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Modern rule of law: Basic approaches to understanding

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Abstract

The modern state governed by the rule of law in the Western legal tradition differs in a number of characteristics (instrumental and substantive), firstly, from its retrospective analogues (for example, the states of the Middle Ages), and secondly, from the understanding and perception of the state in other legal (and cultural) traditions, for example, Islamic. In addition, the process of globalisation and other features of the 21st century require mainly new approaches to understanding the state as a social phenomenon, the relevance of which remains despite significant improvements on this issue in Soviet and Ukrainian legal science. During the Soviet era, one of the most fundamental was the work of V. O. Tenenbaum "The State: a System of Categories" (1971), however, like other works of this period; its content was built on the opposition of the essence of the socialist and bourgeois states. The purpose of this paper is to study the phenomenon of the modern state and analyse the main scientific approaches to understanding its essence. The methodology of this study is an analysis of the main approaches to understanding the modern state, its essential features and the conditions of its establishment. The problems of state activity that are important for the current conditions of its functioning, in particular, the efficiency of the state, are also considered. The features (theories) of the state found in international law are investigated separately. The implementation of the Montevideo Convention of 1933 established the following four characteristics of a state: 1) a permanent population; 2) a designated territory; 3) own government; 4) capacity to enter into relations with the other states. The paper highlights the phenomenon of semi-sovereign states. Special attention is paid to the investigation of the phenomenon of the modern (national) state, which was formed in the era of bourgeois revolutions and how significantly different from previous types of state, such features as the foundation of the state in the territorial cultural space and the nation to which free citizens belong; the transformation of society into a civil society with the principle of equality and prohibition of privileges. Despite significant scientific developments in the study of this problem, the need for further investigation of the essence of this phenomenon is urgent, taking into account the realities of the beginning of the 21st century

Keywords:

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Introduction

The modern state is one of the key categories of legal science. This approach remains relevant at the beginning of the 21st century, reflecting the place and role of the state in the legal system. The concept of “state” continues to be relevant, although a number of researchers abandon it in favour of a certain concrete and effective empirical content of political formations. Despite the really broad and diverse approaches to understanding the state, there is a consensus on what the essential elements of the state are.

There is a high level of dynamics of state-forming processes in the modern world [1]. Notably, at the beginning of the 21st century, more than 250 territorial and political entities with state characteristics functioned on the globe. However, not all of them can be called proper “states”. Such formations can be classified into groups. Conceptually, the state and its criteria will be analysed below, but in this case, the concept of an “independent state” refers to a “nation that is politically organised as a sovereign state in a certain territory” [2].

The purpose of the study is to outline the main areas for understanding the modern state. What is the state in the modern world? The modern (national) state as a phenomenon is developed in the period after bourgeois (anti-feudal) revolutions, replacing the traditional state. This period in economic history is designated as the beginning of the industrial era.

Presentation of Main Material

In the general study of the nature of the national state, this concept is defined as a political organisation of society formed in the industrial era, the legitimacy of which is ensured by the representation and protection of the interests of individuals included in it based on ideas and values of socio-cultural, spiritual, historical, linguistic, territorial cohesion and a single level of economic development [3]. Living in developed countries (Germany, the United Kingdom) in the 19th century, Karl Marx and Friedrich Engels observed an unattractive picture of the state of that time, in particular, the considerable property and social differentiation (proletarians – bourgeois) and the lack of voting rights for the vast majority of the adult population. Their views were formed in the conditions of that time and rationally reproduced reality. Indeed, when only the wealthy had the right to vote, democracy was fake and the state was only formed by those strata (classes). This reality of the 19th century dictated the development of classical theses of Marxism.

In addition, such ideas were common in Western Europe at the beginning of the 20th century. German researcher A. Menger, in his “New Doctrine of the State” (1905), outlined the main parameters of the so-called “socialist” and “communist” states of the future. In particular, he planned “the transfer of property rights from individuals to broad social groups”, “equality

of means of consumption in communist society”, “the implementation of the socialist idea through constant reforms”, “socialist public property”, “the weakening of the Roman concept of property in legal order” [4].

The Marxist-Leninist theory provided, first, for the recognition that the state as a social institution did not exist forever. The primitive system, in which the universal unit of society was the ancestry, did not know and could not know the state. The emergence and existence of the latter is connected with the division of society into classes. The state arises from the need for one ruling class to keep other, oppressed classes in subjection. Secondly, revealing the content of the state, the Marxist-Leninist theory states that the state consists of a special category of people who have special means for systematically applying coercion and subjugation of people in society. According to F. Engels, “the state is nothing more than a machine for suppressing one class by another”. Later V. Ulyanov-Lenin (“The State and the Revolution”, 1917) clarified: “the state is a machine for maintaining the dominance of one class over another”. Later, he noted that the state is a special category of people “who are allocated to manage others and that in the interests, in order to manage systematically, constantly possess a well-known instrument of coercion, an instrument of violence, which is now armed detachments of troops, prisons, and other means of subjugating someone else's will by violence – this is the essence of the state”. Third, the state has special functions that consist in managing society. The state acts as an instrument of suppression of political opponents of the ruling class. On the other hand, the state performs functions in which it acts as an official representative of the entire society. In the end, Marxism-Leninism justified the inevitability of the complete extinction of the state, which is associated with the complete elimination of classes, with the transition to communist public self-government [5].

At the same time, Max Weber did not perceive the essence of the state in its functional orientation, that is, from the “content of activity”. Thus, in 1918, he noted that there are almost no tasks that the political union would not be involved in. Therefore, it is possible to give a sociological definition of the modern state, in the end, only considering the specific means used by it – physical violence. In his view, a state should be called a human society that claims (with success – the author emphasised) a monopoly on physical violence within a certain branch. In other words, the only source of the “right” to violence is the state. Max Weber also emphasised that this refers to such “relations of domination of people over people who rely on legitimate (that is, what is considered legitimate) violence as a means. For a state to exist, people under its rule must submit to the authority claimed by those who rule” [6].

As Christopher Pierson notes, transnational forces in general and the globalised market economy, in particular, have decisively limited the “free hand” of the

state in both internal and external affairs. However, states remain the main players in national politics and in the international arena, although there is a huge difference between states in terms of their ability to act independently on the world stage. This does not refer to the “decline of the state”, but rather to a change in its essence and mode of activity. The same researcher argued that a state should be considered a political organisation that performs continuous actions and can claim the state level if its administrative staff successfully supports claims to the monopoly of the legal use of physical force in the event of execution of an order. Christopher Pearson identifies the following features of the state:

- 1) control (monopoly) over the use of violence;
- 2) territorial character;
- 3) sovereignty;
- 4) constitutionality;
- 5) rule of law and non-personalised force;
- 6) state bureaucracy;
- 7) powers/legitimacy;
- 8) citizenship; an additional feature is taxation [7].

The idea of the state as a phenomenon specific to modern times is based on one position, which, meanwhile, is shared by followers of different schools. This is depicted, for example, in the works of V. Chetvernin, who separately studied the evolution of Western scientists' views on the modern state. Its position is that the state is a phenomenon of the modern era, although it has adopted the ideas and institutions of antiquity and the medieval period. At the same time, the French researcher P. Birnbaum gives the following definition of the state: “The state is an institutional political and legal machine, served by functionaries who identify with their role, separated from civil society, over which it tries to exercise full custody, controlling it through its administrative bodies and through its own law, dominating it through its police, setting it in motion through economic intervention, subjugating it eventually through mastering thoughts and linking them with its own values” [8]. Together with his colleague B. Badi outlines the following elements of the modern state:

- 1) a system of institutionalised roles that constantly functions;
- 2) a single legitimate holder that uses force to control the territory in which it exercises its sovereignty, exercising protective power over the territory of the most remote of the provinces, protecting also the borders;
- 3) a political and administrative machine that operates through functionaries who are recruited on an impersonal basis according to meritocratic criteria [9].

The Austrian and American scientist Hans Kelsen notes that the ideologised science of the state “cannot master its essence except by comprehending this social picture as a certain system of human behaviour”. Usually, he continues, “the state is defined as a kind of political organisation. But even this expresses only

the idea that the state is a compulsory order. After all, the specific “political” component of this organisation consists in coercion, which is carried out from person to person and regulated by this procedure, consists in coercive acts that establish this procedure. These are exactly the compulsory acts that the legal order links with the conditions defined by it. The state as a political organisation is a legal order” [10]. Therefore, G. Kelsen defines the state as a “relatively centralised legal order”. According to the researcher, it is precisely this centralisation that distinguishes the state legal order from the original pre-state and supranational (or interstate) order of general international law.

The same scientist develops his argument, opposing other schools of understanding the state. Thus, he notes: “If we understand the state as a certain social community, then this community, as noted earlier, can be constituted only through a certain regulatory procedure. And that a community can be constituted only through one such order (and even identified with this order), then the normative order that constitutes the state can only be a relatively centralised compulsory order, that we recognise it as a state legal order”. He continues: “the state as a social community consists – according to traditional political science – of three components: the state population, the state territory, and the so-called state power, which is exercised by the independent government of the state. And all three components are defined only in legal terms – that is, they can only be understood as the validity and scope of the legal order” [10]. At the same time, G. Kelsen, like G. Cohen, with his idea of “the state as a form of law”, believed that the state does not belong to empirical reality, but corresponds to a certain legal order and personifies it. In other words, with this approach, the state and law are identified. In his opinion, the state as an organisation of coercion is identical to the rule of law and is itself generated by law. Thus, he concludes that any state is constitutional, including authoritarian. According to G. Kelsen, it is possible to understand the state through the prism of international law. It determines what a state is and what are the necessary conditions for its existence, in particular: “law and order”, “efficiency of territory management”, “independence of society from other societies”. In this sense, states have relative sovereignty, and are also subordinate to subjects of international law (supranational organisations) [11].

However, in a monographic study on the problem of state sovereignty, the famous soviet researcher I. Levin noted as early as 1948 that sovereignty is the state of full autonomy of a state on its territory and its independence from other states. He also defined the following features of the sovereignty of public authority acting on behalf of the state:

- 1) unity of power, which is expressed in the presence of a higher body or system of bodies that collectively make up the highest state power;

2) monopoly or concentration of power coercion in the hands of the state in the person of its bodies;

3) unlimited state power (as noted by I. Levin, these three features constitute the sovereignty of state power);

4) external independence of state power. He also believed that “sovereignty and independence of the state” are manifested in the exercise of state functions and provide for the existence of sovereign rights that legally ensure the implementation of these functions. This includes such rights as the right to create their own authorities, the right to conduct external relations, the right to be considered a belligerent party, the right to make laws, the right to a fair trial, and the right to maintain order on their territory [12].

A legally independent state differs from a quasi-state entity precisely in the completeness of the actual exercise of sovereign rights. To denote quasi-states, the concept of “semi-sovereign state” is widely used in international law [13].

In the Ukrainian scientific community, the concept of the state is understood in different ways. Thus, P.M. Rabinovich in one of the latest studies presented the following definition of this issue: “the state is an organisation of political power of the dominant part of the population in a socially heterogeneous society, which, ensuring its integrity and security, organises the satisfaction of general social needs and manages society primarily in the interests of this part of it” [14]. Ukrainian researcher O.F. Skakun noted that it is impossible to define a general concept of the state, which would contain all the features and properties characteristic of each of its periods in the past, present and future, without exception. At the same time, any state has a set of universal features that manifest themselves at all stages of its development, for example, territory, population, and power. However, the researcher still formulates the appropriate definition:

“The state is a sovereign political and territorial organisation of society with power, which is carried out by the state apparatus on the basis of legal norms that ensure the protection and coordination of public, group, and individual interests with legal coercion if necessary” [15]. Prominent Ukrainian researcher V. Sirenko noted that a state-organised society can only be considered a society that, by organising and isolating state power from its environment, has endowed this power with the power of supremacy, completeness and general obligation in all aspects of the functioning of society. First of all, this refers to the potential possibility of state power to show its supremacy, the general obligation of its requirements on any issue of public life [16].

In the international legal aspect, a number of features (criteria) of a state are determined by international law, in particular, the Montevideo Convention of 1933 establishes four features:

- 1) a permanent population;
- 2) a defined territory;

3) own government;

4) capacity to enter into relations with the other states. Although this convention has an inter-American character, it has de facto become the standard of international legal understanding of the state as a subject of international relations. The text of this document contains several other basic characteristics of the state, which are the embodiment of its essential nature, in particular:

1) the political existence of the state does not depend on recognition by other states.

Even before recognition, the state has the right to protect its integrity and independence to ensure its preservation and prosperity, and therefore, to organise its own life as it sees fit, take legislative measures based on its interests, administer its services, and determine the jurisdiction and competence of its courts. The exercise of these rights has no other restrictions than the exercise of the rights of other states under international law (Article 3 of the Convention);

2) states are legally equal, enjoy the same rights and have equal ways of exercising them. The fundamental rights of states may not be violated in any way (Articles 4, 5 of the Convention);

3) recognition of a state means that the state that recognises it accepts another with all the rights and obligations defined by international law. Recognition is unconditional and irrevocable. In addition, the recognition of a state can be direct or tacit (Articles 6, 7);

4) no state has the right to interfere in the internal or external affairs of another (Article 8) [17].

Conclusions

Thus, the conducted study provides the following conclusions about the conditions of establishment and characteristics of the modern state, which naturally arise in the last few centuries:

1) the state form of society is organised mainly within the area of permanent existence (territory) of a certain national culture. This does not refer to an ethnic group, but about a certain society, designated by a common culture, economic market, a certain style of relations between differentiated groups (religious, ethnic, etc.). The nation-state is defined as “an organisation to govern a nation (or possibly two or more closely related nations) whose territory is defined by national borders, and whose right is determined, at least in part, by national customs and expectations”;

2) “national” in the sense of “national state” reflects a new understanding and new practice of organising the state. The idea, which was put forward and first recorded at the constitutional level during the bourgeois revolutions (especially the French Revolution at the end of the 18th century), about the “origin of all power from the nation” was so revolutionary in itself that de facto for the next two centuries human civilisation followed the path of filling it with content and implementing it in practice. In this context, the national state, in contrast to the traditional one with its elitist content and aversion

to the people, declares itself a “state from the people”. Moreover, the power of the nation (people) as a people is consolidated in the constitution for the first time in history – it is at this time that the first written constitutions were adopted – another civilisational achievement associated with the national state. The meaning of the “first wave” of constitutions is obvious – a contract between the people and the state regarding mutual rights and obligations. An example of consolidating the concept of national sovereignty is the French Constitution of 1790, which stipulates: sovereignty is one, inseparable, inalienable, and essential. It belongs to the nation; no part of the people, no individual can appropriate its implementation. Such a decision allows separating the state from the face of the king;

3) society in such a state becomes different, acquiring mainly a civil character. The idea of legal equality and civil rights significantly and favourably

distinguishes it from all previous public organisations. As a result, it should be recognised that it becomes more effective. Overcoming internal status and spatial obstacles is an expression of social progress and contributes to the consolidation of society. Common ideas and values permeate all its layers, forming a modern nation. The idea of a civil society that granted all men equal legal and political rights became the main prerequisite for the establishment of a modern nation. The key demands of this idea in the 19th century are the abolition of class society privileges and participation in state decision-making through democratic male suffrage, which was combined with universal military service. Thus, the “nation and national state” covered the wider segments of the population. The modern state is based on a nation, and, consequently, gradually acquires not a national, but a national-political character.

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Сучасна правова держава: основні підходи до розуміння

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Анотація

Сучасна правова держава в західній правовій традиції за низкою характеристик (інструментальних і сутнісних) вирізняється, по-перше, від ретроспективних її аналогів (наприклад, держав середньовіччя), по-друге, від розуміння та сприйняття держави в інших правових (і культурних) традиціях, наприклад ісламській. Крім того, процес глобалізації та інші ознаки ХХІ століття потребують переважно нових підходів до розуміння держави як суспільного феномену, актуальність дослідження якого зберігається попри значний доробок із цього питання в радянській та українській правничій науці. За часів СРСР однією з найгрунтовніших була праця В. О. Тененбаума "Держава: система категорій" (1971), однак, як й інші праці цього періоду, її зміст було вибудовано на протиставленні сутності соціалістичної та буржуазної держав. Мета публікації – вивчення феномену сучасної держави, аналіз основних наукових підходів до розуміння його сутності. Методологію цієї статті становить аналіз основних підходів до розуміння сучасної держави, її сутнісних ознак й умов її формування. Також порушено проблеми діяльності держави, які мають значення для сучасних умов її функціонування, зокрема ефективності держави. Окремо досліджуються особливості (теорії) держави, що приховані в міжнародному праві. реалізація в Конвенції Монтевідео 1933 р. закріпила такі чотири ознаки держави: 1) постійне населення; 2) визначена територія; 3) власний уряд; 4) вплив на підтримання відносин з іншими державами. У статті висвітлюється феномен напівсуверенних держав. Особлива увага приділяється дослідженню феномену сучасної (національної) держави, що сформувався в епоху буржуазних революцій і як істотно відрізнявся від попередніх типів держави, такими ознаками, як заснування держави в територіальному культурному просторі та нація, до якої належать вільні громадяни; перетворення суспільства на громадянське суспільство з принципом рівності та заборонаю привілеїв. Попри вагомий науковий доробок у дослідженні окресленої проблеми, актуальною є необхідність подальшого вивчення сутності цього феномену з огляду на реалії початку ХХІ століття

Ключові слова:

сучасна держава; ознаки держави; державний суверенитет; квазідержави; громадянське суспільство