Mohl R.V.* Staatsrecht, Völkerrecht und Politik. In zwei Bände. Erser Band: Staatsrecht und Völkerrecht. Tübingen, 1860. Vrlg. der H. Laupp'schen Buchhandlung — Laup AND Siebeck. S. 620, 621.

[23] Whereas by the beginning of 1800, the population of Germany living in the countryside made about 90%, and the number of those living in cities was close to 5%; in 1871 already 50% of inhabitants considered themselves as townspeople. See more in detail: *Schulze H.* Op. cit. S. 136.

[24] See more in detail: *Ebel F., Thielmann G.* Op. cit. S. 308, 321-324, 345; *Schulze H.* Op. cit. S. 105-121, 151-155; *Fichter A.* Die völker-und Staatliche Stellung der deutschen Kolonialgesellschaft des 19. Jahrhunderts. Dissertation zur Erlangung des

expressed as follows: «The Law is a well understood strong-arm policy».[25]

The process of evolution of states was accompanied by changing of their functions. Prior to the XX century states considered that they enjoy an unlimited right to conduct war for the purpose of capture of new territories and their colonization for providing themselves with additional resources through exploitation, but by the beginning of the XX century, with the establishment of the Versailles system (1919-1945 of), scientific-legal ideas of the essence of the state underwent cardinal changes. Scientists in their researches developed a new direction, namely a classification by a *formation feature,* which distinguished the slave, feudal, capitalist and socialist states.

After the establishment of the Yalta system (1945-1991) of international relations the classification based on the economic criterion was widespread among scientific circles of Germany (as well as in the majority of Western European countries). It was a way of production which formed a basis of differentiation of states into pre-industrial, industrial and post-industrial.

In 1964, decisions of the Geneva conference (UNCTAD-I) resulted in a juridical legalization in the international economic system of the differentiation of states according to their place in the general system of preferences: economically developed and developing countries, and also according to the «degree of marketability of economy»: market economy, "transitional" economy and "not market" economy countries.

The above analysis of notions of states as principal subjects of the international public law, allows to reveal two characteristic features, peculiar to the German concepts of the period of the XVII-XIX centuries:

1) The doctrine of inequality of states;

2) Possibility of a geopolitical repartition of the world through a legitimate way, i.e. the right of war.

A more detailed study of the provisions of these concepts leads us to the following conclusions:

- the choice of the criteria discriminating the states and determining their inclusion or not-inclusion in the international dialogue, was a

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Grades eines Doktor der Rechtswissenschaft des Fachbereiches Rechtswissenschaf der Universität Hamburg. 2002. Droz Zh. History of Germany. M., 2005. P. 45-68. (in Russian); *Pavlov N. P.* The contemporary Germany. M., 2005. P. 485-490. (in Russian).

[25] *Droz Zh.* Op. cit. P. 59. (in Russian).

natural and regular phenomenon for the German concept of international law in the XVII-XIX centuries;

- the differentiation of states according to the religion practiced by the population, testifies to a low level of democratization of international law during the period under consideration while cultural urological criterion denies the inconsistency of such classification;

- the substantiation of the foreign policy of a state, providing a possibility of carrying out of colonial captures, promoted the formation of geopolitical concepts in the scientific circles of Germany;

- legitimacy of war (criterion of force) as a way of settlement of international collisions was undesirable, but admissible in international law up to the XX century;

- expansion of the range of the international dialogue whose subjects establish their relations according to general principles of international law, have created preconditions for progressive ideas and approaches to the state as to a principal subject of the international public law.