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# ON THE DEVELOPMENT OF THE LAW OF SELF-DETERMINATION FROM EXTERNAL TO INTERNAL ASPECTS

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SAN FRANCISCO, CALIFORNIA
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# TITLE

## ON THE DEVELOPMENT OF THE LAW OF SELF-DETERMINATION

## FROM EXTERNAL TO INTERNAL ASPECTS

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# ABSTRACT

The crisis within international law of self-determination cannot be ignored. This dissertation analyses and discusses the reasons for the crisis which are: the lack of analysis of the correlation of legal doctrines with doctrines of social science; a general absence of analysis of the changes occurring within contemporary international law due to the changes of doctrines of social science (particularly on the topics of the subjects of international law, and on the law of self-determination and recognition); a lack of analysis of the new laws within a context of rapid social development; and finally, the absence of a development of a methodology for the purpose of research and analysis of the current issues within international law (especially since the nineteenth century). Using the European family of nations as case study, this paper will analyze the history and development of nation states, and will propose a historical and comparative law method as a method both for general comparative research, and further research on the development of the law of self-determination as interrelated doctrine with the doctrine of constitutionalism. This dissertation will introduce the theory of constitutionalism within that framework of analysis, and will use it as a mechanism for the furtherance of the law of self-determination, recognition, the principle of peaceful coexistence; and finally, for the development of international law generally.

# CHAPTER 1. DEVELOPMENT OF THE LAW OF SELF-DETERMINATION IN THE XXth CENTURY

This paper is to analyze development and changes of concepts and different approaches to problem of the self-determination of peoples and nations in contemporary international law due to the development and changes of the social science. It can be concluded that the changes occurred due to the changes of doctrines of development of the society from the nation-states to the development of the doctrine of constitutionalism.

The starting point of the analysis of self-determination is that "The modern Law of Nations is a product of Christian civilization[1]" and social science generally; that leads to the next logical step that "International law is based on the assumption that there exists an international community embracing all independent States and constituting a legally organized society. From this assumption there necessary follows the acknowledgment of a body of rules of a fundamental character universally binding upon the members of that society.[2]"

It means that in order to analyze development of the theory of self-determination it will be necessary to describe in short development of the system of states in Europe, to introduce development of the theory of international law, to evaluate relations and influence of social sciences such as political science, philosophy, history, foreign policy and diplomacy on the development of international law concepts.

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[1] Oppenheim, p.48
[2] Id. at 51

The development of the system of states, approaches and the development of the theory of self-determination and how it correlates to the development of social science is at issue of this thesis.

The theory of the self-determination is a universal theory, but different schools of international law approached to it in different ways. Despite the fact that the problem of international law as universal legal system was never resolved, and in the beginning of the nineteenth century various conceptions of the Law of Nations insisted and studied the difference between the so-called Anglo-American and Continental School of International Law contemporary international law theorist and scholars agreed with the view that international law is a universal system.

In this dissertation it will be analyzed that the development of the theory moved from the aspects of external self-determination of peoples and nations forming states on the first stages of formation of international community to the more complicated systems and aspects of internal self-determination due to the development of political systems, philosophy and social sciences generally; how the doctrine of constitutionalism replaced the theory of the nation states and result is that the self-determination started to develop mainly in internal ways.

At the same time the differences in the notions, methods and institutes of the international law of self-determination still must become subject of thorough research.

This fundamental question that must be answered- does internal aspect of the self-determination replaced the external way for the self-determination of peoples

looking for opportunity to preserve its' culture and self-identification requires research of the views on nature of international community and the theory of the subjects of international law from the prospect of different branches of social science and international law. The differences in the approach to the definition of the subjects of international law will allow to define the dominion of international law from the point of view of the major regional doctrines and will make possible to make the conclusion.

Subjects of international law can be characterized by their sovereignty. It means that study and comparison of concepts of sovereignty can be used for creation of the new system for development of the law of self-determination in the science of international law.

Another related issue to a theory of self-determination of peoples and nations in the theory of international law and in the theory of general social science is a theory of recognition. The practice of recognition of states as a result of self-determination sometimes moves in different directions- as an example-recognition by the Russian government and denial of recognition by the Western governments supported by different arguments with regards to the rights of self-determination of peoples and nations exposes different approach for analysis of the nature of sovereignty and appealing to declaratory or constitutive theories of recognition.

It is not clear if these differences allows to make conclusions with regards to universality or non-universality of international law of self-determination, but facts and arguments used in this analysis allows to talk about differences that can

result in reassessment of the future trends in development of the law of self-determination..

The development of the principle of self-determination was one of the most prominent and significant doctrines in the theory of international law in the 20th century. Today, it becomes one of the cornerstones in international politics and foreign relations.

The key to understanding the Western theories are the underlying theories of social science and international law that were developed in the 18-19th centuries. The roots of these doctrines must be discovered in analysis of development of legal traditions and philosophy. The Western doctrines and perceptions of international law originally existed since the Roman and Byzantine Empire and were based on different notions that will be demonstrate in this analysis; after that period of time development of these doctrines were influenced by transfer of international law studies to East from Western Europe in a later times, that evolved further and are still defining attitude of international law scholars toward the processes of self-determination and recognition of newly organized states after the World War I.

It can be said that development of the law of self-determination resulted in the development of unique conceptions of theory of international law and this historically unique system contributed to the development of global international law all the way through the 19th and 20th centuries.

**Deniers of Self-Determination as a Legal Principle**

After proclamation of self-determination as a principle of international law attempts were made to present this principle as a merely political principle. Behind attempts to "clarify" the meaning of the principle, attempts to distort and destroy legal content of the principle can be found. The first group of scholars claim that no such principle of international law is in existence, and it is only a political process. The second opinion is that this principle is so complicated that there is no way to define it by the means of legal methodology. The third group of scientists are misrepresenting its content.

One set of arguments against the principle was summarized by professor Clyde Eagleton[3]. Included among the arguments are:

A. By the principle of self-determination "legal right to engage in revolution" establish the legal right to fight not only against the parent state, but against a third state.

B. Principle of self-determination plunges world into chaos, advocacy of self-determination takes "no account of reason, or justice, or practicality."

C. President Eisenhower claimed during the general debate at the 11th General Assembly of the United Nations that implementation of the principle of self-determination was "a challenge to the international community and to peace and to orderly progress."

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[3] Eagleton, C. "Self-Determination in the United Nations" American Journal of International Law, Jan 1953

D. And finally, the representative of France in the U.N. denied the legality of the principle, he claimed it is not a justified right and that it cannot be claimed by individuals in the court of justice[4].

All these conclusions led to the non-establishment of the principle of self-determination within international law which had the effect of "reaffirm[ing] the political significance" of this principle, which in turn, has lead the courts to desist in proclaiming it in its decisions[5]"

The analysis of the doctrine of self-determination demonstrates de facto differences within different schools of thought in international law. It can be said that further development of theory of self-determination changes within the traditional approached of international law are required as a necessary condition of development of general international law.

The international law of recognition can not be based on political arguments, as it was before, but must take into consideration the existence of new subjects of international law- such as peoples, nations and minorities. Further development in the international law of self-determination must concentrate on the analysis of this right as a developing right, not a static one. A legal reappraisal of the right for the secession is necessary to develop to the level of the rules of international law. It is necessary to provide a forum for non-state actors, such as non-recognized peoples, nations and minorities for participating in the discussions regarding current issues and problems of international law.

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[4] Document A/C3/SR. 40, Par. 19
[5] See Official General Assembly Report, Sixth Session, Third Committee, Meeting 371

It must be recognized, that the process of development of contemporary international law in the twenty first century is under a great influence of the foreign policies and diplomatic practices of the great powers and of the developing and newly emerging states.

## The Right to Self-Determination: External and Internal Aspects

In the theory of international law the external aspect of the right to self-determination guarantees a right of the peoples and nations "to be free from foreign interference which affects the international status of that state[6]" At the same time the right to internal self-determination entitles peoples and nations to participate in the political decision-making process which affects their economic, political, cultural conditions of their lives.

## *The Concepts of External Self-Determination in the Theory of International Law*

Probably, in today's world of foreign policy and practice of the self-determination and recognition the Russian Federation is an example of the approach to these issues from the point of view and support of external aspects of the theory of self-determination. The recent developments in the Russian foreign policy such as recognition of Abkhazia, Ossetia, position with regards to the Crimea and Lugansk and Donetsk Republics taken the Russian government and analysis of the underlying legal theory will allow to demonstrate the differences in the approach to the practice of the self-determination and necessity of a new

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[6] A. Casesse, The Self-Determination of Peoples, in The International Bill of Rights 100 (Lou Henkin Ed., 1981)

method for the purpose of analysis of international law and practice problems. Also, it will allow to demonstrate the distinctive feature of the Russian concepts of international law as a method of analysis of the function of the rule of law in terms of policies, shaping the life of international community.

Current trend in the development of international law insist on the highly formalized study of various legal documents, such as treaties, decisions of tribunals, charters and statutes of international organizations. At the same time it pays little or no attention to the analysis of the facts and actual reasons behind these sources of law, such as interests of individual powers, or political unions, analysis of the balance of forces and of the claims and demands of the emerging subjects of international law, such as minorities developing into national groups, nations and peoples.

It can be noted that this paper assumes that the real life of the international community consists of the activities of a great number of economic, social and political institutions that are operate in conditions created by the international order.

For the analysis of the different approach to the analysis of the problem of self-determination, the Russian method of international law can be to be studied as an example of distinctive from the Western one. Probably, the best way to describe the distinctiveness of Russian method of international law is do describe it as analyzing the international law problems using historical method and approach. As future development of international law doctrines depends on the ability of scholars to summarize all previous experience and the development of

international law doctrines from the historical prospective it can be said that future of international law is in codification of all available sources and development of the new method of international law.

Historical analysis of development of the international law can help concentrate on the development of the theory of self-determination and sovereignty, as it was developed through the course of history. These doctrines must be compared as they were developed by the different schools and the research will be unique by implementation of the comparative law method into the international law. Comparative law approach is necessary to apply, because this is an only way to explain how these concepts are practically implemented in foreign relations and diplomatic practice of modern world.

It can be noted that regrettably the doctrine of self-determination is not very well researched by international legal science essentially in the area of self-determination and sovereignty from the historical approach.

These theory possesses its own features little known or even unknown to international law scholars. Theory of self-determination includes philosophical and ethical framework with its own distinctive outlook. Jurists who researched this area performed a significant work developing contemporary issues of international law. They are overcome and developed dogmatic conceptions on the issues of role and function of international law, the role of nation and peoples in international law, the concept of sovereignty and developed a principle of self-determination from scratch. Tremendous work was made to avoid dogmatism and

citation-mania and to eliminate legal nihilism that is a part of contemporary theory of international law.

## Principle of Self-Determination

The recognition of the principle in the United Nations Charter and by the Geneva Conference of 1954 raised a discussion regarding the content of the principle, who can claim the right to self-determination and how the right for self-determination can be claimed.

### Content of the Principle of Self-Determination

Despite the fact that the existence of the principle of the self-determination was confirmed by the number of important international acts, some authors are still denying its legality and existence. As it was noted previously, opposition to this principle was summarized by Clyde Eagleton in his article "Self-Determination in the United Nations" where he wrote, that the principle of self-determination, establishing " legal right to engage in revolution", allowed an individual to "legally fight not only against the parent state but against other individuals", that it is pushing the world into "chaos" , that advocacy of self-determination takes "no account of reason, or justice, or practicality...[7]"

In contemporary science of international law this concept was developed further as a "right of every people and every nation to decide all questions concerning its relations with other peoples and nations up to and including

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[7] C. Eagleton Self-Determination in the United Nations, *American Journal of International law*, Jan. 1953

secession and formation of independent states, as well as all questions concerning the internal system without interference from other states."[8]

## Claimants for a Right for Self-Determination According to Contemporary International Law Theory

One of the main questions that needs to be clarified is who can claim the right to self-determination. The answer can be found in treaties and normative acts of the United Nations. Article 1, par.2 of the chapter on the purposes and principles of the United Nations speaks of "peoples" and "nations". This phrase shows definite intent to promote friendly relations not only among the nations-U.N. members, but also among the peoples, who are not members of the United Nations yet, and not have a state of their own. To lay down a foundation for these relationships the U.N. Charter proclaims the principle of equal rights. Further, in the Resolution adopted by the Eight Session of the Committee on Human Rights the first part of the article on self-determination. The definition of" nation", "peoples" and "minorities" according to existing theory are following:

## Nation in the Theory of International Law

According to contemporary theory of international law the formation of national groups dates back to the consolidation of tribal unions, and accordingly to the disintegration of the tribal community. A national group is not a simple mixture of different tribes, but a new type of community of people, different from

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[8] G. Starushenko The Principle of National Self-Determination in Soviet Foreign Policy, p. 169

the tribe. National group contains elements of territorial community, which make it stable.

Second essential feature of a national group is a common language. The language of a national group developed as a result of a fusion of a several tribal languages. The groups related by origin speak similar dialects.

At higher stages of national development a national community is also characterized by a common psychological makeup, which can be found in a common culture.

According to established doctrine a national group can be defined as a "Historically constituted, relatively stable community of people which precedes the formation of a nation. A national group forms on the basis of three elements of a nation which are in the process of formation and development- common language, common territory and common psychological make-up, which manifest itself in a common culture.[9]"

In the process of the historical development a national group usually develops into a nation. On some point ends the formation of a common territory and areas populated by a single national group transforms into a single national state.

But it must be noted, that a nation can be formed only as a result of people's long and systematic relationship. People that live the same economic life and in the same conditions develop common traits of national character.

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[9] G. Starushenko The Principle of National Self-Determination in Soviet Foreign Policy, p. 18

A common psychological make-up is one of the essential characteristics of a nation. So, a nation can be defined as: "A historically constituted, stable community of people, formed on the basis of the common possession of four principal characteristics, such as: a common language, a common territory, a common economic life, and a common psychological make-up manifested in common specific features of national culture.[10]"

It is only the sum of these four characteristics that can describe an existing nation.

According to the theory of international law all nations are subjects for self-determination. But at the same time, the concept of subjects for self-determination is much broader.

**Peoples**

The concept of "peoples" is a very broad concept, it includes concept of "Nations" and "minorities". Many concepts and definitions of "peoples" were given in the United Nations. The Syrian delegate to the United Nations has defined it as a large number of people forming a nation or as conglomeration of diverse national groups ruled by the same government. In the draft resolution introduced by Indian representatives "People" were defined as a considerable solid national group and the Yugoslavia's draft resolution defined it as a group living on common territory and bound by the same ethnic, cultural, historic or other ties.

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[10] *Ibid*, at 22

It can be summarized, that the subjects of the self-determination can be considered national groups; nations; and peoples, consisting of several nations, nationalities and national groups which have a common territory, possesses one or more common traits (historic, cultural, linguistic, religious, social, etc.,) and strive to achieve a common goal through the claim of self-determination.

At the same time we need to distinguish the concept of "minorities", which generally has no right for self-determination, but can enjoy only the rights for national autonomy and self-government. But in case if minorities distinct from the majority group of the population can rely on the right to self-determination if they can be characterized as "a people".

**Minorities**

The definition of "minorities" suggested by Capotorti is generally accepted:

> "A minority is a group which is numerically inferior to the
> rest of the population of a State and in a non-dominant
> position, whose members possess ethnic, religious or
> linguistic characteristics which differ from those of the rest of
> the population and who, if only implicitly, maintain a sense
> of solidarity directed towards preserving their culture,
> traditions, religion or language.[11]"

It can be concluded, that in the analysis of the subjects for the self-determination three distinctive types of groups can be found: national groups or nations, peoples, and minorities.

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[11] F. Capotorti, 'Minorities', in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law*, Volume 3 (1997), 411.

## Sources of the Law of Self-Determination

General international law doctrines were concentrated on the issues of the self-determination with respect to fundamental freedoms and the basic rights of individuals.

International law scholars did not recognized a principle of self-determination as a binding legal principle, instead it was proclaimed as a "pragmatic policy statement", "a political formula", "a metalegal norm", anything, but a juridical precept[12].

Prominent international law scholar Starushenko explained that the principle of self-determination developed from the political principle into the norm of international law and was codified in the United Nations Charter:

The General Assembly Resolutions 1514 and 2625, Covenants on Human Rights established provisions that have evolved into the international law norms and rules.

Article 1 of the First Additional Protocol to the 1949 Geneva Conventions on the Victims of War, agreed in 1974 and adopted on Geneva Conference in 1977 proves the meaning of the principle of self-determination as it was set in the 1970 Declaration on Friendly Relations and refer to the armed conflicts where " peoples are fighting against colonial domination or alien occupation and against racist regimes."

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[12] Note 12, at 56

*The Helsinki Final Act*

The principle VIII of the Helsinki Final Act further developed a principle of self-determination of peoples. The Principle VIII can be read as follows:

> The participating States will respect the equal rights of peoples and their right to self determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.
>
> The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

From the text of the principle it is clear, that it applies to all peoples, regardless of whether they live in sovereign or independent state. Second, it defines the right for self-determination as a continuing right, and it removed restrictions of the principle to the sovereign States with racist regimes.

The second area for the development is paragraph 4 of principle VII-"Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief"

> The participating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental

freedoms and will, in this manner, protect their legitimate
interests in this sphere.

This construction of the Final Act excluded minorities from the concept of

"peoples" provided them only limited rights and refusing them a right for self-

determination and secession.

Third, by proclamation that "all peoples always have the right, in full

freedom, to determine, when and as they wish, their internal and external political

status, without external interference, and to pursue as they wish their political,

economic, social and cultural development." Helsinki Act established a new level

for the development of the doctrine for self- determination of peoples and can

constitute a new period in the development of the principle that can be called

post-colonial period of law of self-determination.

### The Character of the Concept for Self-Determination in the Final Act

It can be concluded, that the Helsinki Final Act reflects Western view of the

concept for the self-determination of the peoples. The Russian philosophy of the

doctrine on that point was satisfied with those small steps that were made in the

Article VIII.

### The 1976 Algiers Declaration

The 1976 Algiers Declaration in the Articles 5 and 6 confirm the United

Nations Charter Anti- colonialist character and proclaims the neo-colonialist

oppression at present the most dangerous and widespread form of the denial of

self-determination for the people.

**Development of Doctrine of Self- Determination as a form of de-colonization**

Countries of the socialist block started to develop a doctrine for the purposes of the "liberation of non-self-governing peoples from colonial oppression and domination."[13]

"The principle of self-determination presupposes the recognition of the right of every nation freely to determine its political, economic and cultural status, that is, to decide all questions of it's existence right up to and including secession and formation of an independent state[14]" The leading Russian scholar on the theory of Self-Determination Gleb Starushenko describes the Russian approach as:

> The international aspect of the principle of self- determination presupposes the right of a people (or nation) to (a) secede and form an independent state; (b) secede and join another state; and (c) remain in a state as a federal, autonomous, ets. member.[15]
> The internal aspect of the principle of self-determination, that is, the people's right to manage its domestic affairs without interference from without, presupposes recognition of the right of a people (or nation) to (a) decide what its political and social system will be like; (b) freely dispose of its natural resources and manage its economy; and (c) decide all other domestic issues concerning culture, religion, ets[16].

Also, it was described as a dual right reflecting bundle of international and internal rights of peoples and nations for the self- determination. Professor D. Levin explained limitations on the application of the principle. He concluded that

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[13] See Erickson, R, *International Law and the Revolutionary State*, 55-77, (1972)

[14] Starushenko, G.B. *The Principle of National Self-Determination of Nations in Soviet Foreign Policy,* Moscow, Foreign Languages Publishing House. (1963) p.6

[15] *Ibid*, p.173

[16] *Ibid*, p. 180

the peoples and nations has a right to secede from the multi-national state when they expressed the free will. From his point of view the free will can be exercised when a contract of the union was breached and peoples reacquire their sovereignty. Any states that refuses the right of the self-determination under these conditions is committing aggression under the international law[17].

## Self-Determination and Related Problem- Recognition of States

It is necessary to note that the function of international law that developed in that period of time was based on the theory of states as exclusive subjects of international law and the main purpose of international law was to protect and regulate interests of the elite of newly developed "states".

All theories of recognition that we're developed during that period of time became merely formal procedures for resolving such issues by the European family of nations. Treating other members of the "civilized nations' as sovereign and equal allowed the aristocracy and other members of the ruling class to control both the internal and external affairs of the states through the means of "diplomacy

## Contemporary Law of the Recognition of New States

In the Declaration of 16th of December 1991 it was affirmed, that a new state can obtain recognition of it's independence on the following conditions:

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[17] David B. Levin "The Principle of Self-Determination of Nations in International Law" 1962 *Sovetskii Ezhegodnik Mezhdunarodnogo Parava* (1962 Soviet Yearbook of International Law), p.47

- respect for the provisions of the Charter of the United Nations and
the commitments subscribed to in the Final Act of Helsinki and in the
Charter of Paris, especially with regard to the rule of law, democracy
and human rights
- guarantees for the rights of ethnic and national groups and minorities
in accordance with the commitments subscribed to in the framework of
the CSCE
- respect for the inviolability of all frontiers which can only be
changed by peaceful means and by common agreement
- acceptance of all relevant commitments with regard to disarmament
and nuclear non-proliferation as well as to security and regional
stability
- commitment to settle by agreement, including where appropriate by
recourse to arbitration, all questions concerning State succession and
regional disputes.
The Community and its Member States will not recognize entities
which are the result of aggression. They would take account of the
effects of recognition on neighboring States.
The commitment to these principles opens the way to recognition by
the Community and its Member States and to the establishment of
diplomatic relations.

Based on the text of Declaration in can be concluded that the

doctrine of recognition shifts toward the declaratory theory and it can

be demonstarted on the recent events- that the recognition of Abkhazia

and Ossetia statehood as subjects of international community by

Russian government is not contrary to the position expressed in the

Declaration.

### *Independence*

According to the doctrine of recognition the central and the main

requirement for the statehood is independence. In the Austro-German Customs

Union Case Judge Anzilotti expressed the classic definition of independence:

"Two conditions must be satisfied; at first the separate existence

of an entity within reasonably coherent frontiers, and this entity not

being a subject to the authority of any other State or group of States."

### *Criteria for Statehood*

Article I of the Montevideo Convention on the Rights and Duties of States,

1933 defines: " The State is a person of international law should possess the

following qualifications: (a) permanent population; (b) a defined territory; (c)

government; (d) capacity to enter into relations with other States."[18]

### *Practice of Recognition*

As an example the Russian position regarding the function and role of the

theory of self-determination for recognition or non- recognition (non-recognition

of the Soviet Union from the period of the 1917 until the 1933 by the great of the

newly established Soviet Union created problems for diplomatic, political and

economic development) can be analyzed.

Prominent Russian international law scholar Koretsky stated, that

> There was certain danger of returning to the doctrine of legitimism
> or the policy of non-recognition by which one group of States
> could virtually control the existence of another. Illegitimate States
> had the right to exist as well as so-called legitimate States. Any

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[18] Convention on the Rights and Duties of States, Montevideo, 26th December

1933, 165 LNTS 19 Concluding Observations of the Committee on the

Elimination of Racial Discrimination: Georgia, 27 March 2007, CERD/C/GEO/CO/3,

SCOR, S/PV/3007, 12 Sep 1991 (Merimee (France)).

attempt ... to establishing control over their formation, contrary to the principles of self-determination.[19]

The Russian doctrine of international law makes no difference in practice between recognition *de facto* and *de jure*. This practice is based on the tradition to grant recognition to every new nation which was able to obtain sovereignty as a result of the process of decolonization. Further development of the theory resulted in a position, that each national group has the right to statehood and the legal status within the community of the nations.

In the area of the law of self-determination and recognition this differences can be demonstrated by comparison opinions expressed by the prominent Russian scholar Koretsky that the establishment of a State is a matter of municipal law.[20] Also, other Soviet members of the International Law Commission did not accept the theory, that the legal personality of a State in international law must be defined according to the rules of international law. Another Russian international law scholar Tunkin wrote on this issue:

> All states are equal, and modern international law is opposed to
> legal formulations suggesting limitations on sovereignty, capacity or
> semi-dependent status, indicating limitation of sovereignty.
> Restrictions of States to engage in the conduct of their international
> relations may result exclusively from the provisions of their
> municipal law, and the only example of such legally permissible
> limitation is the status of a member of a federal state, when the
> federal government has the exclusive right to represent federation or
> union in international affairs. Even than, however, if the constitution
> is silent, the Member State of the federal State may have
> international capacity, and, for instance, conclude treaties.[21]

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[19] Ibid. (1949) 78

[20] ILC (1949) 95

[21] *Ibid.* (1962) 241

In the development of this idea he concluded, that

> Limitations of State's capacity to make treaties would
> reflect one of the aspects of the new international law, in
> the contradistinction to the old international law, which had
> recognized the existence of States that were not fully
> independent; that situation had been expression of colonial
> dependence. Contemporary international law condemned
> and prohibited any form of subjugation of one State by
> another.[22]

This statement was concluded from the provisions of the United Nations

Charter, as it was developed by the 1960 General Assembly Resolution 1514

(XV) and the "Declaration on the Granting of Independence to Colonial Countries

and Peoples"[23]

According to the theory and doctrine of international law the state is a main

actor and is a main subject of international law. The development of the system of

states started at the end of the twentieth century. In the end of nineteenth century

only fifty states were in existence. In the 1941-1945 there we're approximately 75

states on the political map of the world. Currently, 191 states are members of the

United Nations Organization including the Holy See and not including some

existing states such as Taiwan.

## Law of Self-Determination and Recognition as a Basis for the Development of the Law of Peaceful Coexistence.

After the crash of the Soviet Union the newly established independent States

came into existence. Immediately after they were admitted to the United Nations

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[22] *Ibid.* (1962) 241

[23] *Ibid.* (1965) 25

and recognized by the world community governments of the States such as Ukraine, Moldova, Georgia, Armenia, Azerbaijan found themselves in the centre of problems. The first problem that arises was a claim for independence by the part of nation in the newly established states which resulted in armed conflicts. The roots for those claims can be traced back in time when during the period of building of the Soviet Union different political and national entities were united and different Soviet Republics were formed. It appears that successful development of the new States depends on the resolving of the problems and questions.

The questions that were absolutely differently resolved by the Western and the Russian international law systems:

Does political entity violate obligations under international law when it seceded or attempted to secede from newly established State?

Does recognition of self-proclaimed State by any other State violate obligations under the provisions of international law?

Attempts to resolve the problems of applying the norms of international law resulted in an unexpected outcome- it became clear, that two different approaches to the doctrines of international law of self-determination and recognition of States are in existence on the former Soviet Union territory. The first approach was developed by the scholars of Western countries and the second approach doctrine developed by the scholars of the socialist block. So, it became clear, that Soviet doctrines of international law are in existence as a different from the western doctrines and that they became a basis for the development of new

international law not only on the territory of the former Soviet Union but far

beyond its' borders.

# CHAPTER 2. DEVELOPMENT OF INTERNATIONAL LAW AND INFLUENCE OF THE SOCIAL SCIENCE ON THE DEVELOPMENT OF CONTEMPORARY INTERNATIONAL LAW OF SELF-DETERMINATION

## The Approach to the History of International Law and International Relations

Koskenniemmi wrote that the description of the development of the general theory and history of international law usually starts with Sumerian city-states or the laws of Manu in ancient India, after that it followed up by the description of the 'international' relations of Greek city-states and an overview of Roman expansion resulting in the adoption by the conquered states of rules and norms of Roman law- particularly *ius fetiale* and *ius gentium* .

After the description of the death of legal institutions during the Middle Ages, it will be short introduction of to the Spanish scholastics of the 16th century, the Protestant Reformation, and the Peace of Westphalia in 1648 as the point when the of the modern States system was born as the hidden objective and purpose of all prior history of the whole mankind.

Discussion of development of international law doctrines and international law relations would then discuss Vattel's rejection of the of Civitas Maxima in 1758 following by the study of the Congress of Vienna 1814–1815. History of international law would then proceed to research of period of peace in Europe and colonial expansion with the way jurists of the period "tended to exaggerate' the sovereignty of their States, turning to a 'positivism' that neglected international law's natural home in a universal teleology."

Development of international institutions - the Red Cross in 1864, the two Hague Peace Conferences in 1899 and in 1907, made it possible creation of the League of Nations and the United Nations.

Since the 1960s was the move from statehood to some kind of universal existence—perhaps 'globalization'—that had not yet quite declared its legal form. This simplified attitude toward development of the science of international law and international law scholarship is a result of influence of general science and scientific theories that shaped all social science since 19th century.

## Social Science Approaches for the Analysis of the Nature of Law

Despite the existence of hundreds of definitions of law and hundreds of theories as to laws nature, all these approaches can be classified into three main types, which can be summarized as follows:

1) That concentrates on the analysis of the relationship between law, morality and justice; that which sees the origin of law and sanction as a necessary attribute of law within the approach of "pure reason".

Among the authors that we can refer to using this approach is the Byzantine Emperor Justinian who defined law as a "theory of right and wrong" and the "art of the good and equitable"; the Greek philosopher Aristotle, who described law as "reason free from passion"; and finally, St. Thomas Aquinas who defined law as: "nothing else than an ordinance of reason for the common good, made and promulgated by him who has care of the community.[24]"

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[24] T. Aquinas Summa Theologica, Part II, First Part, Question 90

This approach is usually referred to as *the natural law theory* or the *philosophical approach* and declares the origin of law and sanction as an inherent, and necessary condition within the nature of man. This, due to mans moral and at the same time rational nature, creates the potential which then generates the legal process and consequently, the philosophical approach.

B. That looks through the perspective of the relationship between law and political power, referring to the "will of the state" and its authority to mandate a sanction as the only source of law – this approach is usually referred to as *positivism*. Through this perspective, Thomas Hobbes then defined law as: "... the word of him, that by right has command over others"[25] A later and more precise summary of the approach is: "Law is a command proceeding from the supreme political authority of a state, and addressed to the persons who are subjects of that authority."[26]

One of the practical effects of this school is that it does not allow any moral principles to affect the legal norm, and does not allow any interpretation to change it. It treats the law as a set of technical rules and norms that must be applied precisely and this is the only permitted analysis. Sometimes the name of " analytical jurisprudence" is also associated with this doctrine.

C. The third type of doctrine sees the origin of law and sanction as a part of the historical development of a particular community, and believes that "tradition(s)", "customs" and a community's "national character" are the ultimate sources of law.

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[25] T. Hobbes, Leviathan, or the matter, forme, and power of a commonwealth, ecclesiastical and civil Cambridge, 1935 p. 109
[26] Amos, S, The Science of Law, London, 1909, p.48

The historical school discovers the source of law within the minds and spirit of the people. Prominent scientists and legal theorists of this school are Savigny and Sir Henry Maine.

Later in the 19th century as a result of the mixing of theories of positivism with historical school conceptions, the school of "sociological jurisprudence" developed. Generally, it could not be described as a theory or a school of law, rather, a classification of certain interests grouped for the convenient use of law-givers and all participants of a legal system.

Also, the school of "legal realism" which developed in 1920-1930 in the United States must be mentioned. The school of legal realism concentrated on the analysis of the behavior of judges. As articulated by Carl Llewellyn: "What these officials do about disputes is, to my mind, the law itself"[27].

## International Law v. International Relations, Foreign Policy and Diplomacy. Deniers of International Law

The concept of the function of international law developed by Vattel presupposed that "foreign policy" and "diplomacy" became an excuse allowing the "governments" of "independent states" to exist in "a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the will of any other man"[28]

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[27] Llevelyn, K. The Bramble Bush, New York, 1951, Ch.1
[28] J. Locke, Two Treatises of Government (1690) (ed. P. Laslett; Cambridge, Cambridge University
Press; 1960), p. 309

Vattel introduced the notion of the state of nature into the doctrine of the law of nations. "Since Nations are composed of men who are by nature free and independent, and who before the establishment of civil society lived together in the state of nature, such Nations or sovereign States must be regarded as so many free persons living together in the state of nature.[29]"

Philipp Allott noted that "the semantic confusion in Vattel between "state" and "nation" proved to be of great significance when, in the nineteenth century, it became possible to cause ordinary citizens to confuse their allegiance to their nation with their obligations to the systematic state, a state-system which might cause them to die by the million.[30]"

Vattel also developed a theory as to the subjects of international law and as to the doctrine of the state within international law as a person having its' own will, obligations and rights living in the society of other states with their own affairs and interests. According to Vattel these states have "international relations" using "diplomacy" as a perfect tool to regulate these relations with ultimate right to start a war as a last resort. Those states have to recognize only one principle of international law- law of supreme authority of sovereign over his subjects and non- intervention as a condition of coexistence.

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[29] E. de Vattel, *The Law of Nations, or the Principles of Natural Law applied to the Conduct and to the*
*Affairs of Nations and Sovereigns* (tr. C. G. Fenwick; Washington, DC, Carnegie Institution; 1916), p. 3.
[30] Alott, P. The Health of Nations Society and Law Beyond the State, p. 90, Cambridge University Press 2004

*Conflict of Doctrines of International Law, Foreign Policy and Diplomacy*

Probably the main concern in contemporary theory of international law is a belief that law and policy can never be separated. One of the main problems that must be resolved for further development of the theory of international law is division between the law and politics. Research on the subject of international law must distinguish the issues between the jurisdiction of International law, foreign policy and diplomacy. For proper research in this close relationship it is necessary to evaluate three aspects: "the influence of foreign policy upon the development of international law; the converse influence of international law upon the foreign policy of the state; and the use of international law by states as a support for foreign policy.[31]"

In the process of creation of norms of international law states promote specific principles and interests that are defined by the state's own position on the problem. This position of a State is a part of a state's foreign policy.

Diplomacy is a method of implementing the foreign policy of the state. It can be defined as "[an] activity…of heads of states, of governments, of departments of foreign affairs, of special delegations and missions, and of diplomatic representations appertaining to the effectuation by peaceful means of the purposes and tasks of the foreign policy of a state.[32]" It means that diplomacy plays the main role in the process of creating norms of international law. But diplomacy is not the only tool for promoting of the foreign policies of states. This

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[31] *Id.,* at 271

[32] Levin D.V., Diplomatiia, (Diplomacy)14, 15 (Moskva, Sotsekgiz, 1962)

can include scientific and cultural cooperation, cooperation in the field of

industry, economics and education.

In this process of cooperation and competition between the sovereign states

the norms of international law are formed.

The actual situation was characterized by professor Tunkin, that

> In international relations and in the creation of norms of
> international law in particular the great powers play a special role.
> On the juridical plane the principles of respect for state sovereignty
> and of the equality of the states, which are an important means of
> defending the independence of weak states from the encroachment
> of strong powers...[33]

An example is the armed intervention of the United States army in the

Dominican Republic in 1965. The United States government referred to

the need to protect the life and property of its citizens in that case.

While at the same time, in promoting and carrying out the policy for

the protection of the life and property of its citizens, they are (the great

powers) attempting to prove the existence of norms of international law

that allows for the use of force by one state against another. It must be

recognized, that the process of development of contemporary international

law of the twenty first century is under the great influence of the foreign

policies and diplomatic practices of "the great powers" and also of the

developing and even newly emerging states. International law scholars

need to spend more time studying historical materials and diplomatic

documents in order to perform proper research.

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[33] G.I.Tunkin Theory of International Law, 275, (Harvard University Press, 1974)

**Social Science Approaches to Function of International Law**

.    "International law is based on the assumption that there exists an international community embracing all states and constituting a legally organized society.[34]" This notion can be used as a starting point as to the definition of international law. It was further developed in the classical definition of international law , which was given by Oppenheim as follows: "Law of Nations or International Law *(Droit des gens, Volkerrecht)* is the name for the body of customary and treaty rules which are considered legally binding by states in their intercourse with each other".[35] Further, in his system, Oppenheim subdivided it to *universal* International Law, in "contradistinction to *particular* International Law, which is binding on two or a few states only."[36]

In order to resolve the conflict as to the approaches of different legal systems on several problems in the theory of contemporary international law including: the self-determination of nations, the recognition of newly established states, sovereignty method of comparative law need to be applied. This method will take an approach that is closely related to the analysis of the meaning of the terms "Peoples" and "Nation."

The legal category of a "nation" need to  be analyzed from the historical point of view, tracing the development of European nations as main actors and subjects of international law.

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[34] Oppenheim L. International Law; a Treatise. 51 (8th ed.,  David McKay Company, Inc. New York 1955)

[35] *Id.*, at 4

[36] *Id.*, at 5

The concept of the sovereignty of a nation must be analyzed from it's origin and roots not in the French and American revolutions, but much earlier; this was both proved and illustrated by national movements in both Europe and Russia. Also, the concept of national sovereignty must be distinguished from the concept of state sovereignty.

Development of the concept of national and state sovereignty would resolve many conflicts in the contemporary doctrine of international law. Development of the theory of self-determination and recognition of peoples and nations as both actors and subjects of international law will allow for the resolution of the problems of lacunas in international law.

With regards to the analysis of the above stated problems application of constitutionalism as a theory of international law will allow for the scientific exploration of the origin and development of the norms of international law and to resolve the problem, and to also scientifically discover the origin and nature of the principle of the self-determination would allow for development of the international law doctrine on the recognition of new states.

Application of this principle would also allow to propose criteria for the comparison of doctrines of international law as international law of families of nations.

Using comparative law method and analyzing doctrines of international law recognizing peoples and nations as subjects, such as within the Russian doctrine, can be compared to other approaches- looking at the peoples and nations as a

minorities, subject to protection along with other minority groups by the states only.

Further research of these problems and the analysis of the nation as a subject and the actor of international law will allow for the establishment of a new direction for the development of the doctrine of international law and to find an approach to overcome the current crisis of international law.

**Formation of International Law: A States Practice as a Notion within Western International Law**

The beginning of the development of the Western doctrines of international law was described as:

> "At a time when the borderline between peace and war was as thin as between the reprisals and piracy, these lawyers deduced their systems of the law of nations- as it appears to us- from nowhere. Yet, in an age of transition quotations from bible, church fathers, classical writers, mythology, history, and state practice served the purpose of devising a rational system.[37]"

Further development can be introduced in the following order:

The Italian School:

The Italian school was named after the Italian post-glossators, such as Bartolus (1314-1357) and Baldus (1327-1400), first fragmentarily exposed the existence of international law. They a law of nations as "universal and natural law applicable between independent princes and free commonwealths[38]"

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[37] Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 Harvard Law Review, (1946-1947) 539, 542

[38] Schwarzenberger & Brown, A Manual of International Law, 15, (Sixth Ed., Professional Books Limited, 1976)

The Spanish School:

In the end of fifteenth and beginning of the sixteenth centuries the center for development of international law moved to Spain. This happened because Spain at that time became the "leading power in the Western State system.[39]" Vitoria became the founder of the Spanish school of international law. He continued the tradition of the universal validity of international law.

The Anglo-Dutch School

Gentily (1552-1608), in his works established international law as not a "moral standards to which a behavior of States ought to conform, but a living body of law, actually applied between States.[40]" Grotius (1583-1645), usually referred as the father of contemporary international law, advocated the principle of the freedom of the seas and also developed a theory, that a State is a main actor in international law. In his method he used authorities of Natural law, Roman law, and State practices.

The Naturalist School

Pufendorf (1632-1694) described international law as completely natural law. From his opinion, the natural law is divided into natural law of individuals, and the natural law of States. After he concluded, that outside the Natural law of Nations, no any another type of law exists, which has the force of real law.

The Positivist School

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[39] *Id.,*

[40] *Id.,* at 16

Zouche (1590-1660) established a new theory of positivism in international law. Bynkershoek (1673- 1743) and Moser (1701-1785), developed this theory of international law after. The developed theory put a distinction between the natural law and positive sources of international law and defined the branched of international law regulating the relationships between the States in the time of peace and in the time of war and neutrality.

The Eclectic School (Grotian)

Wolff (1679-1754) and Wattel ( 1714- 1767) established a practice to use as a source of law select authorities from natural law, legal maxims, State practice, and decisions of national courts and international courts.

Deniers of international law

The origin of the concept denying a universal international law, and claiming the absence of any legal restrains among nations, was developed by the English philosopher Thomas Hobbes (1588- 1679). Hobbes starts from the notion that men's development started from the "state of nature". The state of nature comes to the end when men unite through the social contract to form a state. After that the single authority – or "sovereign" was created and those sovereign is a law, real and existing law, contrary to the "law of nature". And it was explained as: "covenants without the sword are but words." In other words "his argument ...is an almost classical expression of the ever recurrent feeling that international

law is no more than an inane phrase."[41] Hobbes concepts were not accepted until nineteenth or even twentieth century.

In the nineteenth century Austin took up the same attitude. Law was defined as "a body of rules for human conduct set and enforced by a sovereign political authority.[42]"

The conclusion that follows is that if this definition is correct, International law cannot be called law.

Modern Approaches - Behaviouralist Movement

This movement included in the study of international law elements of psychology, anthropology, sociology, and statistics. "It reflected the altering emphasis from analysis in terms of idealistic or cynical (realistic) conceptions of the world political order, to a mechanistic discussion of the system as its operates today, by means of field studies and other tools of the social science.[43]"

The behavioral approach to international law has been developed into the "policy-oriented" movement. The proponent of this theory – Professor McDougal regarded "law as a comprehensive process of decision-making rather than as a defined set of rules and obligations.[44]"

Critical Legal Studies

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[41] Arthur Nussbaum, A Concise History of the Law of Nations, 146 (Revised Edition, New York, The Macmillan Company 1958)

[42] Oppenheim L. International Law; a Treatise. 7 (8th ed., David McKay Company, Inc. New York 1955)

[43] Malcolm N. Shaw, International Law, 54 (Fifth Ed., Cambridge University Press, 2003)

[44] *Id.*, at 57

The critical legal studies theory based on the notion, that the classic approach to international law "has in essence involved the transportation of "liberal" principles of domestic systems onto the international scene, but this has led to further problems.[45]"

That theory describes close relationship between law and society, but notion is that conceptual analysis is necessary, because the concepts are not independent in nature, but based on relationships and represents particular powers. The theory states, those relationships between the State and international legal concepts must be analyzed, because such concepts reflect political power. Koskenniemi wrote:" a post-realist theory…aims to answer questions regarding the relationship of law and society, and the legitimacy of constraint in a world of sovereigns as aspects of one single problem: the problem of power in concepts.[46]"

## Development of International Law in Russia

As a special case of development of international law theory analysis of the Russian approach to public international law made using traditional historical method and newly developed comparative law method together, shows that rise of the Russian Empire in the nineteenth century and creation of The Union of the Soviet Socialist Republics (U.S.S.R.) in the twentieth century are the stages of the development of the same nation, with one distinctive legal tradition. This analysis shows different approach to the problem of self-determination and different

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[45] Koskenniemi M., International Law, xvi

[46] Koskenniemi, From Apology to Utopia, 52

reasoning behind the acts of recognition of newly established states. It can be described through the analysis of the historical development of the Russian law of the nations; through the research of the Russian legal tradition and can be characterized as a special case in the international law theory.

## *Chronology of Development of International Law in Russia.*

The key to the historical approach to international law is establishing of the chronology of underlying historical facts and relevant events. Those facts and events must be analyzed and evaluated for the purpose of defining a different periods of development of international law.

The general approach of scholars to Russian international law that the history of all Russian law falls into four main periods:

A. From 1917 to 1930: Beginning of the Soviet approach and development of international law;

B. From 1930 to 1938: Second period, according to Western scholars "denoted a quest for stability in international relations in order to achieve a breathing spell and also to employ all available resources for the internal reconstruction of the Soviet Union[47]."

C. From 1938 to 1955: The period that called "Stalinist" international law,

D. From 1955 to current time; the period of the new international law, new understanding of the role of the Soviet Union in the world.

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[47] Kazimierz Grzyboski, Soviet Public International Law Doctrines and Diplomatic Practice 3, (A.W. Sijthoff, Leyden, 1970)

Also, another approach often used to describe development of system of international law:

The first period: from 1917 to the moment of full recognition of the Soviet Union as a state in 1933;

Second period: from 1932 to the beginning of the World War II in 1939;

Third period: 1939- to the moment of establishing of the United Nations, when the UN Charter was signed in the 1945;

Fourth period: from 1945 to the mid-80s; characterized by the development of the principles of International Law, those were established by the U.N. Charter;

The fifth period: from the mid-80s to 1991 to the beginning of Perestroyka; is a period when the main purpose and goal of international law was to eliminate the cold war and arms- race, the full *detente* by all countries[48].

In this paper for the purpose of historical analysis the chronology will be completed by the periods, usually omitted by the scholars- periods of development of International law in Russia in the nineteenth century, and concluded with the analysis of the current state of international law in Russia as directly relevant to the analysis of the theory of self-determination.

**The First Stage- Development of International Law under the Czars (1682-1917)**

This period can be called as a Tsarist period for the development of international law. Despite the popular opinion of the absence of international law

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[48] Akademi'a nauk SSSR Institut Gosudarstva I Prava, Kurs Mezhdunarodnogo Prava, vol. 1, 122 (Moskva, Nauka, 1989)

in Russia in tsarist period, development of international law by Shafirov, Martens, Taube is an evidence of existing school of eminent scholars.

In this chapter the period after the Crimean War of 1854-1856 until the Great October Socialist Revolution of 1917 is of the interest. Russian government of that period using diplomatic methods promoted ideas of "humanity", "civilization", and "the international community.[49]" Promotion of these ideas was a result of the discussion between "slavianofils" – and "zapadniki" (westernizers.) From the nineteenth century Slavianofils insisted on the idea, that Russia must follow its own way based on its unique historical and cultural heritage. Zapadniki-Westernizers opposed to that by demanding Russia to accept Western science, culture, and social ideas, such as rule of law and individual rights. This resulted in those legal scholars from the both camps to promote the ideas of "humanity", "civilization", and building of "international community". Efforts in promoting of the higher standards of "civilization" were brought in attempts to codify laws of war. The reasons and justification for these efforts had moral character and a part of the historical Russian mission. Knyaz Romanovsky wrote:

> The high moral principle…is understood and applied first by one people and only latter becomes the property of the entire civilized world, and new laws of war will in all probability go this path.
> Yes, Russia will be the first people, and may she, accepting and proclaiming the need for these laws of war, give the example for the civilized Europe.[50]"

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[49] Eric Myles, *"Humanity", "Civilization", and the "International Community" in the Late Imperial Russian Mirror: Three Ideas Topical for Our Days,* Journal of the History of International Law, no. 4 (2002) at 310

[50] *Ibid,* note 32 at 316

The Paris Declaration of 1856 on the law of maritime warfare was a first

attempt to codify the international laws of war. The 1868 Saint-Petersburg

Declaration, initiated by Russian Cabinet's initiative, banned particular types of

weapons. The accent was made on the necessity to limit the unnecessary death

and suffering, "the necessities of war ought to yield to the requirements of

humanity."

The Hague Peace conference of 1899 "assigned the "requirements of

humanity"… as it codified further the international norms of warfare.[51]" The

second convention stated that the purpose of the contracting parties is to "to serve,

even in the extreme hypothesis the interests of the humanity and the ever

increasing requirements of civilization."[52]

In Convention II Martens clause was inserted and formulated as follows:

"populations and belligerents remain under the protection and empire of the

principles of international law, as they result from the usages established between

civilized nations, from the laws of humanity, and the requirements of the public

conscience."[53]

The Martens clause became a main principle for further development of

international law. It can be found in Convention IV of the 1907 Hague Peace

Conference, Geneva Conventions I to IV of 1949, Resolution XXIII adopted at

Teheran I international Conference on Human Rights in 1968.

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[51] *Ibid*, at 318

[52] *Ibid,* at 318

[53] *Ibid.*

The Martens clause developed further to the definitions of the "crimes against humanity."[54] In the Declaration of 24th of May 1915 to the Ottoman Empire, who committed the massacre of the Armenians, this crime was characterized as a "crime against humanity."

Short description of the stages of development of international law in Russia is necessary to introduce a "big picture" of the Russian history of the Czar's period.

### The Kiev Russ

The Kiev government of southwestern Russia and then the Muscovy government maintained treaty relations with neighboring empires, kingdoms, and cities[55]. The Czars had "sent and received ambassadors, drawn boundaries, negotiated rights of navigation and commerce, even insisted on occasion upon formal and substantive rules of war.[56]" In the sixteenth and seventeenth centuries the increase of the international trade brought the centralized Moscow government into relationship with all the European states.

### Peter the Great (1682-1725)

Peter the Great did much to develop the Russian legal system, especially in the area of the international law. He concentrated his expansionist energies in a series of successful aggressive wars which were concluded in treaties favorable to the growing Russian trade with other countries Pre-Petrine Russia was not part of

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[54] Bassiouni M.C., Crimes Against Humanity in International Law, 62 (2nd Ed., The Hague, Cluver. 1999)

[55] P.Corbett, Law in Diplomacy, 83 (Princeton University Press, 1959)

[56] Id., at 83

European *respublica christiana*. After the forced Europeanization of Russia, the international legal scholarship started to develop in Russia. Peter Shafirov's *"A discourse Concerning the Just Causes of the War Between Russia and Sweden"* was published in the Saint Petersburg in 1717. Peter the Great contributed to the paper, he wrote a conclusion and contributed to other parts.

## Catherine II (1762-1796)

Catherine II first formulated the principle of armed neutrality in the act of 1780.[57]

From the point of view of some authors Czarist government done a little to further development of international law. Corbett expressed an opinion that "recent Soviet writers have been at great pains to emphasize prerevolutionary Russian contributions of doctrine and practice to the development of international law."[58] But all of the authors agreed, that this was the practical step toward establishing principles of maritime warfare.

## Alexander I (1801-1825)

Alexander I made several proposals for international codification, disarmament and slave trade.

In 1818 the United States and England asked him for the arbitration of their dispute over the ownership of slaves in American territory which had been

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[57] J. Clarkson, A history of Russia, 250 (Random House New York 2nd Ed. 1969) (1961)

[58] P. Corbett, Supra, at 83-84.

occupied by English troops[59]. Alexander II (1855-1881) and Alexander III (1881-1894) participated in many proceedings which later served as models for later international conventions. Proceedings under Professor F.F.Martens of the University of the Saint Petersburg resulted in the unanimous award in the famous boundary dispute between Great Britain and Venezuela and later served as model for the Convention on the Peaceful Settlement of International Disputes adopted in The Hague in 1899.

### *Alexander II (1855-1881)*

Alexander II was an initiator of the Brussels Conference of 1874. The Conference was held to establish a set of rules for land warfare. The conference failed to establish any body of rules. Despite it, The Russian- Turkish war of 1877-1878 became a significant point in the development of international law. The Senate issued a decree mandating to comply with the 1864 Geneva Convention. Russia became the first European state recognized the Red Crescent. In the same decree, Russia declared the observance of the 1874 Brussels Conference "Proposed Laws for Land Warfare." The convention was not ratified at that time and the principles were not binding. By doing so, Russia developed a standard for observing laws of far for civilized states.

### *Nicholas II (1894-1917)*

Nicholas II, the grandson of Alexander II, initiated The Hague Pease conference for the same purpose on May 18, 1899. The Convention Respecting

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[59] J. Ralston, International arbitration from Athens to Locarno (1929)

the Laws and Customs of War on Land were drafted, adopting most of the non-ratified Brussels draft. Nicholas II had publicly announced the objective of the Hague conference of the 1899 to establish a world peace. The second international Peace Conference, which was held on June 15, 1907, failed to improve the judicial system of the world community. "The Hague Conference of 1907 carried on the work of Codification, extending it to include the rights and duties of neutral powers and persons in maritime war. At the same time the Conference adopted a number of other conventions relative to the conduct of hostilities and the mutual relations of the belligerents"[60]

### F.F. Martens and Contemporary International Law

At the time when international law was explained from the positions of "natural law" or "positive law" Fedor Martens- Russia's most famous international law scientist proposed the idea of contemporary international law as the expression of the cultural life and recognition of law by the peoples of civilized Europe.[61]

At that period of history, Russian international law scholars agreed, that a specific tradition in Russian politics exist, which purpose is to develop institutions of international law and adjudication[62].

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[60] C. Fenwick, International Law, 82 (3rd ed. 1948)

[61] *See* Fedor Martens, Sovremennoe mezhdunarodnnoe pravo tsivilizovannykh narodov, (St. Petersburg: Tipografiia ministerstva putei soobshchenii, 2nd ed. 1887)
[62] Aleksandr Gorovtsev, Voina i pravo: Soobshchenie, prochitannoe v Obshchestve revnitelei voennykh znanii, 6 marta 1902 g.: Izdanie vtoroe 54-55 (St. Petersburg: Tipografiia V. F. Kirshbaum, 1910);

Existing western scholarly literature recognizes Russia's curiously prominent role.[63]

Development of international law in Russia allowed bringing an idea of law in the practice of foreign relations.

**The Second Stage (1917-1933)**

The first period finished and the second period in the development of international law started from the Great October Socialist Revolution on 1917. The second period was characterized by the announcing of the democratic and revolutionary principles of international law as an official mainstream of foreign policies of a new state, and concluding of the treaties with neighboring countries based on those policies. Another step for this period was the development of the principle of *Clausula Rebus Sic Standibus*, meaning that "upon a change in that state of facts whose continued existence was envisaged when the treaty was concluded[64]" the treaty may be annulled. Initially this principle was employed for the purpose of abrogation of the Tzarist treaties, such as treaties regarding Tzarist debt, and a Brest-Litovsk treaty.

Development of this principle was closely related to the development of the principles of unequal treaties and *res inter alios gesta* (State succession). Unequal treaties are not protected by the principle of p*acta sunt servanda*. In the Russian

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[63] Eric Myles, *Humanity', 'Civilization,' and the 'International Community' in the Late Imperial Russian Mirror: Three Ideas 'Topical for Our Days,* Journal of the History of International Law 2, 6 (2002)

[64] Akademi'a Nauk SSSR, Institut Gosudarstva I Prava, International Law. translated by Denis Ogden, 107;

view unequal treaties are contrary to international law and do not need to be

obeyed. "Unequal treaties are legally worthless at all times.[65]"

### The Third Stage (1933-1940)

This period is the time of further development of the principles of self-

determination; of sovereign equality of the states; of the peaceful coexistence, and

prohibition of the aggression between the states.

### The Fourth Stage (1940-1945)

According to the Russian theory, in the end of the fourth period a United Nations

Charter was concluded. The right of nations for self-determination was developed

as anti-colonial policy, principle of peaceful settlement of disputes, international

law of the human rights started to emerge.

### The Fifth Stage (1945- 1991)

New international law emerged, new understanding of the role of the Soviet

Union in the world. The Russian doctrines and practices influenced the

development of contemporary international law. Block of socialist and developing

countries became a leading power in development of customary international law,

especially the law of self-determination.

### The Sixth Stage (1991-Current)

The current state of international law in Russia can be characterized as

international law of transitional period. But at this period new Russia followed the

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[65] Id., at 83

developed principles of International Law. This period started from the proclamation of the supremacy of international law principles over the national legislation. Norms of international law were included in the body of national legal system and announced as a norms of supreme authority.

Short overview of the development of social science theories that established foundation for the future theories of self-determination in Russia probably will help to explain different approaches of the Russian and European theories of the self-determination.

## Influence of Social Science on Development of the Doctrines international law in Russia

The doctrines of self-determination in Russia were developed separately from the Western doctrines and this isolation of the Russian social science from the European social theories defined differences.

Russian science of international law is not monolithic. Three main streams must be analyzed. Those streams are Liberalism represented by Zapadniki (Westernizes), Pan-Slavinism- Slavianofils, and Socialism were three main political and philosophical streams in Russia of nineteenth century that shaped the science of international law in the nineteenth-twentieth centuries.

The usual misunderstanding of the Russian science of international law based on the concept, that the general approach for the analysis of legal systems was defined by Lenin in 1916 with a statement: "A law is a political measure, it is

politics"[66] Another opinion, that contributed to misunderstanding of

International law in Russia is Marxist definition of international law, which can

be formulated as follows: "The superstructure of norms and procedures, in any

given society, that are based upon the economic organization of production and

enter in the relationship of this given society with some other state[67]." It was and

still believed by many, that Marxism is a main and the only source of the Russian

science of international law.

Based on this misunderstanding of the Russian theory of international law a

contradictive western definition of international law was formulated:

> "The system of jurisprudence consisting of general
> principles of right, equity, and humanitarianism, founded
> upon established customs and acts of states and upon
> international agreements not inconsistent with standards of
> justice and Christian and civilized states recognize as
> obligatory in their relations and dealing with each other as
> well as with the citizens and subjects of each."[68]

This competition of definitions for International law did not help to develop a

common theory, which will serve the whole community of scholars.

Russian view of the science of international law is based on the concept that

it is necessary to distinguish between international law as a body of rules, and the

science of international law, which treats topics outside the law in force.[69] Legal

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[66] J.Hazard I.Shapiro, The Soviet Legal System 3(1962)

[67] P.Corbett, Law in Diplomacy, 89-90 (Princeton University Press, 1959)

[68] A.Thomas Communism versus international law 3 (1953)

[69] Kazimers Grzybovski Soviet International Law and the world economic order, 9 (Duke University Press 1987)

science entails the organization of legal rules in a systematic order based on a theoretical concept.[70]

During the nineteenth century Russian scholars created a science of international law not only translated from European languages, but transformed it into the distinctive Russian school. That school formed before the Revolution of 1917 grew up and developed itself into the International law of the Soviet Union. The Soviet international law became a foundation for the development in international law in all the countries of former socialist block and developing countries. It can be said, that contemporary universal international law can not be understood without proper analysis and understanding of the Russian conceptions of international law and the history of its development.

## Self Identification of the Russian Family of Nations

Self Identification of the Russian Family of Nations can be described by the following quotes that can be found in the Russian literature:

> "Nationhood (narodnost') is to the idea of humanity what personality is to the idea of the human being. In other words: nations (narodnosti) are the personalities of humanity. Without nationalities humanity would be a dead logical abstraction, a word without content, a sound without meaning.[71]"

Further it was described as:

> "In the expression Holy Russia there is reflected our whole unique history; this name Russia has from its baptism, but its meaning it acquired from the period of fragmentation into appanages, when there was one chief, great prince over various subordinate ones, when,

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[70] Levin B. Aktualnye problemy teorii mezhdunarodnogo prava pp.78-94 (1974)

[71] Belinsky, V. Vzglyad na russkuyu literatury 1846 goda. Polnoe Sobranie sochinenii, 10 Moscow, Academia Nauk, 1956 7-50

together with their great principality there were many
small independent ones, and when it all conjoined into
one, not into Russia, but into Rus', that is, not into a state
but into a family where all had the same Motherland,
same faith, same language, same memories and
legends...there was for all the one, living, indivisible holy
Rus'.

Accent was made, that Russian God, Holy Russia-such names for God and
for Motherland are not possessed by any European peoples. Russia has
become a state, the peculiar attribute of the tsar while Holy Rus
remained... the common treasure of tsar and people....Holy Rus is the
peculiar hereditary property of the Russian people, confirmed to it by
God[72]"

This set of statements can help to define and to understand the Russian

theory of self-identification and the development of theory of constitutionalism

and international law theory of peculiar family of nations- Slavic family of

Nations.

**Summary of the Russian Approach to Development of the Law of Self -**

**Determination and Recognition**

Summary of the Russian approach to development of the law of self -

determination and recognition can be found in the work of Danilevski "Russia and

Europe." Danilevsky wrote, that:

A. Every family of nations can be defined by different characteristics, such as

separate language or group of languages that are close to each other, is a

distinctive cultural-historical type, and is capable of historical development;

B. In order peoples could create and develop their own civilization peoples

must be able to become politically independent;

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[72] Cherniavsky, M. Holy Russia: a study in the history of an idea. American History Review, 1958
68 p..3

C. Attempts to "civilize" other peoples result not in acculturation, but in colonization and suppression of development of civilization of other type;

D. Peoples developing their own civilization can succeed only when they are not being absorbed into one political entity, but only constituting a federation or political system of the state.

## The Problem of a Communitarian Concept and the Nature of International Community

In the twentieth century the theory of international law faced a problem of universality of international law.

The concept of idealism within international law generally agrees that a law, including international law, is a reflection of common ideology. Accordingly, the conclusion was made that a universal idea international law is impossible in the presence of different social systems and different legal traditions. It was concluded, that universal international law was functioning temporarily and was in the permanent process of breaking up into separate regional systems of international law.

F. Asbeck wrote: "…nations are divided by a high wall- a conflict of fundamental convictions…as long as the antagonism in fundamental convictions continues to divide the world, the road to the international legal order for the world as a whole lies barred…[73]"

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[73] Asbeck F. *Growth and movement of International Law,* 1071, International and Comparative Law Quarterly, XI, (1962)

H. Smith described the presence of an absence of a basis for international

law as "no common agreement upon a divine or "natural" law to which all human

law and all political power, even mightiest, is bound to conform[74]"

Wright expressed an opinion, that "...international law tends to split into

opposing ideologies...[75]"

This communitarian theory of international law was criticized some

international law scientists too. Tunkin wrote: "the danger of this concept consists

in the fact that the practical conclusions which are derived there from correspond

to the political credo...of the powers.[76]" Tunkin explained the position on this

issue:

> From the concept, that the basis of law, including international
> law, is a common ideology, it follows that the emergence of a
> large number of a new states in the international arena whose
> cultural heritage undoubtedly is distinct from "western
> civilization" leads to a contraction of the developmental base of
> contemporary general international law.[77]

Further, in his work *Questions of the Theory of International Law* he

concluded: "The Soviet doctrine of international law proceeded and

proceeds from the idea that general international law, the norms of which

regulate relationships between all states independently from their social

system,exists, and possibilities of its further progressive development

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[74] Smith H. The Crisis of the Law of Nations, 18 (London, Stevens and Sons, 1947)

[75] Wright Q. *International Law and Ideologies*, American Journal of International Law, XLVIII, 657, (1954)

[76] Tunkin G. Theory of International Law, 28 (Harvard University Press, 1974)

[77] *Id*, at 31.

increase with the rise of the powers of peace."[78] Tunkin concluded, that

the Revolution made it universal, and only after the 1917 international

law became new law, which was available and belonged not only to

"civilized" or Christian States.[79] This discussion, probably became the

starting point for the development of the new concepts of the law of self-

determination, as a matter of practical policies toward de-colonization.

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[78] G.I.Tunkin Voprosi Teorii Mezhdunarodnogo Prava, 24,25 (1962)

[79] G.I.Tunkin, Pravo I Sila v Mezdunarodnoy Sisteme, 31 (1983)

# CHAPTER 3 DEVELOPMENT OF THE SOVEREIGN EUROPEAN FAMILY OF NATIONS

Historical analysis of development of concept of sovereignty must be introduced

to discover and to trace the roots of idea of self-determination for peoples and

nations.

## Sovereignty

Jean Bodin was the first philosopher who tried to analyze the concept of

"sovereignty." According to Bodin "...no jurist or political philosopher has in fact

attempted to define sovereignty...[80]". After Bodin, Hobbes in his "Leviathan"

declared: "the Rights, which make the Essence of Sovereignty... are

incommunicable and inseparable.[81]"

Hobbes, in Leviathan, wrote that the Leviathan or Commonwealth or State is

"but an artificial man... in which the sovereignty is...an artificial soul, as giving

life and motion to the whole body[82]".

It is necessary to agree with the point of view that historically sovereignty

was a bundle of specific rights, and not a "a global power", a "pure essence" from

which the state derives its form, and hence that there could be a sharing of such

"royal rights" or "rights of sovereignty[83]".

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[80] Six Books of the Commonwealth (tr. M. J. Tooley; Oxford, Basil Blackwell; no date), i, 8, p. 25).
[81] Hobbes, Leviathan, ch. 18.
[82] (London,J. M. Dent & Sons (Everyman's Library); 1914, p. 3).

[83] L. Favoreu, 'Souverainet'e et supraconstitutionalit'e', in 67 *Pouvoirs. Revue fran‚caise*
d''etudes constitutionnelles et politiques (1993) , pp. 71–7; (Translated by Allott)

From the XVIth century the analysis of the problem of sovereignty became a framework for the ideological battle between the disciplines of international relations, sociology, constitutional law and other scholastic fields. A claim for sovereignty was made on behalf of peoples; of law and for all human beings, of the political elite and national governments.

As a result of this discussion, a new doctrine of liberal democracy emerged that became a foundation for the theory of state-building in the contemporary theory of society, law and international law.

The development of the doctrine of liberal democracy made impossible the existence of the concept of sovereignty as a concept of centralized totalitarian society where the power belongs to a sole "sovereign."

It can be concluded that in contemporary international law the theory of sovereignty became an intellectual puzzle that can be resolved only by taking an approach for analyzing it from the historical point of view as a bundle of rights. These rights are used by peoples in order to declare self-constituting of internal and external powers as constitutional or sovereign rights.

### Development of the Principle of Sovereignty

Historically the concept of the state and sovereignty was different from the concept developed by the modern doctrine of international law. The state in medieval Europe (and in some parts of Europe until the last century) meant a feudal group of the people who by privilege and tradition had a right of their own

against the ruler of the land[84]. Relating to the concept of a state to the concept of sovereignty means that power that may command every other power in a given territory; at the same time, sovereignty means that power that takes no command from any extraterritorial power. From the point of view of Grotius, international law must be concerned exclusively with regulating the relations between princes or republics sovereign in their territories and independent of their neighbors ignoring the fact that, at that time, there we're only two sovereign powers: the Emperor, who held the secular authority over all the princes and powers of this world; and the pope, who laid down the spiritual authority that was laid by Christ. This doctrine prevailed until the time of the Reformation.[85] For Grotius, " the sovereign" meant a person and not an idea.

Later, Rousseau developed the theory of the social contract, showing that even monarchs derived their supreme power from the will of the people and not from the God.

In the second part of the IXXth century, the doctrine of international law developed a new principle that it is the inborn right of every national unit to have its own self-determined state, the right of national independence and sovereignty.

Within the conflict of the doctrines of the state and sovereignty", The *droits de l'homme et du citoyen* were often neglected in an outrageous manner; the Leviathan of state, in its dire need, swallowed them one after another."[86]

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[84] Walter Simons The Evolution of International Public International Law in Europe Since Grotius , p.7, 1931

[85] *Id*, at p.11.

[86] *Id*, at 21.

The development of the state and the issues of interstate relations can be studied only recognizing people and nations as subjects of international law and using anthropological and ethnographic method for research.

The self-determination of peoples and nations in the second part of twentieth century became both a battle place and an area for experimentation for the theories of the fields of international relations, foreign policy, diplomacy, sociology and philosophy scholarship. At the same time, international legal scholars were rewriting and restating basic principles of legal doctrine developed mainly by scholars of the Soviet Union and other developing countries. Today it can be concluded that this shift of the doctrine from the area of international law to the field of international relations resulted in numerous armed conflicts-interstate and intrastate, the development of a general attitude of non-responsibility of politics and international organizations; and finally, the escalation of military aggression.

Probably, development of the law of self-determination of peoples and the law of recognition as the cornerstone of international law of peaceful coexistence and the fundamental human right must become a main concern for contemporary international legal scholars.

The problems of the analysis of international law issues such as with the question of the recognition of a particular nation as a state, is sn impossibility of analysis from the point of law that was created by the state. It makes obsolete the "positivists" approach and requires the application of different types of philosophy. This philosophy must be supported by the legal philosophy of law

existing beyond the state by which all states are bound. This means that the theory applied must be known to states and be a part of legal system of each subject and object of international law.

The key can be found in studying all the actors of the international community: subjects of international law- traditional, such as states and international organizations compared to non-typical subjects: The Holy See, The Maltisian Order, Israel - as a nation state with religious based self-identification. This means that all types of existing self-identification such as states, nations, religions, economies must be analyzed.

What can be observed, that all these actors possess in common, is a constitution in either written or unwritten form. It means that the theory of constitutionalism can be applied as a basis for resolving the problem of recognition or non-recognition.

It can be concluded that for development of the theory on recognition, two foundations must be found: a proper theory of legal philosophy and an appropriate method for analysis.

The issue of the relationship between the law, the theories of international relations, and diplomacy is crucial for the development of science of international law. We must consider the theory of international relations and "law in diplomacy" as the main source of legal nihilism and denial of international law as a law. Law is the only condition for peaceful coexistence.

Another issue that must be analyzed in relation to the problem of recognition is the phenomena of "Family of Nations". The question at issue is: do all nations

constitute one family, or does international society consists of several families of nations?

> "A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.[87]"

To demonstrate the existence of multiple families of nations, historical descriptions of the development of the European family of nations and the Slavic family of nations is necessary. Fact of the simultaneous existence of several families of nations will help to explain the problem when a newly established state is recognized by one group of states and not-recognized by another group of states at the same time.

It means that the self-determination of peoples is a fundamental human right and a condition for peaceful coexistence.

The shift from the nation-based and nation oriented international law doctrines to the state-based approach in the twentieth century changed the whole landscape of the science of international law. However, the existing doctrines of international law were divided on many crucial issues such as to the subjects of international law, are nations the subjects of international law or protected groups? On the theory of the general principles of international law: on the origin, nature, and even on the question what they are; on the principle of

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[87] Bull, Hedley The anarchical Society: a study of order in world politics, 1977 p.13

sovereignty. As a result of this shift the lacunas in international legal theory broadened, and international law as a communitarian concept ceased to exist.

These changes resulted in factual inequality of existing subjects of international law, implantation of European legal tradition into the science of international law, and as a result, it can be observed how international law became a vehicle for a new form of colonization- legal acculturation.

At the same time, these changes established a framework for comparative analysis of contemporary doctrines and systems of international law. International legal norms can be analyzed as categories as developed by nations and families of nations.

The proposed method relies on methodology of interdisciplinary analysis and can help to resolve the existing international legal problems and lacunas within the theory, such as the role of "peoples" and "nations" in the formation of subjects of international law; the comparison of approaches on the origin and nature of general principles of law as recognized by civilized nations as a source of law and what is the nature of sovereignty and to trace the origin of the concept. Comparative analysis of the development of the Western and the Russian doctrines of international law will help to demonstrate how the state-based Western system of international law is different from the Russian doctrine of international law.

It can be noted that international legal theory must be based on research both of the state and the nation- as historically developed subjects and equal actors within contemporary international law. To describe and to resolve all of the stated

above issues the new method for research and study must be applied by international legal scholars- through the historical and comparative method.

The study of the development of the European family of nations is one of the proofs of this theory. The effect of their religion, and the historic method of law make it distinctive from the contemporary doctrines and will demonstrate the application of this method of analysis and the development of the international law of self-determination, sovereignty and recognition of states.

Before these questions at issue can be analyzed, it is necessary to make an overview of the theories on the nature, function and method of international law, that was already done in the previous part. The history of the development of statehood by the European Family of Nations will be compared to the development of doctrines of nation-state and later of a doctrine of - constitutionalism resulting in the development and changes of approaches for analysis of problems within international law , and as a result, to the development of a new paradigm and system of international law with regards to issues of self-determination and recognition.

**The Development of the Doctrine of "State" in International Law**

In the Western theory of international law the doctrine of "state" has changed since the seventeenth century. Usually, the definition of a "state" refers to Grotius: "a complete association of free men, joined together for the enjoyment of rights and for their common interest[88]"

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[88] Grotius, De Jure Belli ac Pacis, Book 1, Ch. 1, (1646)

Francisco Vitoria defined a State as a: "A perfect State or community...is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and the like..[89]"

Vattel further developed the definition of States: "Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.[90]" As it was noted by Crawford, the statehood for the purpose of international law became different from actual independence in the nineteenth century under the influence of Hegel with the implementation of the doctrine of sovereignty by Wheaton in "Elements of International Law."

In the twentieth century, changes and developments in the world community resulted in integration or fragmentation of states. These changes brought other subjects of international law within the scope of research of international legal scholars, but this research was merely descriptive in its nature, and no attempts were made to analyze actual forces behind these changes in disposition of actors in the area of international law.

It was noted, that:

> "For the modern state to be heading towards crisis, or significant long-term change, at least one of three things would have to be true: first, consent to particular and reasonably long established sites of authoritative rule is breaking down either through large-scale resistance to the rule of law, or through the rejection of the rules of rule of such a state by a significant section of the political community constituted by it, and those

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[89] Vitoria De Indis ac de Iure Belli Relectiones (1696)
[90] Vattel Le Droit des Gens, Vol 1, Introduction, (1758)

who command the state's power cannot contain such developments; secondly, previously capable states are unable to command coercive power against those over whom they rule and against their external enemies; thirdly, the laws and demands of international institutions and organizations have enforceable claims against historically sovereign states.[91]"

All three described phenomena must be subject to research by international legal scholars as this is evidence of changes in the established order of nation-states. The reason for these changes can be explained through the changes within constitutionalism and the development of a theory known as "constitutional pluralism". The theory supposes that:

"almost equally uncontroversially, a revised conception of constitutionalism should of course then also be open to the discovery of meaningful constitutional discourse and processes in non-state sites . . . Even for those who are most sceptical or pessimistic about the viability of constitutionalism beyond the state, their position is based either upon an incapacity to imagine the form in which such post-state constitutionalism might be effectively articulated and institutionalised or upon an unwillingness to concede that the time is yet ripe for such an enterprise, rather than upon a refusal in principle to contemplate that a constitutional steering mechanism, or its functional equivalent, might be appropriate for significant circuits of transnational power.[92]"

Not arguing with the fact that states today are still are the main actors of international law and the main subjects of the international system, in order to move forward with the development of the theory on the international law of self-determination and recognition, all these trends must be analyzed.

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[91] Thompson 'The modern state and its adversaries' (2006) 41 *Government and Opposition* 23, 26,
[92] Walker, The idea of constitutional pluralism' (2002) 65 *MLR* 317 p 334.

**Formation of Sovereign European Family of Nations[93]**

The formation of subjects of international law and development of the law-based community of nations from which the development of contemporary international law started in the second half of Middle Ages. From the historical point of view it required a demolition of universal Papal-Imperial system and development on it foundation of states in its modern meaning.

Development of institutions- main actors of that period- the Empire and Papacy and strengthening of the feudalism was a mainstream of histirical development. These three institutions in the Europe of the XI, XII and XIIIth centuries did not allow development of international law insitutions as we know it today.

International legal system didn't yet exist at that moment of history . Under the rule of the Empire and Papacy cultural unity of Europe created a sense of solidarity of its nations. But that solidarity based upon a quite different ground rather than today. The first half of the Middle Ages didn't yet know any community of independent states equal to each other. All states were arranged into a strict hierarchical order – one over another (or depending on another) – ascending in the long run either to the Emperor or to the Pope. It must be noted that the idea of cultural community and law had already introduced into the

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[93] See Generally: R. Ward, An Inquiry into the Foundation of the Laws of Nations in Europe, from the Times of Greek and Romans, to the Age of Grotius, 1795
See generally: F.F. Martens, Sovremennoe Mezhdunarodnoe pravo zivilozovannih narodov V. 1. 1904
A. Nussbaum, A Concise History of the Law of Nations, Revised Ed., 1958

international life, but at the same time the idea of the equality of states did not exist.

For development of the international law as a tool for communications between the nations required development of international relations in its modern sense which was at that period of time non-existent. The development of this idea was impossible by that very Papal-Imperial system which proved to be of benefit in many other ways.

Despite the contributions of these institutions to the development of international relations, main concepts are even was not knownt that are now considered to be integral parts of international relations and international law.

Mediaeval relations between the nations in the universal Papal-Imperial system, was not similar to the international relations and international law in its modern meaning. International relations in the Middle Ages (especially during the first half of this period lasted from the X to the XIIIth century) can be described as *sui generis*; as a class or group of its own - and cannot be compared with a community of nations in our contemporary meaning.

Also, Papacy and Empire, being a type of Mediaeval unity cannot be described as a type of international relationship based on international law. For one of them devoted to the global Theocracy, and the other – to the *dominium mundi*, the very opportunity of existence of any international law was impossible. This union represented a type of the state rather an international legal system.

The development of international law was based on conditions that bound the whole Europe into unanimous family by means of cultural affinity, than

as an already established international legal system. In this sense it would be correct to talk not of the Papacy and the Empire *per se*, but of the Catholicism and Feudalism concentrating in themselves as an aggregate of intellectual and material culture of Mediaeval Europe.

For the idea of international law Papacy and Empire were the representatives of the conception of universal Catholic Church and universal feudal monarchy, which means that they could represent a common cultural unity of Europe – the unity that only by lapse of time and due to another factors turned into the international law.

Using this approach it will be possible to define actors and cultural factors in the first half of Middle Ages that played role in the process of forming the idea of international law.

It can be demonstrated that the Empire, in alliance with the Papacy, imparted to the commonwealth of Western nations the sense of their cultural unity, while feudalism added to this commonwealth the idea of law.

From the approach of history of development of international relations this covers the development of the feudal Papal-Imperial Europe from the first half of Middle Ages comprising the period since the year 1000 up to the end of Crusades.

Development of this idea into its modern sense demanded, one more concept – the concept of the equality of states. This means that was needed a group of political bodies that could be independent and equal to each other, instead of the corporate Imperial-Papal monarchy. In other words, the idea of

international law lacked the very subjects of the future international law, for they were still in the bud hiding themselves from all-absorbing Empire and Papacy that rejected the very possibility of their individual existence.

All the stated above was summarized by Mohl: [94]"The idea of international law was still absent", says he about Mediaeval Papal-Imperial Europe, "but now not for the reason that European nations did not entirely acknowledge each other's right for existence or any rights at all, but only due to the magnificent view of the world of the day according to which all Christianity ought to compose one Kingdom of God with Pope and Emperor at the head of it, so that separate national states could only be its inferior provinces".

## History of Development of Nationalities in the Papal-Imperial System

As it was noted by the well-known Russian historian Vizinski: "There was no place for individual development of nations within the feudal system focused upon the Emperor's authority. Feudal system contained in itself a negation of nationalities: there were no nations, just estates – feudal aristocracy, clergy, burghers, villeins..."[95]

The Empire denies nationalities or only admits their existence placing itself above them. It strives to impersonalize them and to absorb them in its supranational structure. It was a policy of feudal Imperial order and of the Papal Catholicism. The Papacy did not acknowledge any nations or kings, but only a rack of obedient children of the Holy Roman Church.

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[94] R. V. Mohl. Encyclopädie der Staatswissenschaften (Tübingen 1872). SS. 406, 407. Cited by M.Taube Istoria Mezhdunarodnogo Prava

[95] Vizinsky, Papstvo i Sv. Rimskaya Imperia, p. 11

It can be said that the ideal of Empire is a united feudal monarchy, the ideal of Papacy – a united Catholic theocracy. The Empire and Papacy shared their political world view. All the nations of Romano-Germanic Europe ought to have formed an integrated, indivisible and uniform Christian republic with an Emperor or a Pope, or both of them as leaders.

This purpose was achieved by Romano-Germanic Caesars from one side and Roman Pontiffs from another. All educated and intellectual Europe agreed with this ideal believing the unity of Emperor and Pope to be the only remedy from feudal disintegration and dissension.

But the he main mistake of all those mediaeval Popes and Emperors, canonists and legists, philosophers working for such a unity was in ignoring the separate nations whose individual life had already begun. As it was noted: "The blaze of universal imperial crown and "catholic" papal tiara had dazzled them, hiding from their eyes an underlying process devoid of all outer trappings – the process of forming of a whole number of utterly different nationalities out of the tribal and national mix obtained as a consequence of ancient German invasions.[96]"

Self governing nations grew out of the chaos of the IXth and Xth centuries – each one with its peculiar characteristics, particular features and original culture. At the same time when the Popes and Emperors fight to get a control all over the Europe, contesting for it with one another, that very Europe, which they imagined to be or searched to make unified and homogenous, was already disintegrating into separate large national gravity centers.

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[96] Ibid, at 11

The process of national differentiation and formation of the family of nations started. It was beyond the control of Emperors and Popes. The suzerainty of the first and spiritual supremacy of the second was that time universally accepted . The struggle against the historical mainstream of the national life, against the great wave that carries humanity to the civilization through the centuries, against the historical progress itself, this struggle is inherently doomed to failure.

This movement of the development of nations became a force, leading the progress for the next five hundred years. Neither the Popes (successors of Saint Peter) nor the Emperors (inheritors of absolute and universal Caesars) could or would understand that the times of the idea of world monarchy had passed.

At the same time they wouldn't have given up their titles and ambitions. But since the start of the period it is necessary to examine -the second half of Middle Ages, nationalities were developed enough for independent social and political actions.

That was a result of the accelerating process of national growth that started despite the general political and ethnical chaos of the decaying Carolingian Empire.

The historians described the process that the germs of nowadays nations are hidden nowhere else than in that remotest époque that followed the time of barbarian German invasions, for it was the spirit of German individualism that brought to light – as we have seen it above the very idea of nations as of legally capable subjects.

It was observed by Laurent, "the idea of nationality per se is nothing but recognizing of the right for individual existence for the entire nations as if they were distinct human beings[97]". The Germans not only brought with themselves the principle of individualism but also took the most active part in the general process of race mixing that lasted for several centuries after the ruin of West Roman Empire.

The Carolingian Empire became that very place where all the groups set into motion series of tribal and national migrations ceased their wandering at last and framed what we now call Romano-Germanic Europe which is the result of Romano-Celtic and German cross-cultural communication.

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[97] Laurent, Etudes, t. XVIII, p. 511: "la nationalité n'est autre chose que la reconnaissance du droit qu'ont les nations à une existence individuelle au mêm titre que les hommes". Cf. Laurent, t. X, p. 41. Cited in Martens, Sovremennoe Mezhdunarodnoe pravo zivilozovannih narodov
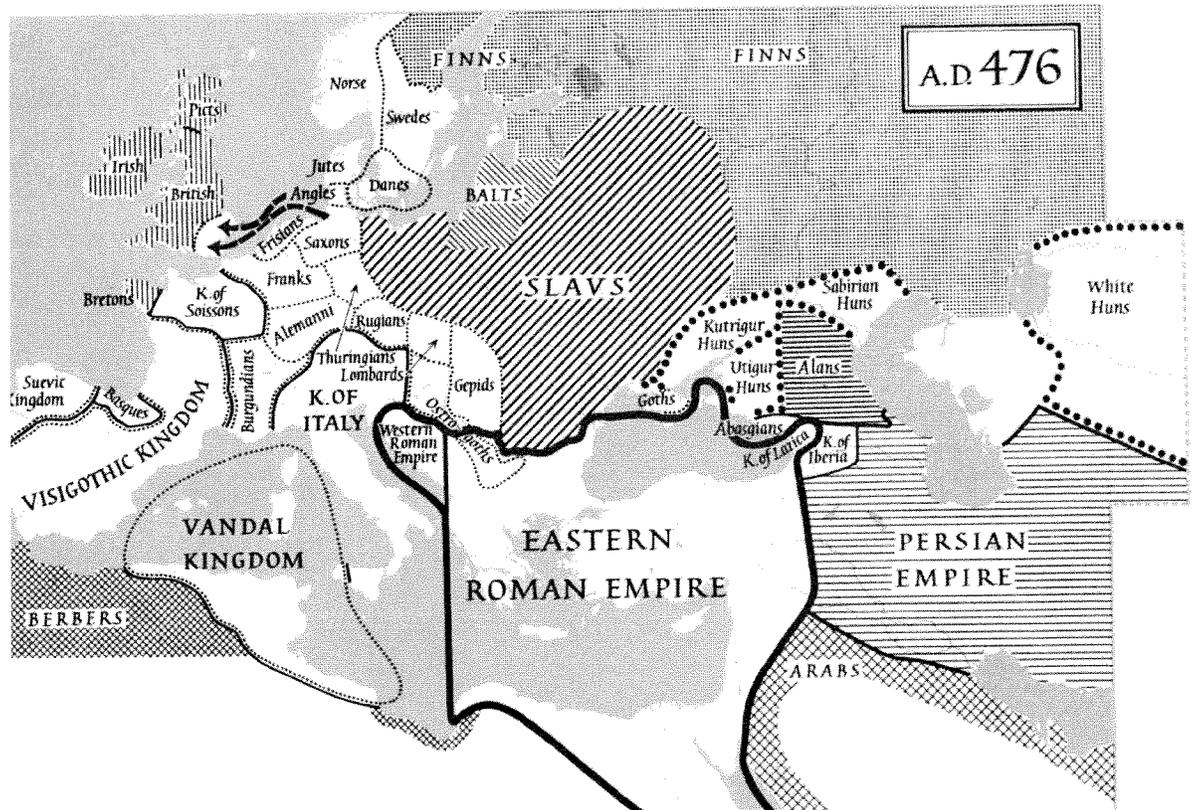
**Figure 1 Map of the Western Europe in AD 476**

Sourcce: Colin McEvedy The Penguin Atlas of Medieval History, p 32, Penguin Books, 1961

### Formation of European nations

The IXth century already established the framework of future separate

nationalities. France became the centre of Empire. Germany was the land newly

formed after a long struggle. It was always hostile to its western neighbor and

opposed to it in the very basics of their lifestyle. The German element prevailed

from one side, the Roman one – from the other. That's why Germany used the

very first opportunity concluding the Treaty of Verdun, 843 to start its

independent existence.

Italy went on with its peculiar life surpassing its Franco-Germanic patrons in

cultural respect and treating them as barbarians. Christian Spain even was not

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developed comparing to the Moslem world. So its conditions differed very much from those of the others. And the last but not the least, England didn't merge itself with the Empire even during the reign of Charles the Great. Celto-Saxon nation, which needed only its final component to become a modern English nationality became it after the Norman Conquest.

## XIXth Century Anthropological Approach

From the anthropological point of view with the emergence of these first signs of national political differentiation a process of linguistic differentiation started. (See diagram) The tribal dialects were gradually losing their former similarity growing into separate national languages. The Latin language that spread with the Roman conquests was to a great extent corrupted by subdivided population and turned into lingua romana rustica which intermixed in widely different degrees with native aboriginal elements and gave birth to several utterly distinct dialects.
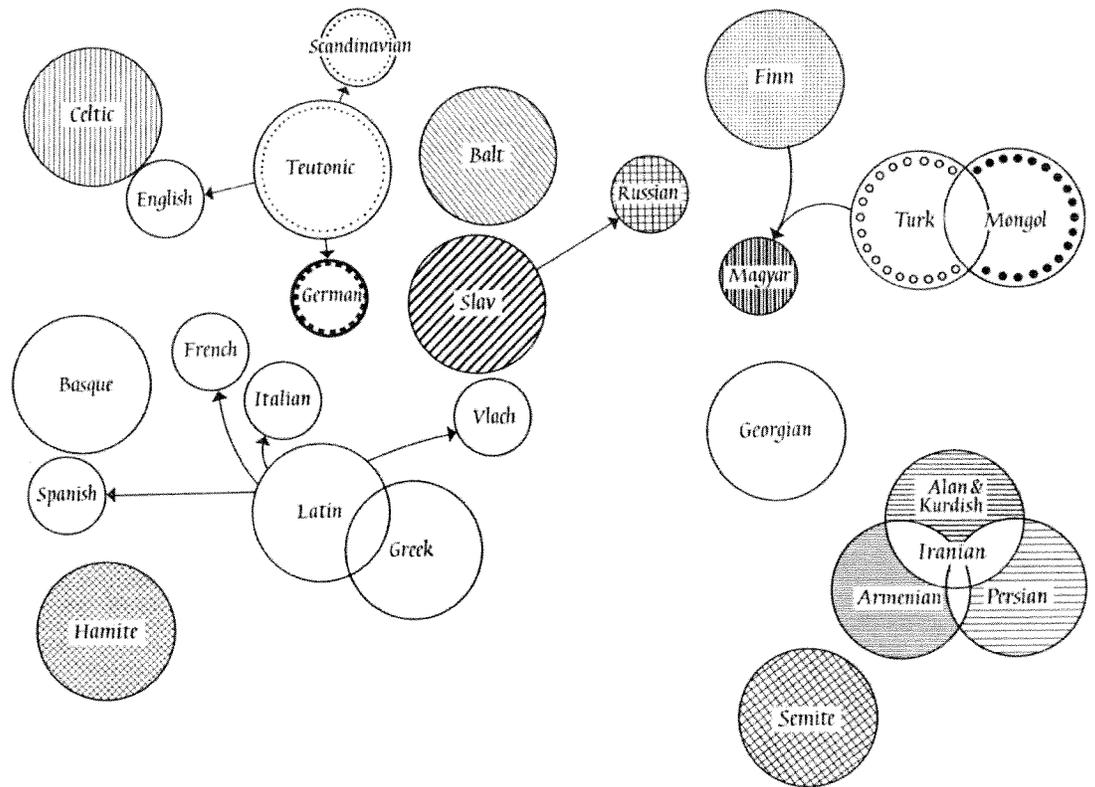
**Figure 2 Medieval Europe Nations Languages and Dialects**
Source: Colin McEvedy The Penguin Atlas of Medieval History, p 5, Penguin
Books, 1961

Italy, Spain and England existed at the outskirts of the Romano-Germanic

world already spoke their own, more or less similar, languages. And France,

which was the very center of this world and the then centre of the West-European

continent, was occupied by the invaders of the German origin (the Franks) and

also split as to linguistics into two different groups.

By the time of their political division the language of the Romanized Franks

had greatly diverged from that of "Eastern Franks" -the Germans.

The Oaths of Strasbourg on February14th, 842 sworn before the conclusion

of the Verdun Treaty by Charles the Bald and Louis the German were pronounced

on both sides in two different languages. Earlier, in 813, the Council of Tours

proposed the bishops to attend to the translation of several Scriptures from standard Latin into its local popular form in the Old French and also in German[98].

It developed into two different branches – the Northern and the Southern. So it can be seen that together with the first signs of autonomous political life displayed by different nations in different parts of the Western -Romano-Germanic world their individual dialects also come into being.

Thus the five century lapse that divide the destruction of the Western Roman Empire by the German barbarians from the beginning of Middle Ages as we properly understand them successfully established a foundation for the future separate national existence. By the beginning of the period -by the year 1000 A. D. – nationalities in their general features already exist.

At the same time their integrity was not in the form of a political union. While the feudal disintegration is the main condition, only one form of unity – that of the ethnical aspect which arises, according to Guizot,[99] "not from the commonness of the state structure or historical destinies, but from the conformity of social order, public institutions, morals, ideas, sentiments and language". This is the essence of national integrity comparable with the integrity of a human being. And such form of nationality already existed by the beginning of the XIth century. The particular features acquired by each of them were so prominent that nascent nations successfully resist their mergence in the universal Papal-Imperial system.

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[98] Hallam, Middle Ages, p. 728.
[99] See Guizot. Istoria Tzivilizatsii Francii t. III, p. 206, 207.

The newly born nationalities developed their identity. They build up enough strength to survive this challenging two and a half century period of Papacy and Empire influence and to obtain their complete independence during the second half of Middle Ages.

The feudal Papal-Imperial system couldn't destroy nationalities even on the first stage of their existence. Not only because the system was not strong enough to achieve this, but also because the historical process itself promoted the growth of young nationalities however powerful and glorious Papacy and Empire could be during that first half of the mediaeval period.

Now it's known that the abovementioned stretch of the Middle Ages (the first half of them) was all prepared by the struggle that spread in two directions, and both of those directions added a lot to the development of independent national life.

It was the struggle between Emperors and Popes that exhausted the both opposing forces. None of them could achieve a decisive victory and become an incontestable sovereign of the whole Europe.

So the nations found themselves as the observers of that struggle and could concentrate upon their further progress having no need to fear the absorption either by the monarchy of the new pan-European Emperors or by the theocratic tyranny of Roman Popes. It can be said that the Pope destroyed the Empire, the Emperor destroyed Papacy, only nations remained.

By the middle of the XIIIth century, or just at the end of the first half of Middle Ages – Papacy prevailed in its struggle against the Empire and win

forever with the real pan-European significance of Emperors, but this victory was achieved too late. The end of this great struggle happened in time with the cessation of another great military enterprise – the Crusades.

Started by the Church, they brought to Papacy, already considerably weakened by its fight against the Emperors, the results that was unexpected: an age-long fight against the Muslim world ended with Christian defeat which brought a skepticism in masses formerly blindly believing that the Crusades were undertaken by the will of God – they failed – this means that Christian God may be defeated – and this means that He isn't truly God.

All this taken together established the foundation of the future intellectual opposition to Papacy that brought to eventual Reformation. The church had to face their new enemy born of the contact with Eastern World and the treasures of Ancient Greek thinkers. This enemy was the power of free thinking, of open mind that became the main opponent of Papacy since the XIIIth century.

At the end of the XIIIth century Papacy was no more dangerous for the separated nations. The very first Pope who declared the unity of Clerical and Lay and merging of the both branches of government into one- Boniface VIII, was at the same time the last representative of mediaeval Papacy. It can be concluded that the Crusades produced even more immediate effect upon the national growth.

The division of estates which was of the main importance all along the first mediaeval period changed to the division of nations. Coming across each other on the plains of Asia representatives of different clans belonging to one and the same nation felt especially keenly the proximity of their kinship.

The struggle between Papacy and Empire resulted in the process of growth of different national groups. The first half of the Middle Ages was also very productive in this, for it had prepared the basis for the new era in the history of feudal states, so all that was latent in the first half of the period became visible and clear in the second one.

It is necessary to  concentrate the scope of the research on this two-century period of time (approximately since the end of the XIIIth till the end of the XVth century) from this viewpoint to discover that it's all occupied by two historical processes closely related to each other.

The main point of the evolution of the mediaeval European international life is as follows: from one side, new national states, already evolved due to their ethnographic, geographic and other conditions into unique separated bodies, declare one after another their entire self-sufficiency and independence of the Emperor and the Pope; on the other, simultaneously with this emancipation of national states there goes on another process – that of the decline of the political significance of the Empire and Papacy.

Ceasing to be a real political force approximately as they were in the first half of Middle Ages they gradually turn into an abstract idea lucking  any substantial authority.

It was already mentioned that France was in the frontlines of the separate nations seeking for emancipation from Imperial and Papal influence.

*France*

It was already mentioned that even in the first half of Middle Ages, when the supremacy of Emperors was universally accepted, France successfully asserted the principle of its entire independence. Europe had never seen any of its kings-Capetians taking an oath of allegiance subordinates itself to a Romano-Germanic sovereign. Otto I was the last one whom Frenchmen accepted as suzerain. The succeeding Emperors couldn't obtain even a formal recognition in spite of the political weakness of the first Capetians. All their claims – even those supported by force of arms remained claims and nothing more; the defeat of the Anglo-Germanic coalition in the battle of Bouvines not only saved the independence of France but also conclusively proved that "the land of Western Franks" was a distinct state that had forever got beyond even a nominal jurisdiction of the Empire.

This early separation of France from "universal" Empire has its own reasons, and among them the fact that France very early indeed obtained its individual life and detached from Germany.

Thus defending their independence from the Imperial Crown French kings had every time to defend their sovereignty.

In the days of the first Carolingians the centre of Empire was focused exactly on the Western Franks, - on the future France. Though the Imperial title passes from French to Italians and from Italians to Germans and so on, these transformations can no more affect the destiny of France as of a separate state, for this destiny is already predetermined in Verdun in 843 when Western Franks,

already separated from their Eastern kinsmen by their transformed language, decide to separate themselves also as a political entity.

Collapse of the Carolingian Empire in 888 still preserved the earlier established order of things, and a hundred years later (that is by the beginning of Middle Ages in the full sense of this word) it already deal with the duly formed new nation of French governed by the national dynasty of Hugh Capet's progeny.

In previous ages it was possible to talk only of Gauls, Romans, Gallo-Romans, Franks and Gallo-Franks. But since the beginning of the Capetian era only French nation became a reality.

As it is stated by the famous French historian, Guizot: the cradle of the French nationality should be searched for in the end of the Xth century. Just at the same time the end of the period in the political history of the former "land of West Franks" when the kingdom existed by the laws of feudal anarchy tended to unite under the scepter of neighboring German Emperors who were growing stronger day after day. As it was already noted, French kings couldn't bear even the thought of the vassalage to German Emperors. And if this was true even for the times of the weak XIth century Capetians, further on we see France and its kings getting more and more into the character of an independent state and its permanently strengthening rulers.

This independent status of France was additionally supported by the fact that the grandeur of the French royal crown was never less than the grander of the Imperial one. And though the last one was viewed as the legacy of Caesars –

those ancient and originally pagan rulers of the whole world – it forever remained something abstract and alien to the masses of people.

Contrary, the crown of French kings was looked upon as something familiar, national, originating not from the foreign and long forgotten pagan world but from the native soil of the Catholic Occident. For the Great Church of the entire Western World it was unacceptable, and its bearer was no less than a "most Christian Majesty" (Rex christianissimus) and its "firstborn son" (filius primogenitus Ecclesiae). Thus his *persona* was regarded as something sacred, and he had all rights to compete with the "Sacred Majesty" (Sacra Majestas) of the Roman Emperor.

It must be noted, that the Roman's Emperor crown was always surrounded by a mystic and supernatural. Supernatural miracle-working powers were attributed to the French king: it was believed that he was endowed with the phenomenal ability to cure diseases. Mediaeval superstition attributed to French kings was the ability to cure scrofulous diseases. It's a curious fact that Edward the IIIrd, proclaiming himself a lawful inheritor of the French crown and evidently having in mind this sham ability, challenged Philip of Valois to make a test – who of them would relieve an ill person from that kind of ailment.

Interesting fact: The Holy Ampoule is used to anoint him to reign – a bulb with the sacred chrism delivered from Heaven by an angel to baptize converted Clovis. This artifact of antiquity was always encompassed with mystical glory and served, as a fable has it, for 13 centuries. Scores of the French kings – from

Clovis to Louis XVIth – were crowned with its assistance. It was preserved in the Reims Cathedral till the year 1793 when one the members of National Convention performed an act of vandalism smashing it with a hammer on behalf of the revolutionary people.

The extra contribution to the weight of the French kings was made by the fact that in the course of Middle Ages a lot of representatives of the French nation placed themselves on the thrones of different countries, sometimes rather far from France, thus peddling the reputation of their country all over Europe and planting the idea of might and superiority of their national leaders.

The Duke of Normandy, being a liege of a French king, conquered England in 1066 and became an English king thus launching a dynasty of Frenchmen on the throne of England. After his lineage ceased, the English crown passed to another Frenchman – Count of Blois (1135). He was succeeded also by a Frenchman (1154) – Count of Anjou who laid the foundation of Plantagenet dynasty. Meanwhile on the other side of Europe a family of Northman adventurers – that of de Hauteville – captured Southern Italy where they successively became the Dukes of Apulia and Calabria, the Great Counts of Sicily and eventually the kings of the Two Sicilies.

In the end of the XIth century a prince from the House of Burgundy, also of Capetian ancestry Henry the Young – got Portuguese as a fief from his father-in-law – Alfonso VI, the king of Castile – and acquired the title of Count. And in 1139 his son was proclaimed Alfonso I – the first independent king of Portuguese. By that time all the other Christian states of Iberian Peninsula also obtain the

dynasties of French origin. In the same XIIth century the same Burgundian House gives a new royal dynasty to Castile; Alfonso VII, the son of Princess Urraca and Raymond of Burgundy, in 1126. Counts of Barcelona become the kings of Aragon; In the XIIth century Barcelona was a liege county under the French crown. and last of all, in the XIIIth century Counts of Champagne become the kings of Navarre.

The Crusades not only increased the prestige of the 'Frank' name to even more advanced level, having obscured all the other Western nations from the eyes of Moslems, but also created new royal dynasties of French origin. Godfrey of Bouillon, the leader of the First Crusade, was proclaimed a king of Jerusalem in 1099. And the Fourth Crusade brings, though for a short time, as much as the imperial crown of the Orient to the French feudal lords – Counts of Flanders and seigniors of Courtenay (the descendants of Louis the Fat). Last of all, in the second half of the XIIIth century we see that though Louis the Saint failed to hoist his standard over rampant Moslem Africa or Palestine, his brother Charles of Anjou managed to extract the kingdom of the Two Sicilies from the hands of Hohenstaufens who inherited it from its Norman kings and to establish there a new dynasty the offsprings of which could be found then even on the royal thrones of Hungary and Poland.

One of those Princes of the House of Anjou was Louis the Great (1342 – 1382), the king of Hungary and Poland. He is known as one of the greatest Hungarian kings. His elder daughter Maria, the queen of Hungary, married Sigismund who subsequently became an Emperor; and his younger daughter

Hedwig (Jadwiga), the queen of Poland, married Jogaila, Grand Duke of Lithuania.

The authority of the French kings  overtook one land after another. French monarchy consolidated around the French crown a wide range of other kingdoms the rulers of which considered France as their motherland and would never forget their motherland. England, Naples, Sicily, Iberian kingdoms, Jerusalem, Latin Empire (called a 'New France' for all good reasons) added to good old France a lot of additional splendor. All those crowns that adorned the heads of its former vassals as if composed its own circle of associated states – just as that of Empire. And this international status gave France all the more reason to rank itself *pari passu* with the Empire and to assert its independence with dignity and self-confidence.

It is necessary to  add to the abovementioned that in its relations with the Church France also succeeded in taking an especial rank in comparison with the rest of Catholic Europe, that due to the early appearance of some artful and vigorous fighters for clerical independence (such as Hincmar of Reims as early as in the IXth century) it could create its own Gallican Church (considerably autonomous from the omnipotent Bishops of Rome), it will become quite clear why was it French nation among all others that became the very first *Staat im Staate* of the feudal-catholic Europe, and segregated itself into a separate state and emancipated itself from Papal-Imperial monarchy the idea of which still weighed upon the other national kingdoms of the Occident.

It can be concluded that France was the first who protest of the national state principle against the idea of universal imperial supremacy, for Capetians were the very first who declared the independence of their crown from everything and everyone in this world but God. "La France a toujours relevé de Dieu seul" – if even this slogan does not actually belong to the Pragmatic Sanction of Louis the Saint of 1268 it nevertheless reflects very accurately the real state of affairs throughout the first half of the mediaeval period and the national apperception of Frenchmen which we find completely cultivated by the beginning of its second half by the beginning of the XIVth century.

In this demarcation point we observe the actual enunciation by France of its political freedom from all signs of papal-imperial custodianship. This enunciation was provoked by one of the components of the decrepit Papal-Imperial system, namely by the Roman pontiff who tried again to maintain his supremacy over the French king.

The controversy between Philip IV the Fair and Boniface VIII is meant here. The king appealed to his nation for support against the Pope. In 1302 he summoned representatives of clergy, feudal aristocracy and burghers who constituted the first national Seim of France (Etats Généraux), and this Seim proclaimed, by the way, the full independence of the crown in mundane affairs from whosoever but God.

Thus, in April, the 10th, 1302, the kingdom of France, represented by its king and its various estates, summoned as the spokesmen of the entire nation, solemnly declared its complete independence.

This was the issue of the national principle that had been developing throughout the first mediaeval period. This formal realization of the state as of a distinctive politically independent body took place in the very beginning of the second half of the Middle Ages and had an effect of further unifying of the French nation. The awareness of its unity, as opposed to all other nations and states, increased even more. The great century-long struggle against England that started right in the beginning of the XIVth century added to this process so much.

By this time the land of the old Romanized Franks had already completed the process of its evolution as of an original national body, and its proper name "Francia" [100]had already established itself all over Europe. Elimination of it by the other monarchies was now imaginable. In the XIVth – XVth centuries it appears with its own peculiar character and an independent kingdom of France impersonated in its king and the estates was formed.

The growth of its authority and of its political independence started earlier than in the other countries, so France became a kind of example for all other European nations to follow. All of them passed more or less the same way with France, and the declaration of its estates made in 1302 started similar processes in all Western nationalities. In the period of time between the end of the XIIIth and the end of the XVth century all nations of Romano-Germanic world proclaimed their independence one after another.

*Germany*

Further it is necessary to describe development of national states. The fall of

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[100] See Braiss, p. 359

Hohenstaufens and the so called Great Interregnum in Germany that followed this fall and thus marked the beginning of the second mediaeval period of the development of nations lead by Saxon, Frankish and Swabian Emperors and as it was indeed recognized by the majority of Europe of those days. Since the time of the Interregnum the real Imperial power was lost forever. The Empire in its pure mediaeval sense *de facto* existed no more, and *ipso facto* nations, that couldn't resist the Imperial suzerainty while Emperors possessed any real power, now threw off one by one all its outward signs without any hesitation.

At the same time the Papacy, having exhausted itself with the struggle against the Emperors, had no more chance to remain on those heights of purely mundane dominion that had been once achieved due to the efforts of its power-hungry pontiffs. Declaring their independence from the Emperors, nations at the same time revolted against all authorities of Popes. All national royal emancipations from the claims of Roman Emperors and Roman Pontiffs; emancipations with the solemn declarations of independence – took place between the years 1300 and 1500.

### *England[101]*

As it was already noted, England during the first period of the Middle Ages was often compelled to appeal to the Emperors as to its superior feudal lords. This connection of the kingdom with the Empire could become even closer if Richard of Cornwall were elected an Emperor under normal conditions and not in the troublesome times of Interregnum. But although this brother of the English king

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[101] See Generally: Trevelyan G.M, History of England, V. 1, 1956

won votes of four prince-electors and then was hastily crowned in Aachen, he could never obtain a countrywide recognition in Germany; his reign passed practically unnoticed and he soon died having contributed nothing new into the relations of England and Empire. These relations were therefore left to their natural evolution, and so the all-European process of national emancipation wasn't violated even in this case and nothing could prevent England from achieving its full independence. Edward II (1307 – 1327) proclaimed "Regnum Angliae ab omni subjectione imperiali esse liberrimum"[102].

But this declaration of sovereignty by no means covered the whole ground for England, for it belonged to the number of nations that were regarded as Papal feuds. John Lackland, formally avowed himself a feoffee of the Roman Pontiff and bound himself to pay him an annual homage. England had to tear apart these fetters as well. And so it happened in 1301 at first, when independence from Papacy was declared; and then in 1367, when Edward III and the Parliament proclaimed the kingdom sovereign and refused to pay the homage taken by John Lackland.

Simultaneously there started a process of national consolidation: England turns into a *sui generis* nation, for Norman conquerors assimilate themselves by that time with the conquered Anglo-Saxons, and since the second half of the XIVth century French and Latin are gradually ousted by the "English" language, duly developed and used by the majority of population. This cause of national

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[102] Selden, Titles of Honour. Part I chap. II.

apperception was stimulated – as it happened also in France – by the Hundred Years' War, for it consolidated all Englishmen as opposed to all Frenchmen. The War also gave England its new borders more suitable for the isolated nation. In the beginning of the period under consideration (that is the end of the XIIIth century) English kings increased their insular possessions by annexation of Wales and Ireland, but after the Hundred Years' War they lost their mainland possessions instead. Thus by the end of Middle Ages we see England secluded in its natural boundaries; its sovereigns have already forgotten their ancestral fiefdoms in France and come into the Modern History as strictly national monarchs of England.

### Scotland

English kings never missed an opportunity to claim their rights to feudal supremacy over the land of ancient Picts and Scotts. Scottish kings however swore their feudal oaths to the kings of England only for Cumbria. They were always successful in assertion of their independence, and their solemn coronation in Scone with placing of a new king on the legendary Coronation Stone.

Interesting fact: this Stone served as a siege to put a new Scottish king upon it; and this act was given the same superstitious and mystical emphasis as to the Holy Ampoule in France, the crown of St. Stephen in Hungary, the Sword of Osman in Turkey etc.   According to tradition, this very Stone served as a bed-head to Patriarch Jacob when he dreamt of his ladder to heaven (Genesis, ch. 28). Brought from Scotland to London as a trophy by Edward I ,1297, the Stone was built into the throne upon which the English kings are crowned up until now.

Even now the Throne and the Stone may be seen now in Westminster Abbey in Chapel of St. Edward. This status of Scotland developed during the first period of Middle Ages and preserved throughout the second one. Only in the days of transition from one period to the other the extinction of the old dynasty of Kenneth gave Englishmen a chance to secure the vassalage of Scotland by means of blood and iron. Edward I almost did it. He conquered the northern kingdom but for a short time only. In the beginning of the second mediaeval period the Scotts restored their independence, so the XIVth and the XVth centuries are all occupied by national dynasties of Robert the Bruce and his relatives – Stewarts. Under the scepter of these kings Scotland was a completely independent kingdom standing on one level with England.

**Development of national kingdoms in Europe in the XII-XVth centuries**

Throughout the first period of the Middle Ages all of the formed kingdoms distanced from the supremacy of the Holy Roman Emperors. And all of them in the long run formed individual states . When all these newly formed states declared themselves formally independent  in the first half of the Middle Ages this Holy Empire in its strict sense represented the union of Germany, Upper Italy and the kingdom of Arelat.

**Figure 3 Western Europe National Kingdoms in AD 1130**

Source: Colin McEvedy The Penguin Atlas of Medieval History, p 64, Penguin Books, 1961

*Italy*

In the Northern Italy the formation of absolutely independent communities on the base of small city-republics started to develop. These numerous states divided among themselves the territory of the old Lombard Kingdom that formerly belonged to the Holy Roman Emperors. Disengaged from the Emperors and their governors, the cities of Northern Italy set themselves to forming their local, fully independent governments, and throughout the duration of the second mediaeval period lasting 200 – 250 years, these governments were demonstrating their growing predisposition to principate.

Newly developed cities – such as Milan, Florence, Mantua, Verona, Ferrara – brought forth one by one their Visconti (subsequently Sforza), Medici, Gonzaga, della Scala, d'Este, creating a number of independent from each other and entirely self-sufficient petty city-republics, sometime described as city-tyrannies to the feudal Europe.

This analogue of Ancient Greece passed through the XIVth and XVth centuries and even entered the Modern Period of history preserving this new type of autocratical regimes. The attitude of these regimes to the feudal statehood and to the antique idea of state will be described below.

Political history of Italy in these two centuries resulted in strength of the actual sovereignty in the region now totally got rid of Imperial authority among the five comparatively large political bodies. This state of things took shape by the end of mediaeval and the beginning of modern period (that's by the end of the XVth century), and the political bodies mentioned were the Papal state, Naples, Florence, Venice and Milan. They were sui generis Great Powers of Apennine Peninsula that had already formed inter se a kind of a system of political union.

*France*

The kingdom of Arelat separated in the second half of Middle Ages from Germany. The difference was that it didn't form a national state or any group of independent states but was absorbed by France. After the death of its last king Rudolph III this Arelat (or Burgundian) kingdom was absorbed by the Empire by Conrad II went on its own isolated life, and the crown conferred on the Emperor in Arles was overshadowed here by local bishops and barons. Since the beginning

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of the second mediaeval period the weakening of German Empire progressed and the strengthening of its neighbor France increased. The both processes were simultaneous, and two and a half centuries were enough for France to absorb Arelat.

In 1349 France obtained Dauphiné as a domain of the heirs to the throne of its kings; in 1348 it attached the free County of Burgundy (so called Franche-Comté, Freigrafschaft or palatinate of Burgundy) to the Dukes of its Royal House; in 1486 it occupied Provence, and though the Emperors didn't formally dropped their rights to these territories the kings of France were their actual proprietors. Of all these territories only Franche-Comté availed itself to the authority of Empire at the end of the Middle Ages after the death of Charles the Bold in 1477. But it became the part of the France again in two centuries after Nijmegen Treaty of 1678.

Thus having lost control over its feudatory national kingdoms in the days of the Great Interregnum disarray (just on the threshold of the second half of Middle Ages), the Empire gradually seized and became a federated monarchy in a strict meaning of this word and was restricted to its German boundaries. Just as the lands between the Rhone River and Alps, the region of the Lower Rhine , approximately bordering today Holland and Belgium also seceded from Germany. Its population started to distinguish itself from the rest of Germany because of different geographical, cultural and other particularities as early as in the first mediaeval period and ultimately evolved into a distinctive unit when the bulk of the country formerly fractured into petty seigneuries was reunited at the

end of the XIVth century (1384), due to the Flemish marriage of Philip the Bold,

To Margaret of Flanders, daughter of Louis, Count de Mâle, and the heiress of

many domains in Flanders, Brabant and Holland under the government of the

House of French Burgundian Dukes.

The Empire however was not intended to abandon its formal rights to these

seceded lands though de facto – as in the case of Arelat – it had no more resources

to interrupt this process, and at the very end of the period under consideration

they moved toward Habsburgs after the death of Charles the Bold in 1477 whose

daughter Mary married Maximilian Habsburg, the future Emperor. At the

beginning of Modern historical period their descendants – Philip the Fair, spouse

of Joanna of Spain and Charles I of Spain – brought the entire country under the

Spanish rule which it could escape only in the second half of the XVIth century in

the shape of free States recognized by the Western World according to the Peace

of Westphalia (1648) – the very first generally accepted international act of a new

Europe.

### Switzerland

The second state in the same way recognized as a full-fledged member of the

European family of nations by the Osnabrück and Münster Congresses was

Switzerland ,also emancipated from the Empire in the second mediaeval period.

The foundations of its autonomous life were laid by the Liberties given to this part

of the Empire by Frederick II, and the following XIVth century can be rightly

named a heroic epoch of independent Switzerland. As a separate individual state

Switzerland was declared after the battles of Morgarten in1315 and of Sempach

in1386, and at the turn of Mediaeval and Modern periods of history this fact was virtually accepted by the Emperor Maximilian, who was compelled to expel it after struggle from the authority of his Imperial Reichs-Kammer-Gericht.

### *Germany*

In the second half of the Middle Ages – in the years between the Great Interregnum and the end of the XVth century – the Holy Roman Empire lost not only its large semi-vassal national kingdoms, but also a number of German territories and turned into a national state - precisely the same as those that surrounded it now.

Erstwhile Pan-European Empire reduced to the limits of a national German kingdom. Thus even for this part of Romano-Germanic World the XIVth and the XVth centuries became an era of a complete individualization as a small national world and of a transformation into a peculiar politically self-consistent nationality. Multitudinous nations that emancipated from its suzerainty and formed compact political units now attacked Germany from all sides and forced the German people to leave aside all its non-German possessions, and to build its purely national kingdom thus following their own example.

In this second mediaeval period the formation of an individual German nationality with its own national state identity was completed. The foundations of their future national development were established much earlier, so in this regard Germany doesn't differ from its neighboring nations as well.

In the second half of Middle Ages Germany formed – along with a lot of other nations – a distinct ethno-cultural unit – Deutschland, in contraposition

toWelschland (all foreign, non-German countries). In the XIVth century it has a fully grown national personality. As a proof of this it can be mentioned, by analogy with France, England etc. a substitution of ancient Latin by national German language in official written documents.

At the same time Germany eventually obtained its specific German character distinctive from those of all other nations.

And just as the other nations that had to emancipate themselves from the pressure of German sovereigns and Popes, Germany had to get rid of the dictate of Roman pontiffs. In the XIIIth century Papacy was still an ominous threat for German national identity. The countrywide consciousness of national independence could not permit for the nation that had already reached the level of individual existence a repeat of events analogous to dethronement of Frederick II or to the demand of a feudal loyalty oath from Albert I. Following the path of its neighboring national kingdoms, Germany declared in the second half of Middle Ages The Emperor Louis the Bavarian and the Pope John XXII. its total freedom from all Papal claims for authority.

On the 15th of July 1338, in the small town of Rhense the Princes-Electors proclaimed that the king-emperor elected by them on behalf of the whole German nation held his power with a God-given authority only, and this national choice permitted no authorization or abrogation or alteration on the part of the Holy See. Thus the Crown of Germany after this declaration of its absolute sovereignty was officially withdrawn from the reign, suzerainty and control of the Roman Archpriest. And the Imperial Seim called the next year in the March of 1339 in

Frankfurt on the Main not only ratified this declaration but added also that even the Imperial Crown received by the German king from the hands of Pope didn't make the king any way dependent on the St. Peter's Vicar. The king elected now became an Emperor ipso facto. He was the Emperor before his arrival to the Eternal City, and his coronation by Pope was nothing but a ritual devoid of any real political significance.

Thus Germany became independent and its sovereign – proclaimed not only as a national king but also as an Emperor with all his claims to world domination. Western Europe of the second half of mediaeval period gradually covering itself with a network of individual independent national kingdoms.

### The Holy Roman Empire

As for the Empire, with all the abovementioned facts concerning the history of national growth in Europe it becomes quite clear that the Imperial system of the Xth – XIIIth centuries turned into anachronism in the century XIVth. The Imperial claims to dominium mundi – even at the scales that seemed compassable in the light of Imperial might of the first part of mediaeval era – lost all their meaning and authority. This is the only conclusion we can come to after describing of all facts of national growth that led the nations to their complete emancipation in second half of Middle Ages.

The Holy Roman Empire found itself surrounded by duly formed independent political bodies – as sovereign as the Empire itself, and it was induced to contract itself to the bounds of German nation – to give up its former international pan-European status and to put up with its transfiguration into a

separate national body – exactly the same as the nations around it. The Holy

Roman Empire turned from a Monarchy that occupied more than a half of

Western Europe and was acknowledged as a suzerain in popular opinion

throughout all the Romano-Germanic World transformed into a simple German

kingdom equal to the other independent members of the European family of sates.

This transformation was in the XIVth – XVth centuries, and by the end of

the period even  official Germany had to add to its universal Sacrum Imperium

Romanum a restricting addendum – "nationis teutonicae".

In the XIVth and XVth centuries the question of Imperial supremacy still

was trying to get authority in the minds of European people, but it usually found a

negative response.

By the beginning of the XIVth century the West-European Imperial system

was ultimately undermined. Europe split into a number of totally independent

national kingdoms. Germany split into a number of territories tending to total

independency. Accordingly monarchs of the Middle Europe who represented the

international unity of the entire Feudal Catholic World were substituted by

German Princes who were only nominal kings of disintegrated Germany

pretending to all-European authority. In the XIVth and XVth centuries – the Holy

Roman Emperor of the German Nation was neither an Emperor nor even a king of

Germany in proper sense of the word.

The Emperors of this so called "new breed" were nothing but the same

Princes in their ancestral Princedoms. The German royalty descended upon them

as something external and indistinct, and the emperorship has no real power. The

only difference between the Prince declared an Emperor and the other suzerain lords consisted in these high-flown but  titles and in the superannuated ambitions customarily connected with them.

But the Emperors expressed no intention to leave these ambitions though they did not believe in the possibility of it. In the period  of full national independence, as at the XIVth and XVth centuries were, the Emperor kept on considering or just claiming himself "dominus mundi" This contrast describes all this two-century period – from the Great Ineterreign up to the beginning of "Modern Times" started by the rule of Maximilian I – "the last paladin" and the first "imperator electus" who almost officially absolved his Imperial Title from the ambitions of his predecessors and thus commenced a new history – that of a new "Germanic-Austrian" Monarchy[103].

## HISTORY OF FORMATION OF THE SLAVIC FAMILY OF NATIONS

### Byzantium and the Slavic Nations

Compared to the Western European Family of Nations Byzantium and Slavic Nations did not develop any feudal system or a specific concept of feudal king or feudal state, and no any concept of Teutonicism entered their culture. As it was in Europe the death of state and state authority principle in the Middle Ages was the result of the triumph of Teutonicism over the Antique World; and vice versa, the revival of this principle was nothing but a triumph of antique Roman perceptions over Germanic individualism that substituted the idea of state authority by personal relations of individuals.

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[103] Г. Вызинскій. Папство и Св. Римская Имперія въ XIV и XV в G. (Vizinsky. Papstvo i Sv. Rimskaya Imperia v XIV i XV v.)

Summarizing everything that was subject for research about the history of creation of states in West Europe during the latter half of Middle Ages, it can be concluded that Imperial-and-Papal feudal system that dominated throughout the first half of mediaeval period in X – XIII centuries faced its ultimate collapse by the beginning of the so called Modern European history.

Individual nations evolved into political bodies and destroyed universal Empire and Papacy; and the tendencies to internal consolidation between these independent nations led to the elimination of internal political feudalism and to the appearance in its place of institute of centralized and duly elaborated system of state that was different from the processes that shaped state institutions in Byzantine and Slavic states.

**Formation of The Greco-Slavic World**

The formation of a new Roman Empire in the West divided Christian world into Western and Eastern. And the Eastern world was defined by it territory. Byzantine
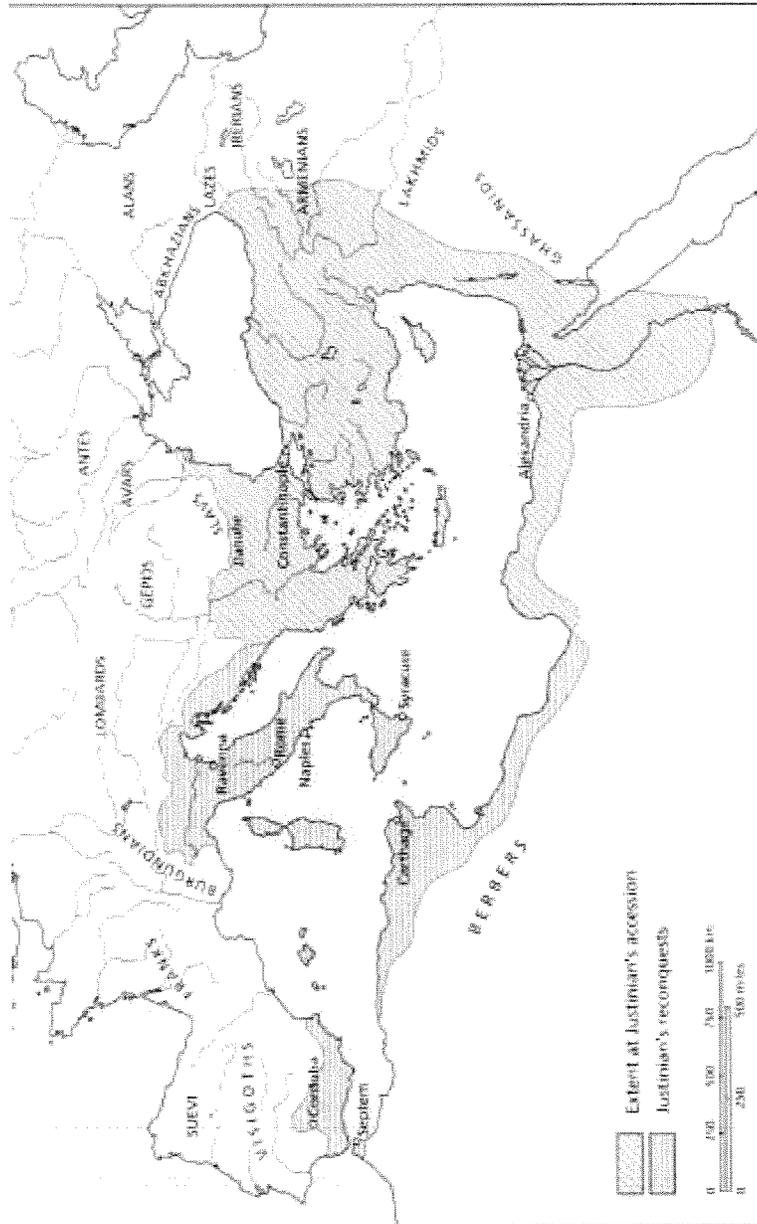
**Figure 4 Expansion of the East Rome**

Empire was the only representative of Eastern Christianity at that time, and it was

located unto the southern part of Balkan Peninsula, Asia Minor and Southern

Italy. But since the middle of the same IXth century Slavic nations started to

participate in international relations of Chrisitian Europe, forming their national

states and adopting Christianity from Byzantium.

The Greek world turned into Graeco-Slavic that included a number of states and was opposed to Romano-Germans. Southern, Western and Eastern Slavs formed their own states – independent and developing. Such were the powers of Bulgarians and Russians, Great Moravia and Poland. Eastern Europe formed a union of nations, a family of states that were tired up together with the unity of faith and culture who were capable of elaborating their own legal tradition that could regulate their mutual relations – just as it was made in the West. Short introduction required in order to understand how different system of international relations was formed between the Slavs.

**International Relations of Slavs**

Immediately after their conversion into Christianity Western Slavs found themselves alienated from the Byzantine world. They were isolated from it by Hungarians who also adopted Christianity, but from Rome. Thus the Czechs, the Moravians and the Poles joined the West and were peoples and nations different from Byzantine-Slavic culture.

By the beginning of the XIth century this was already an accomplished process. And right about this time the only state created by Southern Slavs on Balkan Peninsula seized to exist. In the XIth the final breach between the Churches of Constantinople and of Rome marked the irrevocable severance of Orient and Occident – all Slavs were already a part of Christian Europe, but the newly formed world of Greco-Slavic Christianity didn't embrace the whole family of nations united with common civilization, faith and system of governance. It consisted just of Byzantine Empire on one side and a group of

Russian "domains" on the other. Those domains got united just for a short time under the sway of Saint Vladimir and then of Yaroslav, but henceforth were hostile to each other.

The idea of integral state hasn't yet developed by Eastern (Russian) Slavs, and the Russian Land was nothing more than a group of Princedoms yet under-developed and unstable in their outlines. A state didn't yet existed in the strictly juridical sense, and thus Byzantium was still the only representative of the Eastern Christian world, for Byzantium was a state in a modern sense of the word.

This state of things maintained until the second half of the XIIth century when Serbia did free itself of Byzantine yoke and consolidated under the sway of Nemanjić dynasty and then Bulgaria followed its example and also broke away from Byzantium. Thus, after nearly two hundred years of Byzantine subjection, Bulgaria restored its status of independent Princedom with national dynasty of Asens as a leader.

The substantial changes in the political system of Christian Orient,that was already on the eve of the XIII century that turned fatal for the Graeco-Slavic world.

Two destructive invasions swept over it simultaneously – one from the East and the other from the West. The participants of the 4th Crusade captured Constantinople and transformed Byzantine Empire into Latin, and thus the young Bulgarian and Serbian states felt themselves forced to incline to the Western side. Stephen II of Serbia and Kaloyan of Bulgaria received their royal crowns from Rome. At the same time the other wave of Crusaders first appeared in the mouth

of Western Dvina, and this apparition triggered off the series of Western attempts to produce upon Russia the same effect that had been already produced upon the Balkan states.

At that period of time forces that threatened the existence of started to form and disintegrated Russian Princedoms: The Swedes from behind the Neva river, Danish and German chivalry from Estonia and the Livonian Brotherhood of the Sword with Teutonic Order from Livonia.

Pskov and a part of Novgorodian lands passed into the hands of Germans; and the mightiest Russian Prince of the time, Daniel Romanovich of Galich, was ready to join the Western world and received the royal crown from Pope.

From another side Mongols invaded Russia to and fro and submitted it for a long time to their yoke thus retarding considerably its political and cultural progress. The main strike of Mongolian hordes on their way westward from Central Asia fell upon the Russian Land, but the echoes of the great invasion reached Byzantine Empire as well.

In the XIIIth century Turkish tribes that had been establishing its roots in trans-Caspian steppes were driven away by Mongols from their native lands, invaded Syria and showed themselves as a menacing spout on the outskirts of Byzantium. In 1244 they captured Jerusalem thus making the Eastern Empire to know that it had faced a new rival – the Ottoman Turks who replaced the Seljuqs, also a Turkish nation whose constant attacks had been threatening the Greek dominance in Asia Minor for a long time.

It can be concluded that in the XIIIth century was a period of crisis for the entire Greco-Slavic world. European West and Asia clutched it from both sides, so it seemed that the history of this culture-historical world was approaching its termination point.

Russia that seized to exist as an independent entity of international life at least for several decades. Only Serbians and Bulgarians continued to form their Slavic originality. And small remnants of the Greek Empire that retained their independence Nicaea, Trebizond etc. turned into centres of resistance to the invaders.

After 60 years of supremacy over the lands stubborn to Feudal-Catholic ways Franks were replaced by Michael Palaiologos. For a century to come Byzantium kept hold of Balkan Peninsula together with Slavism. Discords and wars between the Greek Empire and Serbians ceased only with a new awful invasion that swept away Byzantium together with Serbia and Bulgaria.

Ottoman Turks who conquered Asia Minor then appeared on the European shore in 1357; and in the Battle of Kosovo in 1389 determined the future of Balkan Slavs, as well as of Byzantium. In the year 1453 Turks captured the capital of the Empire the existence of which had terminated long before. And when the last of its territories such as Trebizond, Morea were added to the possessions of Sultan the great Turkish Empire utterly devoured the entire Southern half of Greco-Slavic world.

But even after that these nations developed it relations -this development started process of development of North-Eastern part of Europe.

These far-off North-Eastern Russian Princedoms enslaved by Tatars proved themselves able of such a magnificent ascent. While their coreligionists and brothers on Balkan Peninsula had barely recovered from the pressure of Western Europe and were on the threshold of fatal invasion of Ottoman Turks, the inhabitants of great East-European Plain concentrated their attention upon the two mighty contemporaries – the Grand Duke of Lithuania and Russia Gediminas (1315 - 1340) and Uzbeg, the Great Khan of the Golden Horde (1313 - 1340), for these two were real sovereigns of that day Russia.

**Figure 5 Russia in 1396**

Ivan Kalita (1328 - 1340) successfully complete the struggle waged for a quarter

of a century by treacherous and cruel Moscow Princes against fearless Princes of

Tver for the great Princely Throne in Vladimir.

The heroic Princes of Tver fell in this struggle. Tsars of Saray viewed Eastern Russia as North-Eastern outskirts of their Ulus and its rulers as a bunch of petty vassals occupied with eternal squabble with each other.

Moscow became a place where the idea of a Great Russian Power just started to form at that time. Another important events: end the domination of Tatars over Rus in the battle of Kulikovo, 1380; and the destruction the Greco-Slavic culture-historical type in the South during the seizure of Constantinople, 1453 when Ivan III let Rus free from the Tatar yoke (1480).

After that Russia, being the only representative of the old Eastern Christian World and Greco-Slavic culture-historical type, started to move forward in it development .

A hundred years after Ivan III Russian tsar became a sovereign of Kazan and Astrakhan. 100 years more and controversy with Lithuanian Rus came to an end: Eternal Peace with Poland of 1686 made it clear for everyone that the times of Algirdas had passed for good. Lithuanian Rus existed no more. It was replaced by the "autocrat of the Great and Minor and White Russia".

A hundred years more and Poland disappeared. One more a century-and there came a turn of the other ancient foe – that very one who had come 400 years ago to enslave the only one stronghold of the Graeco-Slavic cultural world.

**Seizure of Constantinople**

By the end of Middle Ages Greco-Slavic world was destroyed totally on Balkan Peninsula, but at the same time revived as an independent original body of the Russian state governed at first by its Grand Dukes and later on by tsars.

These are main stages of political history of Byzantine-Slavic Orient since its separation from Romano-Germanic Occident and up to the end of Middle ages. The main question is whether this Byzantine-Slavic world already developed any kind of an organized system of international law.

Researching the internal life of this Greco-Slavic world during the entire period with the exception of the initial and final stages of its existence when it was represented by a single state only, this world permanently consisted of nothing more than Byzantine Empire on one side and the Slavs Southern, Eastern and even Western, but for a short term only on the other.

Slavs were trying their prentice hand forming this or that state formation that were coming and going rather by accident.

The main Slavic princedoms was just creating primary public unions – without definite structure, unstable and formed upon a tribal base. The interrelations between those 'volost's, princedoms rested upon one common rule – the striving of each princedom and quest for hegemony over its neighbors.

Therefore these relations resolved themselves to total disunity. And this was most typical also of the Slavs of Russia.

Summarizing the research on this issue it can be concluded that the foreign relations of Princes in Russian Slavic lands of that time were driven by one single motivation which was described as a "policy of egoism". Disunity and enmity mentioned above were most typical characteristics of Slavic foreign relations.

Western Europe was politically split as well, and its territorial units were as well hostile to each other; but due to several factors that will be mentioned below

they still recognized their essential unity. In spite of the utmost individualism of German spirit there were moments in the biographies of Western seigneurs when they maintained their solidarity, at least in the face of common enemy. With Slavs it was different type of relations. Even common danger that threatened everyone of them could not bring them in union with each other.

This conclusion can be supported by behavior of Russian Princes in the face of Tatar invasion or the discords of Balkan Slavs in the course of Turkish conquest. Not only the absence of unanimity and solidarity but even the treason to common goal was viewed upon as normal state of things. The same disunity to their Slavic neighbors were characteristic of those few ephemeral states per se that could appear in the Slavic world, such as the First and the Second Bulgarian Kingdoms or the kingdom of Serbia. And the bigger those political bodies could grow, the greater in proportion grew with them their enmity to their neighbors.

This was absolutely different from the West type of the international relations of Slavic tribes, princedoms and kingdoms. They motivated themselves with the principle of self- reliance based on achievement of very short goals. The Slavic Princes relied only of themselves, considered only themselves.

The contacts of individual Slavic nations with Byzantium the common off-spring that had turned them all into European Christian culture had the same issues. For the relations between Slavs and Byzantine Empire must have been even more cold and unfriendly than the relations of Slavs to each other.

Byzantine communicated to Slavdom its culture and its Christian religion altogether with definite features of Graeco-Roman civilization, but it never

composed any kind of integrity with them. Eastern Europe was not involved in the process of racial crossbreeding – the process that consolidated all nations of Western Europe into one common individual world now known to us as "European Occident".

By the time this complicated process began, the Orient was already separated from Occident and the correlation of elements that formed both of those culture-historical types was by no means equal.

When these processes just started the role of German and Slavic nations was identical in different parts of Europe. Slavic tribes played the same role in the history of Byzantium as German barbarians in the history of Rome. Germans and Slavs on one side and Rome with Byzantium on the other – these were two original elements in formation of the European Civilization. Germans came to destroy Rome, Slavs came to destroy Byzantium. But only Germans had successfully fulfilled their mission, and the following historical period – the centuries from V to X and especially the rule of Charlemagne became the time of struggle and intermingling of Roman and German elements that resulted in the formation of integrated Romano-Germanic West-European world.

The difference was that the Slavs couldn't destroy Byzantine Empire and they remained just neighbors or even enemies who never formed any common intermingled type.

This is the reason why the Greco-Slavic world cannot be considered part of Romans and Germans. But Eastern Christian or Graeco-Slavic world differed from it not only in cultural and historical respect. It differed also in structure, for

it never lost its binary character. It were two worlds – Byzantine and Slavic formed on the ground of common culture.

The Slavs of that time were yet uncorrupted and strong young nation that just appeared on the historical stage and was struggling for its future; and Byzantium was a descending nation protected for a while by its historical fate, for the Occident needed time to take its shape and to assimilate all treasures of Greco-Roman civilization that Byzantine Empire still preserved but undervalued.

Historical circumstances prevented Slavs from following the ways of Graeco-Romans, for Byzantium, as it seemed, combined in itself all traits and features of its both cultural predecessors.

**Distinctiveness of the Doctrine of a State and Government Developed by Slavs**

It may be compared only with a political structure of Western Europe of the IXth and Xth centuries. But if for Western Europe it was rather an exception, for Byzantium it was a rule. It was a kind of an improbable continuous anarchy. Murders and inhuman cruelties, treachery, cowardice and suppression of masses fully absorbed in their competitions, limitless despotism of Oriental tyranny, incredible political weakness combined with extreme arrogance, such was the history of Byzantine Caesars.

The states established by Slavs never formed any kind of a close-bodied family with the Eastern Empire and were always hostile to it. The reasons for such state of things must be looked for on both sides. Just because of the old

traditions of Imperial Rome we have mentioned above Byzantium couldn't

change itself so as to become closer to its Slavic neighbors.

In spite of their actual weakness the Autocrats of Constantinople couldn't

shake off the idea of their de jure status of "Universal Emperors" and treated all

neighboring rulers from this moment.

It can be concluded that the attitude of Emperors to the Slavic neighbors who

always caused trouble to them was that they were sending to Russian Princes,

Bulgarian Tsars and Serbian krals golden crowns together with Greek archbishops

and metropolitans spreading the Christianity to the developing world of the Slavic

civilization..
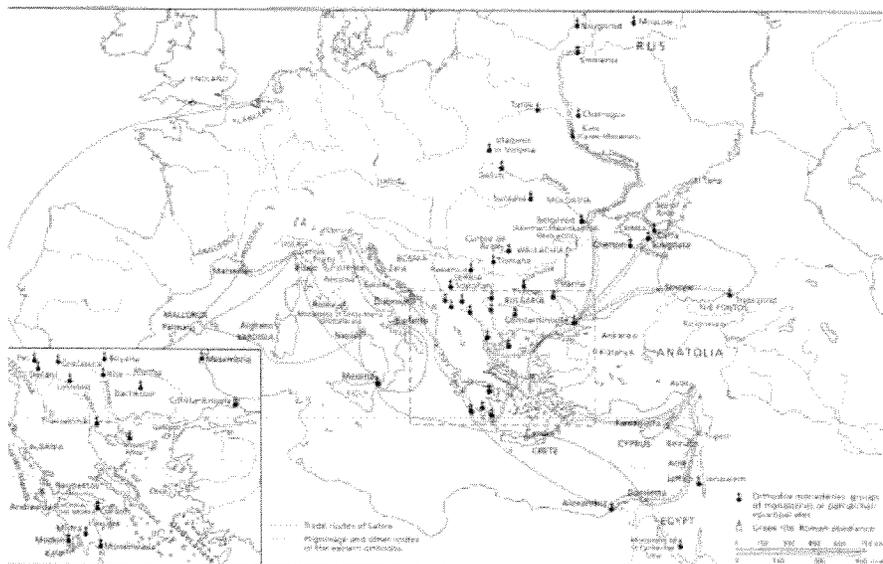


**Figure 6 Expansion of Christianity**

**Difference of The Principle of the Equality of States**

The principle of equality with any other states didn't exist in the Slavic

foreign relations practice, and the only international law known to it was dealing

in the self-interest for which Byzantium became well known and notorious in the neighboring lands.

Such was the spirit of Byzantine Empire, as it was described by historians. The Slavs followed the same practice. But development of Christian institutions lead to more close relationship with Eastern Empire. They satisfied themselves with the adoption of its Christian culture and strived not for any mutually sympathetic and equal relationships. Slavs were the Germans of the East. They also came to inspire the Eastern half of Europe with new life and, just as the Germans, they were to save and to relieve from decomposed and often plainly pagan forms everything that still preserved healthy and unaffected.

That's why the Slavs could be but foes and profound opponents of Byzantium. This fact was well understood as by the Byzantine Emperors, so by the Slavs themselves, and this understanding influenced the entire history of their interrelations: "Universal" Emperors sought to enslave independent Slavic nations, the Slavs sought to destroy Byzantine Empire.

Russian history begins with a series of expeditions against Byzantium. Serbian and Bulgarian history teems with the episodes of bitter struggle for independence against the Empire. And the same tendency is clearly visible in a variety of other major facts. As soon as the Slavic neighbors succeeded in building up a more or less massive and powerful political body they started at once to look for the realization of the idea that, so to say, was intrinsic to them. It was the idea of substitution the Byzantines by Slavs and of establishing the unified Greco-Slavic monarchy.

In other words they tried to carry out the reforms analogous to that of

Charlemagne, i. e. to amalgamate opposing elements in one integral state and thus

achieve the effect that was so beneficial for Western Europe, but for the East did

not work.

After the evangelical mission of Cyril and Methodius began, Simeon the

Great (893 - 927), the second Christian Prince of Bulgaria, having conquered a lot

of neighboring lands, crowned himself a tsar and declared himself "Basileōs

Rōmaiōn" . After 400 years passed and again independence was achieved by the

Slavs on Balkan Peninsula.

This time the attempt of Simeon was repeated by Serbian kral. The famous

Stephen Dušan (1335 - 1355) gathered the major part of Balkan Peninsula under

his sway, Bulgaria ruled by the House of Shishman that substituted the House of

Asen was also his subject, and in the same way came to ignore the Byzantine

Emperor. Planning to build a new Greco-Slavic Empire he declared himself a

"Roman Caesar". He died on his way to Constantinople when he was leading

there a numerous army to determine at last the fate of those scrappy patches of

land that still enjoyed the pompous name of Roman Empire.

Therefore, if the solidarity among the Slavs couldn't be established due to

the traditional disagreement among them, the same problem in the relations

between Byzantium and Slavdom existed due to the cultural differences. In the

Graeco-Slavic world there was no foundation for any international law at all, and

basic concepts of international relations in our modern meaning did not exist.

It can be concluded that despite the fact that different nations had developed international relations and a definite practice of those interrelations ,more or less rational from the standpoint of international law existed. Yet this practice was not ensued by recognition of its necessity and universal binding, and nothing of that we could call an "international laws" was then developed. Nations and states remained alien to each other. And even united with one common culture they could attain no solidarity. The principles of equality and law remained alien to their international life; the idea of society and national intercourse didn't exist; international law was absent. This state of things was peculiar to the Ancient pagan world and nothing changed in this relation either in the Christian Greco-Roman world or in the World of Islam. The same situation was in the world of Greco-Slavs.

# CHAPTER 4. FORMATION OF SOVEREIGN STATES AS "A MATTER OF FACT" AND DEVELOPMENT OF CUSTOMARY NORMS OF EXTERNAL SELF-DETERMINATION

It was noted by Oppengheim that " the formation of a new state is ...a matter of fact, and not of law.[104]" In order to analyze the creation of state by particular European nation and formation of the European family of nations historical research must be conducted further.

In previous chapter it was demonstrated that Western Europe occupied by independent national groups was not a system of states. National identity of these groups formed by the beginning of the XIVth century was main factor for interaction between those groups but it cannot be characterized as a sovereign state.

According to the universally adopted definition a state is a sovereign territorial public union or a community of residents that possesses an exclusive and ultimate power of coercion. Those public unions that we call large mediaeval national states already existed as sovereign power. But the persons who represented those states in relation to the outer world and neighboring groups still did not have full political power and authority.

The factor that must be taken in consideration was a feudal system. The feudal king together with his noblemen could declare himself a source of a supreme power that didn't depend of anything or anyone outside, not depending on an Emperor or Pope.

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[104] Oppenheim, (8th Ed.), vol. 1 p. 677

But this doesn't mean that his power was exclusive on the territory under his control. Contrary, he always could face a concurrent power that could sometimes completely expel his own; and this was the power of a regional feudal seigneur.

On the other side, the territory under jurisdiction of the feudal seignior was not a state, and despite of all its feudal autonomy that may rise up to the exceptional jurisdiction over subordinate population the power of a liege is never independent and it's always based on a superior source – it was delegated by the sovereign.

It was demonstrated that "neither a state nor a system of states existed in the feudal society"[105], and the subjects of international law were still undeveloped. In fact, feudal France, England etc. cannot be considered such subjects until "baron est souverains en sa baronnie"[106] that baron is sovereign in his land- and it is practically impossible to draw distinct boundaries between the units that may be found equal to our contemporary independent states.

As an example- any local "authority", like Count of Anjou might wage a war and conclude peace, send and receive embassies, issue the laws, judge and punish, mint coins etc., he has the same powers as his supreme sovereign, the king of France. The liege was connected to his seigneur only with bonds of personal vassalage. It can be concluded that there was no notion of state on any side, just as there were no subjects of international law.

The main point and conclusion we can come to after research international law institutes development in the time of dominating feudalism. Under the liege

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[105] Vizinskii Papstvo and Sv. Rimsaia Imperia XIV and XV centuries, p 12
[106] Beaumanoir. Coutumes de Beauvoisis, ch. 31, § 41

system where the hierarchical structure was based on personal interrelations and not the relations of person and state other order of things was impossible. The liege system made it impossible the very idea of interstate relations and did not know the idea of state as such. As cited author noted: "the very expression "feudal state" is contradictio in adjecto"

So the necessary condition for the formation of a state as it is known today as sovereign public association required complete destruction of mediaeval feudal political system.

The formation of subjects of international law in their contemporary meaning required that mediaeval national institutions not only eliminate restrictions put on them by outside authorities.

At that period of time for kings to become free off their quasi-vassal reliance on Emperor or Pope. The elimination of external form of feudalism must have been accompanied by the destruction of the internal one. Half-independent and half-sovereign feudal baron, subordinate only through a feudal contract or, otherwise, through the very idea of feudal suzerainty to particular person as the other party in this relationship, had to be transformed into a subject accustomed to obey though exchange for certain guaranties against despotism of other officials. At this point it changed from an obedience to a person, but to a state as such or, otherwise, to the idea of a state authority.

Separate elements and ideas had to consolidate themselves around this idea thus losing their previous feudal character. This consolidation step by step superseded feudal system and started to form a state in its modern meaning.

Therefore when the process of formation of a new type of state started at the same time two simultaneous processes started to develop , moving towards each other: the vassal had to turn himself into a subject and the suzerain simultaneously had to turn himself into a sovereign.

This means that the formation of a state per se consisted: on the one hand, in general de-feudalization of the national political structure, the process expanding as if from beneath and from different social strata; on the other, in the growth of idea of state authority, this process started from the supreme representatives of national unity.

## Development of the Institute of State in Europe

At this point it is necessary to concentrate the research on the second process mentioned, for it had introduced into political and international life of mediaeval Europe a new idea, absolutely unknown in feudal period – that of a state in its essence and contemporary meaning.

The process of the development of international communication relates to the history of national laws and formation of national states. For as we have shown it before, international relations started in the depth of Middle Ages, but it was namely the idea of a state per se that it lacked.

Formation of subjects of contemporary international law and development of this law would be, impossible without them and realization of the idea of absolute sovereignty -that is the idea of state by a number of national groups shaped specific character of European family of nations of the latter half of Middle Ages from the standpoint of contemporary international law doctrine.

In the development of this process the head of feudal hierarchy turns into a sovereign as he is, putting into practice the idea of state and state authority. This process is a key for understanding of the formation of state as a main actor and subject of international law. That's why this process is so important for investigating both national and international law.

This process of genesis or rather revival of a national idea in the Middle Ages must be studied and described for further development of method of contemporary international law.

Concerning the other of the two important historical processes mentioned: Universal de-feudalization of political system of the time- this de-feudalization composed a necessary underlining of the process of growth of a sovereign state authority idea and essentially accompanied this growth Besides, this process of de-feudalization by which the feudal system got crumbled under the pressure of forces alien to it (mostly the kings, legists and cities taken together) or converted from prevailing political system into a common socioeconomic phenomenon by transformation of qualified property subject to the public law into a wholly owned holding of private character. And as it was mentioned before, it ensues from the very fact of national development and development of national authority idea that are indissolubly interconnected.

This would be one of the most interesting tasks in the sphere of studying mediaeval history at large and the history of its national law in particular to trace how the feudal society organized from top to the foundation on the principle of personal connection of individuals faced a rebirth of the idea of total adherence to

something soaring equally high above everything and everyone – to the principle of state authority.

Here it will be possible to describe only the main points of this process to show where was a center or a starting point of the future revival of society in its new form of a public union of a new, modern type – revival in the form of a state in its contemporary meaning.

This process can be described as a revival of the national idea in Middle Ages because this idea of a state as of a sovereign public union was already familiar to the Ancient Rome and Greece with their city-state republics. So we must mention first of all that this idea was certainly a legacy of Ancient World.

The entire mediaeval world of Western Europe was, as a special cultural historical type, a product of three main factors – Ancient civilization, Christianity and Teutonicism. Antique world had a notion of state equal to modern meaning. In the Middle Ages it was not know about it. So it was lost temporarily due to the influence of Christianity or of Teutonicism the spirit of which was brought to Western Europe by new tribes that occupied it.

Christianity, as it was applied to the juridical form of the society it was meant to moralize, didn't cause any harm to the idea of state, for the Eastern Christian World – Byzantine Empire – kept on living under the domination of the same national principle that manifested itself there probably more implicitly than ever.

Consequently the reasons of the fact that in the Occident the idea of state authority took the remotest back seat in face of a new order of things must be searched for in the spirit of Germanic barbarians which's not at all surprising.

The idea of state in its proper sense is the heritage of the Antique World; and the process of extrusion of the feudal "state" by the state of modern type is at the same time the process of revival and evolution of Roman ideas at the expense of German feudalism that was predominant during the earlier half of mediaeval period.

The process that must be described - the process of genesis of subjects of international law – these types of sovereign modern state that lacked in the first half of Middle Ages started to developed, as a process of the victory of a Roman idea over a German one.

The process of formation of modern states may be confined to the evolution of multitudinous and hierarchically subordinated to each other semi-independent feudal bodies into an integral society consisting of two elements only – the government and its subjects similar to the principle of Antiquity.

This revival of Antique and at the same time modern idea of "government", not known to the earlier feudal mediaeval period but already developed by the beginning of Modern times, was nothing else than the revival of royal power in a shape of a new specific institute that was far from the dignity of a feudal suzerain and at the same time distinct from an absolute monarch in the Roman sense of the term.

**Main power in formation of European states - Royal Authority**

Growth of royal power in mediaeval Europe is one of a particularities of

formation of states in Europe. The idea of sovereign monarchical power (not an

ordinary suzerainty over feudal seigneurs) was never completely eliminated. This

idea was rooted in Roman tradition and renewed then in the Empire of

Charlemagne. Sanctified and supported by the Church, it survived even in the

midst of feudal disunity of kingdoms. Feudal king was, this de facto "primus

inter pares" was still the only king among the others; of all the seigneurs only he

was anointed to reign and consequently was considered someone greater than

even the greatest feudal lords, someone essentially different from them. King was

a fundamental element of a future monarchical regime opposed and antagonistic

to the feudal system.

It can be concluded that the king of feudal era was not only a supreme

suzerain occupying the top tier of the feudal scale of ranks. Beyond his purely

feudal functions he personified an idea of power sui generis, however vague. He

wasn't only a suzerain but, in the bud, as well a sovereign[107].

As an example, in France Philip I can not be compared with his son Louis

the Fat who was the first person who started to unite French territories. This

process just started to develop. The principle of monarchy was just beginning rise

and develop.

This was typical for the entire early part of Middle Ages. At first the

monarchical power just strived to preserve the remnants of the ancient Roman

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[107] Cf. G. Guizot, Hirtoire de la civilisation en France. T. IV, p. 113. ss.

tradition and succeeded in it, as we know, due to the support of all social elements that opposed themselves to feudalism and that were by that time at the opening stage of their progress. Thus the first half of Middle Ages witnessed the return to the study of Roman law.

Spreading itself all over Europe this Law gave birth to generations of legists who opposed to conventional feudal subordination a different principle – "quod principi placuit legis habet vigorem" or: That which pleases the prince has the strength of law".

At the same time emancipation of city-communes in XIth, XIIth centuries started. Legists and burghers together with the clergymen were those forces the royal power could rely upon in the struggle with feudal aristocracy in the X-XIII centuries to develop Roman principle of state from authority suzerainty over vassals. In the end royal powers emerged as the main actor out of the struggle against the still omnipotent feudalism.

This was a result of development of an old feudal and of a new sovereign state by the end of the first mediaeval period. Both took a stand against each other, and this status of the "government", typical to a greater or lesser extent for the entire Europe appeared in a juridical monument of the epoch that's known as "Coutumes de Beauvoisis"- a source of medieval French law by Philippe De Beamanoir at the end of 13th century.

Beaumanoir declared the status of royal power during that transitive period in the XIIIth century when the king stood on the edge of transformation from a powerless headman of feudal hierarchy into a true monarch – a leader of the

nation tending to unification and manifesting the signs of its identity. Beaumanoir still cannot reject that "each baron is a king in his barony". At the same time he speaks of the king not as of a suzerain only but also as of a sovereign: "he (the king) is a sovereign above everyone; the overall defense of the kingdom is entrusted to him by his right; consequently he has a right to pass the decrees he considers pointed at the public weal, and his orders must be obeyed"...

The monarchical power stated to develop similar to Antiquity, and feudalism as a system has no power to resist . The legists trained in an ancient Roman law was main force and authority.

The Crusades, as it was noted before, was an attempt to support feudalism and the barons who had to sell a lot of their manors and liberation charters to the cities. The cities got stronger, the estates, on the contrary, weakened.

At that period of history European nations came as actors, peoples came forth with their expanded demands and, as a consequence, industry and trade started to develop.

All these changes started to form a new Europe, a new order of things where political feudalism has no place at all; where everything tends to install itself in line with new demands. New economics are regulated by already existed Roman law, and the political life takes as a basis the same Roman fundamentals – a state system with a government on one side and the subjects on the other.

**The Development of Political System**

By the beginning of the latter mediaeval period, or by the century XIV, this political system already existed. The congresses of feudal lords let the

representatives of city-communes to be present there and have a right of vote and thus turned themselves into estate-representative institutions personifying a supreme authority in the country together with the king.

A state consisted of landlords, prelate-lords and city-lords with the feudal royal lord on the top, as it was during the feudal period of the X-XIII centuries.

Peoples became subjects who obey the government represented that time by territorial officials and "general estates" headed by the only king typifying the national unity and public and not feudal authority. The century XIII with its reforms of Saint Louis in France, Magna Charta and archetypal parliament in England serves in this case as a form of a new developing type of state.

By that time feudal state was substituted by so called estate monarchy. This kind of state became generally spread in Europe in the latter period of Middle Ages. In the XIVth century witnessed the birth of General Estates in France, ultimate formalization of

Parliament in England, the high noon of Cortes in Castile and Aragon and appearance of Golden Bull and Landtags in a number of German Princedoms that eventually assumed the functions of independent political bodies on the territory of Germany, as will be demonstrated.

In Germanya Lehnsherr turned into a Landesherr; so in the XIVth century the state authority and, consequently, a state in its modern sense already existed. But feudalism was not as yet eliminated; it still could resist, and the new type of state had to deal it a decisive blow to secure its ultimate victory.

## Development of absolutism in Europe

Next it is necessary to research the reasons for Europe to abandon this form of political organization -the estate monarchy and to develop state in a form of absolutism.

One of the reason is support of legistst to the kings in their effort to destroy the feudalism during the centuries XIVth and XVth. And the kings used their theories widely. It was noted: "They turned the traditions of the Ancient World against the Feudal one. In a manner of speaking, the kings shared among themselves the idea of Imperial power drawn from the Roman law, and each of them put it to good use within his own possessions."[108] They were able to use this theory as authority against feudalism and prevailed.

Development of absolute monarchies in a number of European states by the end of the second mediaeval period would be the mark of this victory achieved and ultimate destruction of the feudal system.

## Historical Development of States in Europe

As it was demonstrated in the previous chapter the first mediaeval period was dedicated in Western Europe to the development European nations, the second half of Middle Ages completed this process with the formation of states - the sovereign externally and internally forms of human intercourse that could become the subjects of the nascent international law.

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[108] Vizinskii Papstvo and Sv. Rimsaia Imperia XIV and XV centuries, p 5

In this respect the difference of development of the entire Western Europe in the first and in the second half of Middle Ages is enormous. While the centuries X – XIII were feudal or Papal-Imperial in nature, the centuries XIV – XV present us absolutely different picture pertaining rather to the transitional period from mediaeval way of life to the contemporary states and international relations.

It is necessary to demonstrate the development of West-European nations at the end of the latter half and at the end of the earlier half of Middle Ages.



**Figure 7 Western Europe Kingdoms and States in AD 1478**
Source: Colin McEvedy The Penguin Atlas of Medieval History, p 64, Penguin Books, 1961

**German-Italian Monarchy and its' Role as a Main Actor**

In the first half of the XIII century the central position in the Feudal-Catholic world was occupied by the huge German-Italian monarchy of Emperors that embraced Riga and Marseille, both banks of Rhine and the shores of Sicily. The rest of Europe except of France couldn't yet emancipate itself from the prestige of this Imperial might and had to acknowledge its supremacy and suzerainty in a

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varying degree. However formally, Hungary and Poland, Scandinavian and Iberian states, Scotland and England recognized juridical superiority of Emperors and Popes.

All this taken together brought as the result by the end of the first mediaeval period the actual submission of royal power to the oligarchy of Princes who, so to say, portioned among themselves its prerogative rights. Frederick II in his pragmatic sanctions of 1220 and 1232 bends before this accomplished fact and confirms the sovereign rights of lay and clerical Princes within their own possessions -dominium terrae, Landeshoheit.

The period of Interreign that followed could but secure such fitness of things; therefore we can say that in the latter half of the XIIIth c. with the collapse of the sovereign Imperial power the future destiny of the royal authority in Germany was utterly and definitely foredoomed.

It is necessary to mention that great Emperors of the preceding period didn't try to resist this doom threatening their sovereign power. They also did their best to win back their royal rights in Germany, to impart their royalty a hereditary nature and, all in all, to consolidate the nation for their own benefit following the example of their neighbours – French kings.

This was the general description of development of German Kingdom in the centuries XIV and XV. And as we have stated this before, this list of small Imperial barons was headed by comparatively significant Princes of the Empire in whose behalf the internal centralization of the nation (typical for the national life of the entire Europe of that period) was imperceptibly but surely carried out.

Following the example of neighboring states and their kings, Princes of Germany crushed the feudalism with ever-growing weight of their power and subdivided in the long run all Germany among themselves, just as if they were several dozens of its Landesherr's. This crucial crisis of petty feudal chivalry started in Germany at the same time when it started in neighboring countries, but it lingered a little longer – up to the transitional period between the Middle Ages and Modern Times.

Movement towards centralization was a common tendency and at the end of the XVth century it wasn't alien to Germany as well. Energetic steps in this direction were undertaken by the emperors also. The reforms of Maximilian I especially those carried out by the Diet of Worms, 1495 were aimed at the internal national consolidation. His Reichs-Kammer-Gericht, the division of the Empire into counties, declaration of universal Imperial peace and establishment of permanent army protected Germany to some degree from ultimate disintegration into separate and fully independent states; and in this sense the reforms helped Germany to obtain its specific integrated individual features.

But on the other side all these regulations were incapable to give back to the crown its formerly forfeited power; so in this respect Princes suffered no detriment in their previously acquired status. They entered the XVIth century (the start point of Modern Times) as Landesherr's firmly established in their domains. On one hand they took successful steps to ensure their safety from Imperial tendencies they thought dangerous for themselves (the League of Princes and

Reichsregiment); on the other, they smashed their internal political feudalism, just as the sovereigns of neighboring countries did it.

And their struggle against feudal chivalry resulted at the same time in a famous époque of chivalric and peasants' wars. In Germany just as in France, England and Spain suzerain prevailed over vassal and forced him to become a subject. This struggle ended in a decisive victory of Princes over Imperial knights in the beginning of Modern Period of history: German feudal aristocracy was smashed as a specific half-independent and purely political force together with its chieftain Franz von Sickingen (1523).

It can be concluded that by the end of Middle Ages Germany shared one common destiny with the rest of Western Europe. Here we see the same elimination of political feudalism and internal consolidation of states; the only difference from neighboring national kingdoms lies in a local peculiarity that territorial Princes became the main beneficiaries of this process, not the king.

It must be noted that the final formation of this system was reached by Germany, as we know, after the conclusion of peace of Westphalia in 1648.

**Development of the Institute of a State in Germany**

Movement toward formation of state was the mainstream when the political force of semi-independent barons was broken, and those barons had been the political foundation of the whole mediaeval system. Here we see the same transformation of a suzerain into a sovereign and vassals into subjects. The possession of a feudal knight seized to be a "Staat im Staate" thus breaking the existing order of things that was formed throughout the Middle Ages. The only

difference was that in Germany this movement didn't benefit the king as a supreme representative of an integral state. There were the Imperial Princes who achieved territorial domination- Landeshoheit within their possessions.

This peculiarity in the history of German royal authority a distribution of the last among the territorial Princes of Germany – is directly connected with the fact that the kings of Germany were at the same time Holy Roman Emperors. Their attempts to conquer Italy failed. Further their Italian campaigns prevented them from strengthening their power in Germany.

Italy deflected attention of German kings from Germany where the affairs were thus left to their own devices and the potency and independency of territorial Princedoms were gradually growing up. It was the first half of middle ages, which was the time of "universal" Emperors, that laid the foundation for the state of things that permitted to transfer the centre of gravity of German political life from the king unto Princes. But the Italian affairs of Emperors were by no means the only reason that brought Germany to fragmentation.

**Italy**

These sovereigns of a new type were first developed in Italy. The reason for this was that political feudalism was never well developed here. Italy always surpassed the rest of Europe in the sphere of industry and trade that allowed cities to develop. Feudal nobility was relegated to the sidelines and had to incorporate itself into the city communes. Thus the cities absorbed their feudal seigneurs; and when even the shadow of royal authority seized to exist with the fall of

Hohenstaufens, Italy was found covered with a net of sovereign city-communities instead of petty independent feudal seigneuries.

These city-communes constitute a new type of relations between the subjects and authorities. "Commune is a public system of governance now"; it consists of the authorities on one side and subjects on the other thus "forming a state in the times when a state per se yet didn't exist[109]". Having emancipated itself (in Italy) from all kinds of external dependence, the commune became a sovereign city-republic of an Antique type.

Therefore by the beginning of the second mediaeval period the political situation in Italy much resembled that of Ancient Greece. And as in the Ancient Greece the clashes of political parties often brought about tyranny, so in the mediaeval Italy republicanism was replaced by the principate – that is by an absolute dynasty who represented the sovereignty of the whole city population and whose status was well known since the times of Antiquity.

But Italian sovereigns of the XIV-XV centuries were no more feudal lords. Neither were they the heads of Estate-representative monarchy, but the monarchs of a new type that belonged to the Modern Times that properly began since the XVIth century only.

**France**

All the West-European World subsequently followed the same way. And France was the first state where the principle "si veut le roi, si veut la loi" ("What

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[109] Laurent, Etudes, t. VII, p. 555

the king wants is what the law wants" was openly proclaimed in the latter half of Middle Ages.

The latter half of Middle Ages was quite different in this respect. The following century presents us Boutillier – another famous lawyer whose claims were not as modest. The author of "Somme rurale" – a well-known French legalistic monument – tells us as follows: "que roi est empereur en son royaume et qu'il y peut faire tout et autant qu'a droit impérial appartient."[110] - King is am Emperor in his kingdom and he can do everything and all to his subjects.

If such ideas were declared, it's evident that royal authority already feels itself on the firm ground. Indeed, such was the state of things the French kings were steadily approaching to throughout the XIVth and XVth centuries gradually concentrating in their hands different branches of legislation, justice and governance.

The Hundred Years' War but enhanced the reputation of royal power that came out of this war with a permanent annual levy (la taille) and regular army - General Estates in Orleans, 1439. France needed only  Louis XI – this type of Modern or Renaissant monarch – and Machiavelli to turn itself utterly into a compact centralized state of the new type.

Francis I was absolutely right saying that he had ultimately established the absolutism of Modern Times having crushed the last fort of political feudalism.

The last desperate and unfortunate attempt of the major feudal lords to turn France back to the X - XIII centuries at St. Aubin du Cormier on July, 28, 1488

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[110] Boutillier y Laurent. Etudes, t. VII, p. 638

but by the end of the XVth century France became fully consolidated; the political feudalism existed no more.

**England**

This internal consolidation, inseparably connected with the fall of political feudalism, became a pan-European phenomenon by the end of the XVth century. In England the principal of national state developed itself rather early. As early as in the reign of William the Conqueror the form of the feudal contract radically changed and the after-vassals had to owe allegiance not only to their suzerains but to the king as well which attached all feudal lords equally to one common center. And two centuries after we see a Parliament there and its gradual evolution through the XIVth and XVth centuries then. By the beginning of the so called Modern History England passes through the same process of centralization. Old king-size nobility perished in the War of Roses, and Bosworth played for England the same role as St. Aubin for France. The Yorks, together with the king and all the feudal party, were defeated and the new king – Henry VII, the founder of Tudor dynasty 1485)– inaugurated a brand new era in the history of his nation – the era of absolutism never seen by England either before or after that.

The same lot awaited Spain then. It also got consolidated into one solid and compact nation. The end of the XVth century witnessed such important events as the junction of Castile and Aragon and the expulsion of Moors from Iberian Peninsula. Besides, the substantial changes took place in purely internal organization of this new united kingdom of Spain: Ferdinand the Catholic with his

St. Inquisition and St. Hermanada was as frightful for Spanish barons as Louis XI was for the French ones.

**Other Europe**

The same process of consolidation took place that time even in the minor states. Everywhere the kings lay their heavy hands upon nobility thus destroying it as a political force and making themselves the only foci of political and governmental life in their kingdoms.

John II the Great of Portugal (1481 – 1495) deprived his vassals from their right to execute their subjects and placed all the feuds under royal jurisdiction. Jacob II of Scotland followed the same trend when he considerably diminished the rights of nobility in the same XVth c., such was, for instance, the inheriting of offices.

It's necessary to mention here that this trend developed by the end of XVth c. in the entire Europe and even crossed the borders of Catholic Romano-Germanic World of that time.

**Development of the Principle of Equality, Growth of European States and Formation of the European Family of Nations**

After formation of states in Europe it required two and a half more years to develop international law doctrines. Feudal-and-Catholic institutions were no more in existence, political feudalism was already destroyed in every country and Catholicism was changed by the reformation.

The Empire no more occupied the central place in Romano-Germanic World and it didn't even exist in its mediaeval sense, and only Imperial title survived.

On the movement from medievalism to the modern ages the Empire no more existed in its mediaeval sense, it was replaced by a number of sovereign and fully independent states. Since the year 1000 AD Europe knew only a great Imperial monarchy and future national kingdoms just started to develop that was resisted by the Empire and recognizing their dependence from the Emperor, by the year 1500 Western Europe already presented a modern structure that we can observe up till now.

International life was concentrated in a number of great consolidated states; and by the end of the XVth century on the political map of Europe such massive and powerful political bodies as France, England, Spain, Hungary and Poland accompanied by the group of Italian states and confederation of German princedoms were the main players.

Therefore Middle Ages by the XVIth century already represented modern state of international law subjects -European family of nations or an association of states that were sovereign and equal with regard to each other.

So the main achievement of the second half of Middle Ages consisted just in the elaboration of sovereign and equal states that could become the subjects of international law.

Development of the sovereignty of these states, that can be described in their internal and external independence from each other, that turned them into legally existed international subjects, its growth was possible due to the specific and peculiar historic conditions and required destruction of Papal-Imperial system on one side and destruction of internal political feudalism on another.

The other essential attribute of nations as the subjects of international law is their equality as a condition of their sovereignty. In the first half of Middle Ages the main conditions necessary for mutual agreement on equality – cultural uniformity of European states and the idea of international relations based on the law was developed.

Independent states formed under such similar conditions required to recognize the same rights for each other and see in each other equally emancipated and sovereign units and, consequently, equal subjects of international law.

By the end of the XVth century Western Europe positively turned into a family of states the rulers of which and the kings were equal and even related to each other.Thus we must attribute to the Middle Ages the custom of Monarchs to call each other "frère" and "cousin".

As an example of such official expression of monarchial brotherhood and, at the same time, of juridical equality of their states the preamble of a letter from Louis XII of France to Ferdinand the Catholic and thus pertaining to the transitional period from Middle Ages to Modern Times where the words "par icelle mesme grace" perfectly express the idea of absolute juridical equality.

This de-jure equality as it is became the main principle of the science of international law today.

Despite the fact and numerous opinions that the states are de facto unequal due to their political might, economical magnitude and so on, this inequality always existed and will exist further on, but it doesn't detract the principle of national

equality as such, just like the difference in physical strength, intellectuality, income and so on doesn't make any separate person more or less legally capable.

**Ceremonial Rights of States**

Development of the principle of equality required abandonment of so-called ceremonial rights of states, i. e. the signs of their international rank and titulary. The difference in this respect between contemporary times and Middles Ages lies in the fact that those ceremonial rights were of a great importance earlier, but now the considerations of this kind are of no importance at all.

This issue was always extremely complicated and international mediaeval practice could elaborate the order of monarchical ranks and their precedence in assemblies, that depended upon the rank of their respective states only in the most general terms.

Thus tradition prescribed the following general order: The first place belonged to Pope as spiritual father of Christian World.

The second – to Emperor as former "suzerain" of West-European World.

The third – to appointed kings. Where the first place after the German king (the Emperor) was indisputably given to the French one. Then usually came the king of Spain who had the advantage of the English king, because the last one was a former vassal of the French king (and Pope).

The fourth place was intended for cardinals and other kings.

And the last came "independent rulers" (such as Venetian doge, for instance), Princes-Electors and the grandest vassals of the kings (the former "pares curiae").

Mediaeval legal understandings contented themselves with this general Rangordnung elaborated by tradition. These issues never reached a universal international agreement. The famous "table of ranks" allegedly prescribed to the nations by Pope Julius II as the universal spiritual leader)in 1504 never existed, as it became recently known.

Its details never obtained general acceptance, and precedence in assembly often became a cause of long and sometimes irrelevant disputes between the representatives of different states. All attempts to settle this problem at least within the ceremonials of Roman court was used to draw together representatives of all West-European states evidently could not satisfy every side involved and for this reason never obtained universal acknowledgement, but only added pretexts for new groundless claims on the part of this or that kingdom.

As an instance, in the eyes of mediaeval legists the kingdom of Scotland the sovereignty of which was always disputed by England had to make way for Sicily due to the fact that Sicily was a papal fief and Popes, besides their exceptional position of spiritual heads of the entire Christian World, were whilom suzerains of England as well. But Scotland never agreed with such a downgraded status. Not less disputable was the collocation of Iberian states and England that always attempted to put itself higher than Castile and Aragon contrary to the tradition and opinion of majority. The other bone of contention was the place adjacent to that of the "king of Romans" presumptuous inheritor of Imperial Crown. It formally belonged to the king of France but in practice could be ceded now to one king and then to another. According to the "public opinion" of mediaeval Europe that

placed the Roman king above his French confrere, but it was a precedent of 1378 when the heir to the Imperial throne had to yield his seat to the king of France. French lawyers loved to make references to this case then.

Such international disputes over precedency called all kinds of arguments pro and contra. Not only comparatively valid argumentation, such as historical precedents or ceremonial traditions prevailing at the Holy See, but every trifle thing was put into use by lawyers and statesmen from the antiquity of Christianity and royal authority in every given kingdom and up to the amount of meat consumed and snow falling therein.

Thus Howel (On Precedency, 46, 47)[111] runs into a kind of pathos corroborating the exceptional position of England by the abundance of snow in it, "which like a gentle white rug doth cover the ploughed fields" , and also by "the immense plenty of beef, mutton and veal, which was furnished for the royal tables, and the circumstance that the Yeomen live like Gentlemen, the Gentlemen like Noblemen, the Noblemen like Princes and the Lord Mayor and Sheriffs like Kings"[112].

In the above-described traditional regimentation of the "precedence of honour" for the nations some basic principles of ceremonial rights of European powers as they have preserved up until today.

It can be mentioned as an instance at least the precedence of the Holy See and its legates still obligatory for all Catholic nations, and also the acceptance of the principle of so called first rank states – the possessors of "honneurs royaux".

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[111] Marshall. Curiosities of Ceremonials (London, 1880). p. 18.
[112] See Ward. Enquiry t. II, p. 380,

This group of states was gradually formed by the addition to the Empire and mediaeval Kingdoms (aforementioned categories No. 2, 3 and 4) of the great republics and great Duchies (category No. 5),[113] whereas the nucleus of this group consisted of "anointed kings" whose position was considered exceptional in the sphere of ceremonial rights the words of Edward III, spoken therefore as early as in the XIVth c. concerning the exclusive position of the "anointed kings". and whose kingdoms were the "great powers" of Middle Ages.

According to the established principle in the Middle Ages these "great" powers legally had no real advantage over other nations.

All nations of the then Europe were equally sovereign, legally capable and therefore equivalent political units, or rather, legally equal parts of the European family of nations.

So, from the doctrine of contemporary international law, the process that shaped Western Europe to such "state of the union" o was the most important achievement of the entire second mediaeval period.

It can be concluded that in the centuries XIV and XV the class of states, independent and sovereign legally equal subjects of the international law, known as European Family of Nations was created due to the specific historical conditions.

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[113] Marshall, loc. cit., p. 21

# CHAPTER 5 CONTEMPORARY (POSTMODERN) THEORIES OF INTERNAL SELF-DETERMINATION REPLACED THE TRADITIONAL THEORY OF NATION-STATE AS A BASIS FOR CLAIMS FOR SELF-DETERMINATION

Today, for international law scholars and in academic writings, the concept of sovereignty is considered to be a synonym of state sovereignty. Probably, this is an overbroad generalization of the problem and is an it is necessary to distinguish state sovereignty from the sovereignty of peoples and nations.

The U.N. Charter states that all peoples and nations, including which possesses no statehood of their own have rights as subjects within doctrine of the law of nations. The introductory parts of the Geneva convention(s) (mainly 1949) have clauses recognizing the rights of the peoples of "non-self governing territories" in the course of colonial wars, these include: the prohibition of racial discrimination of civilians, the prohibition of the taking of hostages, offences against human dignity, etc.[114] The international Convention on Genocide protects all peoples and nations against annihilation and barbarous treatment[115]. S.B Krylov holds that peoples living at the trust territories have certain capacities and sovereignties.[116]

Probably, concept of the peoples and nations as subjects of international law and the role of peoples and nations in the making of international law in different periods of development of legal systems can be used as a criteria for the comparison of different approached to analysis of the self-determination..

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[114] See Art. 3 of the Geneva Convention Relative to the Treatment of Prisoners of War

[115] See Art. 2

[116] Krylov Materials on the History of the United Nations Organization, pp. 254-255.

For the analysis of development of the law of self-determination different approaches for analysis of the concept of nation must be discussed.

Today it can be observed how the doctrine of the interrelations of municipal and international law changes today. Governments unite to regulate all issues of international life, creating a new branch of international law- international constitutional law. The concern of classic international law was to regulate relations between states and governments and to resolve disputes between the governments.

Contemporary international law is a law of the development of universal legislation, the enactment of newly drafted and adopted legislation into the national legal systems and the control of the enforcement of international norms by national governments by newly created international tribunals.

It can be concluded that contemporary international law merges with national constitutional legal systems creating a new framework for the development of international communication between nations, and new international constitutional law creates a new realm for European family of nations and other developing societies and international actors generally.

Developing international constitutional law establishes a foundation for regulation and establishes standards for advising on principles of international constitutionalism, for the development of doctrines of human rights and their protection, on the theory of the subjects of international law and international legal persons, it regulates the international law-making process, the relations

between national legal systems and even international criminal matters in the form of international criminal law.

It can be concluded that we can observe end of an international order established by through the doctrines of Vattel, Hobbes and Locke. The development of international constitutional law changed the international legal environment and the whole system of international law.

According to the theory of constitutional law as applied to international law: "The real constitution of a country exists only in the true actual power-relations which are present in the country; written constitutions thus only have worth and durability if they are an exact expression of the real power-relations of society.[117]"

Also, it was noted: "The laws reach but a very little way. Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of Ministers of State . . . Without them, your Commonwealth is no better than a scheme on paper, and not a living, active, effective constitution.[118]"

Ferdinand Lassalle, follower of the ideas of Hegel and Marx, proved that the real constitution is a different phenomena as compared to the written constitution, which was a constituting act of the power of the ruling class and capitalists.

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[117] F. Lassalle, "Uber Verfassungswesen" (On the nature of the constitution) (1863), in Gesammelte Reden und Schriften (ed. E. Bernstein; Berlin, P. Cassirer; 1919), ii, p. 60 (Phillip Allott translation)
E. Burke, Thoughts on the Cause of our Present Discontents (1770), in P. Langford (ed.), The Writings and Speeches of Edmund Burke (Oxford, Clarendon Press; 1981), ii, pp. 251-322, at p. 277. Cited in P. Allott: Health of Nations at
[118]

**Analysis of International Law of Self Determination Applying Theory of Constitutionalism**

New direction for the development of international law of self-determination and recognition is to apply constitutional law theory to the problems of the international community. Application of a law of constitutionalism can help to answer the questions raised by the theory of international law, which are as follows:

-How can the people take power over the authority of the international system which governs international relations?

-How can people make legally accountable governments, states, international organizations for what they are doing within the areas of international politics and relations? Development of international law as a law of constitutionalism is the direction for the development of international law for scholars and scientists.

*Current State of Theory of Constitutionalism*

It is necessary to introduce the current state of the theory of constitutionalism and how constitutional theory is affected by the theory of postmodernism prevailing today in social science. Postmodernism is currently a dominant theory in legal philosophy and its concept in the area of constitutional law can be summarized as follows:

A. The absence of a particular single principle in the theory that can be used to describe its essence. Several concepts are employed to define and explain any process. These concepts are:

1. Anything in existence does not exist as itself, but its existence can be described as cultural, historical, linguistic or social body.

2. Not any proof of any existing principle as a founding or main principle can be presented. It means that certainty of conclusions or truth in its essence cannot be achieved.

3. Knowledge of reality is impossible, all conclusions and facts are results of beliefs and these beliefs can help to explain the solution of a problem closely related to this particular situation.

4. The use of language is not a way to describe a problem or even to explain a solution- language does not correspond to reality. Language is formed by social and cultural conditions and can not refract truth and objective reality.

This approach to the development of modern constitutional theory resulted in a nihilistic approach to the existence of international law. The development of concepts through the postmodern analysis of international legal problems resulted in discussions on the issues of how media and peoples transfer information to each other, how public opinion on the issues of international relations is formed, and how interrelations between the general public in different countries and mass-media platforms can "change the world".

As a result, a new type of international law scholarship arises. These scholars are not engaged in legal activity, do not practice within a particular area of law and do not propose or dispute particular international law norms and principles. The only purpose of such legal research is to disrupt existing established principles of international law on the basis of non-existence of any other problems

other then that of that which is dictated by postmodernism, which within itself dictates the reorganization of institutes and the whole system of international law.

With regards to the problems in the development of the theory of self-determination of peoples, formation and recognition of new states, the international community discussion need to establish new and clear concepts, instead of the formal set of policies that "the principle of equal rights and self-determination of peoples" can only be affirmed and achieved by " earnestly striving by every peaceful means to promote self-government and to secure the independence of all countries whose peoples desire it and are able to undertake its responsibilities. "[119]"

This direction of development of international law doctrines resulted in the replacement of international legal analysis by a postmodern ideology of a non-existence of nations, non-recognition of new states and general degrading of the theories and doctrines within the law of self-determination and recognition.

**Constitutionalism**

To analyze such a subject as a doctrine of constitutionalism in international law the introduction to constitutional theory must be made. Edmund Burke in "Reflections on the Revolution in France (1790)" referenced to a work of Hegel, and a framework of analysis of German constitutional psychology. Montesquieu also described "the spirit of the constitution" of France, Germany and Britain.

> "It follows, therefore, that the constitution of any given
> nation depends in general on the character and development
> of its self-consciousness, . . . The proposal to give a

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[119] Department of State Bulletin, Vol. XXXI, # 795, Sept. 20, 1951

constitution - even one more or less rational in content - a priori to a nation would be a happy thought overlooking precisely that factor in a constitution which makes it more than an ens rationis. Hence every nation has the constitution appropriate to it and suitable for it.[120]"

One of the inventors of a new science -Giambattista Vico, observed: "There must in the nature of human institutions be a mental language common to all nations, which uniformly grasps the substance of things feasible in human social life and expresses it with as many diverse modifications as these same things have diverse aspects[121]". From his point of view the institutional structure embodied in the peoples' everyday life and the laws of development of those institutions are common for the whole human race. It can be said that Jules Michelet, Edmond Burke, Hegel, Vico and Herder developed a foundation for constitutionalism beyond the written texts based on the analysis of the culture(s) and history of peoples.

Their works established a framework for the analysis of such phenomena such as that of the society, nation and state, and showed that it is a product of historical development of the European family of nations. The root is what can be called "collective constitutional consciousness" and the past, self-recreating is itself in the future.

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[120] G.W. F. Hegel, Philosophy of Right (1821) (tr. T. M. Knox; London, Oxford University Press; 1952), § 274, p. 179.
[121] The New Science of Giambattista Vico (3rd edn, 1744) (tr. T. G. Bergin and M. H. Fish; Ithaca, Cornell University Press; 1970), p. 21.

**Self- Constituting of Peoples**

Based on this theory, in order to understand the real or unwritten constitution of peoples, changes that happened during throughout a period of time must be analyzed. A constitution is made at the following levels: at the level of ideas-values of society, philosophy and ideas; at the level of historical events, which affect the creation of social institutions and system of government; and on the level of the formation of legal systems- as written laws and laws of constitutional authority.

It can be said that society constructs itself, its reality and its ideal constitution based on ideas of what it might be, recreating itself through the everyday life achieving what it should be and "becomes what it has chosen to become."[122]

One form of the development of people is through the constitution- creating processes, which are described and named as the state. The process of the constituting of peoples through its development transformed the peoples' will into a republican form of self-government that then resulted in development of state as institution.

At the same time the social science of XVIIIth- XXth centuries opposed the process of self-identification and the self-constituting of peoples in the forms of "societies", "nations" and "states" with the theories of "democracy" and "capitalism."

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[122] Allott, at p.209

Further, it developed the theory of constitutional development defined the

three ways of constituting:

- Self-identification as a nation- that was main idea of the French revolution;

- Self-identification as a society- that became a basis for British constitutionalism;

- Self-identification as a state- basis for the Germany's development as it was seen

by Hegel.

**Self-Identification and Self-Constituting Peoples as Nation, State, Society, Religion, Economy (as a form of Religion). Right for Recognition as a human right**

*The Concept of Nation*

The idea of a nation in classical theory was described as: "Primarily and

properly the word nation is a term of ethnology, and the concept expressed by it is

an ethnologic concept. It is derived from the Latin *nascor*, and has reference,

therefore, primarily to the relations of birth and race-kinship"[123] *Demos* and

*ethnos,* are ideas behind the concept of nation.[124] E. Renan described the "idea of

*demos,* the political nation, based on the recognition of the fact of 'consent, the

clearly expressed desire to continue a common life'."[125]

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[123] Burgess, Political Science and Comparative Law, 1 1893
[124] Cobban, The Nation State and National Self-Determination rev. ed, New York: Crowell, 1969, p. 118
[125] Renan, What is a Nation?, M. Thom (trans.) in *Nation and Narration* (London, Routledge, 1990), p. 19.

## Theory of Ethnic Nationalism

According to the theory of ethnic nationalism - the nation is "an *ethnos*, a cultural Community based on a common language." [126] Further, Chaumont developed a theory that a colonial population became a people, despite the fact that they represent neither a demos, nor a nation through its development of a collective awareness of oppression and "exploitation by the imperial power and through its common fight for liberation."[127] In President Wilson's expression, "peoples . . . are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game".[128] It can be concluded that having the purpose of resolving problems within international legal doctrines on the development of nations, from the historic point of view the European family of nations is necessary to study.

## Nation as Reality

"What is a nation? A body of associates living under a common law and represented by the same legislature, etc... What is the will of the nation? It is the result of the individual wills, as the nation is the assembling of the individuals.[129]"

Scientists tried to analyze the phenomena of "nation" using scientific methods. But the problem with the scientific method is that analyses of the problem presuppose using the method of analogy and comparison to existing

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[126] Ergang, Herder and the Foundations of German Nationalism New York: Columbia University Press, 1931, p. 239.
[127] Id, at 244.
[128]Woodrow Wilson, "Four Points" speech to Congress, 11 February 1918,
[129] E. Siey`es, *Qu'est-ce que le Tiers 'etat?* (1789) (ed. R. Zapperi; Gen`eve, Librairie Droz; 1970),
pp. 126, 204-5 (P.Allott tr.)

categories within mankind's perception. Failure to understand the phenomena of a nation can be explained by the fact that questions, such as why a nation exists or what makes nations different cannot be answered by a methodology similar to that which is used by biology or botany. Analysis of human life cannot be made through the scientific method of naturalism.

For the analysis of the question of the nature of a "nation", the best approach was summarized by Allott as:

"The nation is a prime example of all the metaphysical consequences of human naturalism. Any nation because it conceives of itself and is conceived of by others as a nation is dignified with a measure of human reality equal to that of an y other part of that reality, including that of any other nation. ...Nations are a reality-for-themselves, a subjectivity-for-themselves. They are mind made matter.[130]"

Further, it can be concluded that nations exist in two main forms: genetic form or generic form. Nations that exists in genetic form have a source of its' identity in a mythological or religious reality. An example of such a nation state is the current state of Israel.

Nations that exist in generic form identify itself through the "idea of the special character of its land, its people, its institutions, its values, its traditions. Those features have formed a national identity which is also a national character and which is handed on from mind to mind, from generation to generation.[131]" Slavic family of nations formed through the history formed itself as a generic nation.

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[130] Allott, at p. 108
[131] Ibid.,

Through the course of history it can be seen how identity can be altered by change of self-identification.

Developing this idea further, it can be concluded that the self-identification of a nation results in a particular form of government, a legal system and other means of protecting of national identity- national security. Identity is communicated through the system of education, national ethical values and esthetical representations to other nations.

The altering of the conciseness of a nation results in the extinction of a nation. Extinction happens when a nation chooses to subordinate itself to any other form of self-identification, such as what happened with Athens decided to subordinate to Rome or European nations that became extinct and then turned into a new system of states after 1945. This can be concluded by Hegel's words:

> "It follows, therefore, that the constitution of any given nation depends in general on the character and development of its self-consciousness, . . . The proposal to give a constitution - even one more or less rational in content - a priori to a nation would be a happy thought overlooking precisely that factor in a constitution which makes it more than an ens rationis. Hence every nation has the constitution appropriate to it and suitable for it.[132]"

### Nation and State

In seventeenth century Hobbes and Locke based on a foundation of classic philosophers such as that of Plato, Aristotle and the stoic school of thought developed a theory of a denationalized society organized as political entity based on the principles of natural law. These theories allowed for the creation of

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[132] G.W. F. Hegel, Philosophy of Right (1821) (tr. T. M. Knox; London, Oxford University Press; 1952), § 274, p.179

politically organized states not based on existing nations. The United States of America was formed as a result of this theory. The proclamation and existence of such a state was possible due to the development of a theory of positivist constitutionalism - announcing the constitution as a written text, the sole source of constitutionalism and a condition of the state-building process.

Immediately after establishing themselves as a state, the peoples of the United States started to build themselves as a nation.

The next stage in the development of the theory of a nation and a state we're the French philosophers Voltaire and Montesquieu. They developed a Greek - Roman- Machiavelli line of thought announcing that a state is a form of every politically organized society. The character of the particular state is defined by its national character, culture, geography and climate. According to the new theory these differences must be taken into consideration in order to explain the origin of the state, it nature, customs and the development of theories of law and justice.

Changes within the theory of nations we're expressed by Herder in eighteenth century. According to his views each nation has a unique program which it make visible through the course of history and its' unique features, such as folklore. From his point of view a nation is a developing process and not a finished entity.

In nineteenth century the idea of nation became one of the cornerstones of the social sciences. The main ideas were developed by Savigny and the Historical Right school. This school was looking for an answer as to how a nation and the state are related to each other.

Scientists were trying to discover a "law" in the history of nations, to expose the existence of a higher authority giving a power to law, legal systems and a source of authority of a state. The answer for them was the integration of the power of an individual into non-national state system that is politically organized.

It was characterized later that "The Philosophy of Mind", the system of philosophy developed by Hegel describes the process where: "the individual becomes universal" and the machinery through which "the construction of universality" takes place[133].

It can be summarized that all these schools of though were able to conclude that individuals only through their will, are able to form nations each with their unique hart and soul and the means of politics, to finally create the notion of a state.

### State

The development of a nation was seen by Hegel within the framework of the idea of the rational state. From his point of view only the state, "as a system of rationally organized power", is a key for unlocking of nations' spirit, the nations' spirit being a tool for re-creating of a German nation. The German nation shall express itself as constituting a rational state.

Essential within the idea of a rational state is an act of the self-constituting of a nation in an institution of a higher level- of a national state. For the social science of that time, as for Hegel, the creation of a state was a stage for the development of nations through the proclamation of itself as a socially organized state. For

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[133] H. Marcuse, Reason and Revolution, p. 90.

Hegel, the state is a universal and at the same time unique form of social

organization within the general development of civilized nations.

## Society

British peoples developed its own idea of self-identification and self-constitution.

This was through the idea of "society".

> "Some writers have so confounded society with government, as to leave little or no distinction between them; whereas they are not only different, but have different origins. Society is produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices . . . Society in every state is a blessing, but government even in its best state is but a necessary evil . . . Government, like dress, is the badge of lost innocence; the palaces of king s are built on the ruins of the bowers of paradise.[134]"

## Development of Constitutionalism as a New Social Paradigm

It must be recognized, that the process of development of

contemporary international law of the twenty first century is under the

great influence not only of the foreign policies and diplomatic practiced of

the new "great powers", developed and even newly emerging states.

International law theories are be based on underlying research of

historical materials and diplomatic documents using social science method

in order to establish a proper foundation.

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[134] T. Paine, *Common Sense* (1776), in *Common Sense and Other Political Writings* (ed. N. F.Adkins; New York, Bobbs Merrill Co. (American Heritage Series); 1953), p. 4.

Probably, it can be concluded that different approaches to the theory of self-determination and practice deeply rooted in the history and different philosophical approach.

At the same time, the legal theory beyond the process of the formation of new states did not develop at the same speed as the actual process. The analysis of the problems associated with the self determination of nations, the recognition of newly formed and established states is not supported by the recent development of both social science and philosophy. The theory of the formation and the nature of the state itself must become a subject for research for international law scholars in order to move forward the development of the doctrine of self-determination and recognition.

The following approach in resolving the issues of analysis of self-determination and recognition seems necessary:

A. Further research of concept of self-Identification as a way for self-determination of peoples and nations;

B. Implementation of the theory of the self-constituting of peoples and development of customs as norms of the law of self-determination;

C. Development of theory of constitutionalism as a framework for the law of self-determination and as a condition for preservation of the peoples' and nations' identity;

D. Further research of the process of creation of states as one (and not only) form of social organization;

E. Development of the principle of peaceful coexistence as an ultimate goal of international law. Development of the principle of peaceful coexistence through the development of the theory of self-determination and recognition can be based on the stated above approach.

According to the existing theory of recognition, "...the view that it is a rule of International Law that no new state has a right toward other States to be recognized by them, and that no State has the duty to recognize a new State... A new State before its recognition cannot claim any right which a member of the Family of Nations has as against other members.[135]" On this basis attitude towards recognition as a pure political decision-making process must be reconsidered and become subject to legal analysis.

### Constitutionalism as a Basis for the Analysis of Contemporary Law of Self-Determination and Recognition

It can be concluded that crisis within international law doctrine and science cannot be ignored any more. The reasons for this crisis are: the ignorance by international law scholars the theory of political science and international relations; the absence of analysis of changes in contemporary international law in the area of subjects of international law and related doctrines of self-determination and recognition; a lack of interdisciplinary research within international law, and the absence of the development of a method for research and analysis of current issues since nineteenth century.

The history and process of the development of Families of Nations and system of states- shows existence of pattern for realization of the right for self-

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[135] Oppenheim, vol. 1 108, 126

determination- from external to internal. This conclusion reached through the application of the historical method as a method for comparative research and the analysis of international law issues.

The theory of constitutionalism must be studied by international legal scholars and, as proposed by this paper, can be applied to the development of the law of self-determination; and for the further development of the principle of peaceful coexistence and the development of the general theory of international law. It can be concluded, that the key to development of the theory of self-determination is the development of theory of self-determination based on constitutionalism as the primary theory.

The path toward the development of the science and doctrine of international law is in the development of principle of peaceful coexistence.

# CHAPTER 6 CONTEMPORARY SELF-DETERMINATION: NO RIGTH TO SECESSION

Probably, the main issue that requires analysis with regards to the enforcement of the right to self-determination is an issue of secession. Territorial integrity of the state is a main principle of international law and the basis for rejection of the claim to secede for nation, group or minority from the territory of the state where they live.

The facts that must be taken in the consideration to solve the problem of secession in the course of self-determination are numerous and complex, such as the need to weight interests of the state, neighboring states, interests of the group claiming the right to secession, etc.,

The question of the legality of secession changed through the course of history and analysis of these changes in the theory of secession probably is a key for understanding of the development of the theory and practice of self-determination.

Analyzing the case of the Aaland Islands the League of Nations noted:

> "To concede to minorities, either of language or religion, or
> to any fraction of a population the right of withdrawing
> from the community to which they belong, because it is
> their wish or their good pleasure, would be to destroy order
> and stability within States and to inaugurate anarchy in
> international life; it would be to uphold a theory
> incompatible with the very idea of a State as a territorial
> and political unity."[136]

Later, this position was uphold in the numerous cases such a case of Katanga in 1961, Biafra in 1967, in the case of Bangladesh in 1971. In 1983 the British

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[136] Report of the commission of Rapporteurs, 16 April 1921, League of Nations Council, 28

Foreign Minister restated this position with regards to the matter of claim for the self-determination for Somalis in Ethiopia:

" It has been widely accepted at the United Nations that the right of self-determination does not give any distinct group or territorial sub-division within a State the right to secede from it and thereby dismember the territorial integrity or political unity of sovereign independent states."[137] This position results in the situation, when the peoples and nations claiming the right for self-determination seeking for a different ways to resolve the legal and political problem of secession. These means includes such solutions as plebiscites, the will of peoples and nations can be implemented through the adoption of national legislation allowing secession, or even these attempts can result in civil wars and civil disobedience.

The ways for expression and claims for the right of self-determination and to secede was established by the Commission on Human Rights on the observance by all states of the nations' right to self-determination; the U.N sponsored plebiscite is a one of the recommended tools.[138]

Plebiscite, or referendum refers to the right of the majority of population to determine the political and legal status of the territory by it inhabits.[139]

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[137] British Yearbook of International Law, 1983, 409
[138] U.N Document E/2256, E/CN. 4/669, pp. 38-39
[139] See S.B. Krylov, *Manual on Lectures and Seminars on International Law*, Issue 1, Moscow, 1956, p.14

Referendums were first used as an instrument to legitimize peoples'

will in the course of the French Revolution. It allowed the incorporation of

Avignon in 1791, of Savoy in 1792 and Belgium in 1793 to the France.

During the course of modern history the Mongolian People's Republic

obtained its' independence as a result of referendum of October 20th,

1945. The Baltic Countries Lithuania, Latvia and Estonia became

independent as a result of the Referendum of the population of the Soviet

Union in 1990.

### *The Right to Secession-implementation of Self-Determination under the League of Nations*

After the World War I the idea of the self-determination of nations requested

the answer for the theoretical question: is secession can be a practical way for

implementation of self-determination. Woodrow Wilson advocated the idea of

self-determination in the Fourteen Points.

After the World War of 1914 the idea of self-determination started to

develop in two ways: as a sacred trust of civilization; and national self-

determination. The sacred trust of civilization resulted in the Mandate System

(despite the fact that it was never mentioned in the League of Nations Covenant)

which was applied directly only to fourteen former German and Turkish colonies,

out of one hundred eighteen dependencies in the world.

The national self-determination resulted in redefining of the European

boundaries according to the borders of settlement of ethnic groups and states.

This application of self-determination resulted that "the new map of Europe was drawn in accordance with Wilson's idea of self-determination."[140]

According to the views of Woodrow Wilson the League of Nations was created as a place for the peaceful discussion of all issues and claims to self-determination. In this situation the conflicts arose between the claims to self-determination, economical reasons, existing borders and historical ties.

Covenants' of the League of Nations Article X tried to implement the principle of territorial integrity of the States with the possibility and option for secession:

> "The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity, but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contraction Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary."[141]

According to the Declaration of Independence the right for the self-determination

Is a natural right and this right had to be recognized as a principle and a right under the international aw. However, in the Western tradition of international law this movement toward development of the self-determination was changed and the principle of the preservation of the territorial integrity of the states prevailed.

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[140] P.Hastings, Between the Wars 12 (1968)
[141] David H Miller, The Drafting of the Covenant 12-13 (1928)

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# Abkhazia Case Study: Historical Background

## Dissolution of the Soviet Union

The Union of the Soviet Socialist Republics, which was formed after the Great October Socialist Revolution on the territory of the former Russian Empire, broke up in 1991 into several independent States. According to the Preamble to the Minsk Agreement of 8 December 1991 concluded between the heads of State of the RSFSR, the Ukrainian SSR and the Byelorussian SSR the Soviet Union had "terminated its existence as a subject of international law and a geopolitical reality"[142]This was confirmed in the "Declaration of Alma-Ata" by ten of the fifteen former Soviet Republics.[143]

## Historical Background of Abkhazia's claim for independence

Necessary to mention, that Abkhazia was an independent state since the 15 Century before it came under the protectorate of the Osman Empire and later in 1810 had an agreement to protect it with the Russian Empire. In 1918 during the annexation and suppression of Communist Revolution Abkhazia was integrated into Georgia. In 1921 Abkhazia and Georgia were transformed into two

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[142]Agreement Establishing the Commonwealth of Independent States (Minsk Agreement),
8 December 1991, *Diplomaticheskiy Vestnik* (1992) 1; English translation:
31 ILM (1992) 1, 142-146.
[143] Documents of Alma Ata of 21 December 1991, *Diplomaticheskiy Vestnik* (1992) 1, 6-
13; English translation 31 ILM (1992) 1, 147-154.

independent Soviet Republics. In 1931 it's political status changed- it was changed from a Soviet Socialist republic to a Soviet Autonomous republic under the authority of Georgia.

In 1990 Abkhazia declared its independence. Civil war began in August 1992 when paramilitary groups and parts of the national guards invaded Abkhazia without the consent of the new Georgian President Shevardnadze. On 14 May 1994 the Russian Federation brokered an "Agreement on the ceasefire and separation of forces"[144] controlled by – mainly Russian – soldiers of the CIS and about 120 military observers of the United Nations. The presence of UN troops in Abkhazia can constitute that conflict was international in its nature.[145] Abkhazia's effort to become independent for independence was finished in the early 1990s.

On 21 February 1992[146], the Democratic Republic of Georgia voted to re-establish the Georgian Constitution of 1921, and Abkhazia was granted a status of "autonomy". But in opposition on 23 July 1992 the Abkhaz Supreme Soviet reinstated the 1925 Constitution,[147] according to which Abkhazia was "united with

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[144] Available at www.usip.org/library/pa/georgia/georgia_19940514.html (last visited 13March 2010).

[145] *Cf.* Security Council Resolutions, avaialbe at http://www.un.org/Depts/dpko/missions/ unomig/unomigDrs.htm (last visited 13 March 2010).

[146] *Cf.* http://www.parliament.ge/files/1_5718_330138_27.pdf (last visited 13 March 2010).

[147] Available at: http://www.abkhaziagov.org/ru/state/sovereignty/constitution_1925.php (last visited 13 March 2010).

the Soviet Socialist Republic of Georgia on the basis of a special Union Treaty"

(Article 4), providing for federation between Georgia and Abkhazia on equal

basis.

Abkhazia adopted a new Constitution on 26 November 1994[148] confirmed

by referendum on 3 October 1999.

In August 2008, Russian chambers of Parliament- the State Duma and the

Federation Council, and the Russian president Dmitry Medvedev signed and

ratified a declaration, announcing recognition of Abkhazia as sovereign state by

the Russian Federation. In 2008, bilateral security and cooperation agreements

were concluded, allowing Russian troops to be located in Abkhazia.

This act of recognition of political entities as sovereign states, can be seen a

fundamental change in Russia's view on principles of international law of self-

determination and recognition of States.

Immediate reaction from the Council of Europe expressed in the Resolution

1647:

> "The Assembly condemns the recognition by Russia of the independence
> of South Ossetia and Abkhazia and considers it to be a violation of
> international law and of the Council of Europe's statutory principles. The
> Assembly reaffirms its attachment to the territorial integrity and
> sovereignty of Georgia and reiterates its call on Russia to withdraw its
> recognition of the independence of South Ossetia and Abkhazia and to
> fully respect the sovereignty and territorial integrity of Georgia, as well
> as the inviolability of its borders.[149]"

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[148] Available at http://www.abkhaziagov.org/ru/state/sovereignty/index.php (last
visited 13 March 2010).

[149] Parliamentary Assembly of the Council of Europe Res. 1647, 28 January 2009.

Russian point of view is that the demands to be without a merit and if the Russia will follow recommendations it would lead to another war in the Caucasus.[150]

## Dual Standards for Self-Determination of Peoples on the Former Soviet Union Territory

Law and policy never can be separated. The interconnections between the law and politics must be recognized. Research on the subject of international law must distinguish between the jurisdiction of International law, Foreign policy and diplomacy. For proper research in this close relationship it is necessary to evaluate three aspects: the influence of the foreign policy upon the development of international law; the converse influence of international law upon the foreign policy of the state; and the use of international law by states as a support for foreign policy.

In the process of creating of norms of international law States promotes specific principles and interests, which defined by the State's own position on the problem. This position of a State is a part of State's foreign policy.

Diplomacy is a method of implementing of the foreign policy of the State. It can be defined as "activity…of heads of states, of governments, of departments of foreign affairs, of special delegations and missions, and of diplomatic

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[150]*See* L. Korotun, 'The resolution of the Parliamentary Assembly on the consequences of the war in the Caucasus is not objective and brings into discredit this international organisation', in *Golos Rossii*, 1 Februrary 2009;Daria Iureva, Resolution without extreme positions, The Parliamentary Assembly has refused to „punish" Russia, *Rossijskaja Gazeta*, 29 January 2009.

representations appertaining to the effectuation by peaceful means of the purposes

and tasks of the foreign policy of a state.[151]" It means that diplomacy plays the

main role in the process of creating norms of international law. It must be noted,

that diplomacy is not the only tool for promoting of the foreign policies of States.

This can include scientific and cultural cooperation, cooperation in the field of

industry, economics and education.

In this process of cooperation and competition between the sovereign states

norm of international law are forms.

The actual situation was characterized by professor Tunkin, that

In international relations and in the creation of norms of international law
in particular the great powers play a special role. On the juridical plane the
principles of respect for state sovereignty and of the equality of the states,
which are an important means of defending the independence of weak
states from the encroachment of strong powers...[152]

At the same time, in promoting and carrying out the policy for

protection the life and property of its citizens from great powers attempt

from a position of strength to prove the existence of norms of international

law that allows the use of force by one state against another. An example

can be the armed intervention of the United States army in the Dominican

Republic in 1965. The United States government referred to the need to

protect the life and property of its citizens in that case.

It must be recognized, that the process of development of

contemporary international law of the twenty first century is under the

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[151] Levin D.V., Diplomatiia, 14, 15 Moskva,, (1962)

[152] G.I.Tunkin Theory of International Law, 275, Harvard University Press,
(1974)

great influence of the foreign policies and diplomatic practiced of the great powers and developing and even newly emerging States. International law scholars need to spend more time studying historical materials and diplomatic documents in order to perform a proper research in the area of international law.

## A right to self-determination and secession

The issue in focus is if people of Abkhazia can secede from Georgia. It will be no doubt, that under United Nations Covenants population of Abkhazia has a continuing right to self-determination. The basis for this conclusion is that the people of Abkhazia freely expressed their will. Abkhazia declared its independence from Georgia in 1990.

On 23 July 1992 the Abkhaz Supreme Soviet reinstated the 1925 Constitution[153], according to which Abkhazia was "united with the Soviet Socialist Republic of Georgia on the basis of a special Union Treaty" (Article 4), providing for federation between Georgia and Abkhazia on the basis of equal rights. Abkhazia adopted a new Constitution on 26 November 1994[154] confirmed by referendum on 3 October 1999.

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[153] Available at http://www.abkhaziagov.org/ru/state/sovereignty/constitution_1925.php

[154] Available at http://www.abkhaziagov.org/ru/state/sovereignty/index.php

## Law of Secession

James Crawford noted, that "until 1914, secession was the most conspicuous and probably the most common method of the creation of new states."[155] The position of international law is that "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.[156]"

The right to self-determination is an *ius cogens norm*. The right to secession is justified in cases of gross human rights violations and genocide.

### Right for the self-determination of peoples and reality of secession

The practice of secession of non-colonial territories developed especially fast after 1945. The cases of secession are: Senegal in 1960; Singapore in 1965; Bangladesh in 1971; The former Soviet Baltic States- Estonia, Latvia and Lithuania in 1991; secession of eleven States from the Soviet Union. All those States seceded in 1991.

In 1991-1992 seven States seceded from Yugoslavia. It must be mentioned a dissolution of Czechoslovakia into the Czech Republic and Slovakia in 1993 and case of Eritrea in 1993.

Except the case of the Soviet Union the case of Singapore's secession in 1965 can be used to analyze the nature of the political process and legal reasoning that will result in greater autonomy or to secession.

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[155] Crawford, James *The Creation of States in International Law*, 2nd Ed. p.375 Oxford, (2006)

[156] *Ibid.*, at 390

### Abkhazia's population as a "peoples"

The right to self-determination belongs to the "peoples". Abkhazia's people satisfy all the requirements to be recognized as a nation. First- it is a large group of peoples that historically possess a territory. This possession of the territory can be traced back up to one thousand years. Abkhazians has common language, distinctive from Georgian, Armenian and other languages. Common character and traits can be found in Abkhazian culture.

### Re-Establishment of the State of Abkhazia as of Annexed or Conquered State

Practice of re-establishment of annexed or conquered States which territory was disposed, recognized by the rules of a customary international law.

Legal nullity of Ethiopia's annexation by Italy in 1935was affirmed by the provisions of the Peace Treaty.

Albania's independence was restored after the occupation and all the acts of the puppet government concluded between 1939 and 1943 were declared null and void.

The same rules should apply to the States, created in the period 1918 to 1920 during the formation of the Soviet Union.

### Georgia's Secession from the Soviet Union

Georgia's secession has been an exclusively ethnical by its nature. Michael Mann argues that "modern ethnic cleansing is the dark side of democracy when ethno-nationalist movements claim the state for their own *ethnos*, which

they initially intend to constitute as a democracy, but then they seek to exclude and cleanse others."[157]

The secessionist movement of Georgia became ethnically-oriented and excluded non-Georgians from the political process. The UN Security Council has condemned "the ethnic killings and continuing human rights violations committed in Abkhazia, Georgia." [158]

### Denial of the rights of peoples of Abkhazia to self-determination

In this case there was a complete denial of the rights of peoples to self-determination by Western doctrine of international law.

The denial happened when international law rule was breached stated, that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."

### Continuation of Georgian occupation and the incorporation of the Abkhazia into the Georgia

It must be concluded that non-recognition and attempts to incorporate Abkhazia into the Georgia constituted a further violation of international law: an infringement of the customary rule of international law conferring a right to self-determination on those peoples whose territory is occupied by a foreign Power. It follows, that at present the attempts of occupation by Georgia is contrary for the

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[157] Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing*, Cambridge University Press,2004, p. 503

[158] UN Security Council resolution on Georgia, Abkhazia, 1036, 12 January 1996

two rules of international law: the rule concerning right of the peoples for self-

determination, and a rules relating to foreign military occupation

# CHAPTER 7 DEVELPMENT OF A METHOD FOR ANALYSIS OF CLAIMS FOR SELF-DETERMINATION IS REQUIRED

## Method of International Law

In order to resolve the theory of self-determination and development of states as subjects of international law not only the right theoretical approach must be used but also the proper method must be found.

## The Necessity for the Development of a Method in International Law

Any research on international law must first answer the fundamental questions, such as: "what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions."[159] Legal methodology is the tool that must be employed to connect the theory and practice.

Among the methods that were developed previously, the methods that must be noted are the methods of: natural law, the comparative method and the method of functionalism. Macdonald and Johnston, developed the approach of "three orientations: philosophical (Kelsen, Verdross and Verzijl), humanistic (Brierly, Lauterpacht and Jenks) and scientific (Schwarzenberger, Friedmann and Stone)".[160] Also, the "New Stream" of international legal scholarship is among the newest development of international law scientists.

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[159] 93 Am. J. Int'l L. Symposium on Method in International Law, 292, 1999

[160] Ronald St.J. Macdonald & Douglas M.Johnston, *International Legal Theory: New Frontiers ofthe Discipline* in The structure and Process of International Law 1, 3 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983).

Contemporary international law scholars then also recognize the following

methods of international law and refer to: the New Haven School positivism, the

international legal process, critical legal studies, feminist jurisprudence, the

methodology of legal- economics, international law and international relations. To

introduce a new method for international law scholarship the following questions

must be answered:

1. What assumptions does the method make about the nature of international

law?

2. Who are the decision makers under the method?

3. How does the approach address the distinction between lex lata and lex

ferenda? Is it concerned with only one, both, or neither?

4. How does it factor in the traditional "sources" of law, i.e., prescriptive

processes?

5. Is your method better at tackling some subject areas than others, both as

regards the issue noted above and as compared to other subjects?

6. Why is your method better than others?[161]

Generally, the framework for the science of universal international law was

described by Oppenheim as follows: exposition of the existing rules of law,

historical research, criticism of the existing law, preparation of codification, the

distinction between the old customary and the new conventional law, the fostering

of arbitration, and finally, the popularization of international law.[162]This

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[161] *Ibid*, at 298

[162] L. Oppenheim *The science of international law: its task and method* 2 Am. J.
Int'l L. 313, 314 (1908)

definition is widely accepted within the international legal community and will be used in this paper. The second question is if it is possible to develop a common theory of international law that will be of equal service for the needs of countries with differing legal traditions.

It is proposed that two approaches can be used for the analysis of these types of problems. The first approach can be described as a "historical approach." This method is common in the science of international law worldwide, and was especially popular in XIXth century. This method will be applied to trace the roots of modern approach to public international law in the science in the twentieth century, and in the international law of nineteenth century.

The second approach is the comparative method of legal analysis. The methodology that will be applied was set out by the professor Eberle.[163]

As an example- the phenomena that can be set as an example and explanation is that, after the crash of the Soviet Union the Russian legal tradition did not change despite the disappearance of Marxism-Leninism as a main stream for the development of legal systems and legal science, including the science of international law. This is valid proof, that socialist theories and Marxism-Leninism did not define the Russian legal tradition; but rather, that the Russian tradition was defined by diplomatic practices and foreign relations.

The characterization of the Russian legal tradition as a civil law tradition is a classic description for this type of legal system. In the science of international law

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[163] Edward J. Eberle, *The Method and Role of Comparative Law,* Washington University Global Studies Law Review, vol. 8, No 3, 2009, at 451

and comparative law, the Russian legal tradition is usually described as a "civil law" tradition, or in comparative legal studies, it is characterized as a "socialist law" system.

But the subdivision of all of the world's legal systems into three types, such as "common law", "civil law" and "religious" legal systems is overbroad and does not help to understand a values of a society, that that society's legal system was developed to protect.

As it demonstrated above- the idea of a state was not known until the Middle Ages in Western Europe. Typical characteristics of states started to develop mainly in the first period of the Middle Ages. A state is a sovereign territorial public unity, i. e. a community of people sharing a notion of a central authority that appropriated an exclusive and ultimate power of coercion[164].

Until the end of the XIIIth century a state in its modern sense was still non-existent. The modern idea of separate states was still preceded by the concept of the feudal Christian republic lead by the Pope and Emperor within the nations that just started to develop.

Only with the emancipation of these nations whose territories used to be solemnly proclaimed "sectiones Romani imperii", only with the declaration of sovereignty of those who used to be considered as "reges provinciales" with regard to the Emperor – that is only with the crush of the Papal-Imperial system – a sovereign public unity which became known as a state, became possible.

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[164] .See H. Коркуновъ, Общая теория права, стр. 216. (Korkunov, General Theory of Law, p. 216)

With this crush of the Papal-Imperial system as a power that enjoyed universal authority and with its replacement by separate independent states does the history of national law of each of these states begin.

The development of international law doctrines cannot be studied without researching the development and formation of states that formed the European family of nations. Without these separated and independent national bodies, the evolution of which started at the second half of the Middle Ages, it was impossible to develop the principles of law and international relations elaborated by the papal-imperial social order of the first half of the Middle Ages. International relations established during that period would have forever remained a domestic one and would never have passed onto an international level. For international law without subjects has no possibility of existence.

Even after the emancipation of the national unions, the state ,in our modern understanding already exists. Though every nation (or nationality, or public union) is already sovereign, this sovereignty is applicable only to the foreign affairs. There was still no idea of sovereignty inside the states, for though they had obtained the ultimate power of coercion, this power was not as yet exclusive.

At that period of time the central power was still opposed by local authorities – by feudal seigniors who consider themselves sovereign within their own domains. However, these seigniorial domains had no more rights to be defined as states. For as the feudal king enjoys an ultimate but not an exclusive power within his kingdom, his vassal barons, and vice versa, may enjoy an exclusive power within their territories, but this power is by no means ultimate. For a baron's

power is delegated to him by means of investiture or enfeodded to him by the king.

Despite the fall of political power of the Empire and papacy, a state – in its modern (and also Antic) meaning – is still non-existing until a feudal political order dominates on its territory. It will be shown below, that the notion of a "feudal state" is, impossible also.

Next, within the process of the development of a nation, the state authority would be set free not only from external vassal quasi-dependence on the Emperor or Pope, but also from internal burden of feudal relations. This parallel development of external emancipation and internal consolidation of nations, working on destruction of the whole above-described feudal-papal-imperial system in the first half of Middle Ages, formed the European family of Nations in the second half of mediaeval period, which stretched approximately from the end of the Crusades until the beginning of the Reformation in the XIVth and the XVth centuries.

From the historical point of view formation of states as the subjects of international law, as we understand it now, the states that are independent and for this reason equal to each other, in the modern meaning of state as a member of international community, was done by the developed nations; but since that time doctrines of social science changed the environment and the landscape of the analysis and research of formation of states through the claim for self-determination.

## International Law and Theory of a State

European international law started to develop after 1500 A.D. in the time of prevailing natural law philosophy. The idea of "civilization" and "civilized nation" developed out of the concept of a "pre-societal state of nature" in seventeenth and nineteenth centuries. The same idea became a foundation for development of international law, with only one difference- it did not percept the concept of social contract between the nations (as it happened in social science, according to Locke) Locke even moved further, stating that: "the corruption and viciousness of degenerate men made necessary smaller and divided associations[165]"

The denial of international law by the positivist and realist school of law as a "law" was a result of two types of arguments proposed by philosophers:

(a) Scientists discuss states, governments, etc., assuming that they have their own will and consciousness

(b) Scientists extrapolate features of human nature and of the research of human history on those non-existing artificial entities instead of those who rule and dominate them. In a realist school approach, international law must be treated as random aggregated research of actors(and their interests) within international relations. The best way it was described was as follows:

> "Realism is a theory that divides the globe into two
> different domains. There is the domain inside the state
> which is often seen as progressive, where politics operates

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[165] Locke. D. Two Treatises on Government (1689), ii, § 128

and where society can evolve; and there is a domain outside the state or between states which is not seen as progressive but as static . . . Realism assumes that states are all locked into their own survival and into the pursuit of their own interests.[166]"

It is probably not necessary to note that in this period of time realism was a conventional contemporary international law doctrine, and all problems and failures of international law we're a result of this approach.

"No juristic effort is possible except as it is based on some philosophy, and the very men who are most loath to admit this fact are they -who most blandly and blithely indulge their philosophical assumptions. International law has suffered from nothing else as from our unwillingness to deal with its underlying philosophy in the open.[167]" It was defined as one of the two major tasks confronting jurists of our century[168]. Laski likewise voices the need for a new philosophy of international law.[169].It would therefore seem proper to return to the point where the paths of jurisprudence and philosophy diverge, and from there carry on the philosophical methods

The opinions of authorities on international law with respect to the relation of the law and the state will be analyzed as a necessary introduction.

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[166] "Realism vs cosmopolitanism - a debate between B. Buzan and D. Held", in 24 Review of International Studies (1998), pp. 387-98, at p. 387 (Buzan).

[167] The Prospect for International Law in the Twentieth Century (1925) 10 CORN. L. Q. 419, 423.
[168] Hudson, *id.,*, at 423, 424
[169] *The Theory of an International Society,* in problems of peace (6th ser. 1932) 188.

**Problem of International Law as a Law Beyond the State**

The philosophy of international law cannot be based on "sanctions"-based on the legal philosophies of theorists such as Bentham, Austin or Kelsen. For analysis of international legal problems, the philosophy of constitutionalism and the theory of constitutional law, (that has common features in all nations and states) must be applied. It is necessary to note that, no legal philosophers analyzed constitutional law and international law as a law without sanctions and does not requires such mechanism for its existence.

International law is an example of self-executing mechanism; international law does not need a sanction imposed by a sovereign. The threat of a sanction can turn any command into an enforceable rule. But a sanction does not miraculously turn policy into a norm of law. Command theory is extremely interesting, but it does not relate to the phenomena of law. International law is a law of co-existence. Self-determination cannot be prescribed or refused. Non-recognition is an act of aggression against the peoples' will.

It can be concluded that international law can not be analyzed through the application of categories of political science, international relations, economics or any other social science approach.

At the same time it proves the point of view of international law scholars that non-recognition of the newly established state is a form of sanction in order to refuse the enforcement of the people's will for self-determination. For the development of the doctrine of self-determination, international law must be

approached as a tool for the protection of objective reality and not as a tool for construction of reality.

## Problems in the Current Methodological Approach for the Analysis of the Self-Determination Problems

### *Evolutionism as an Approach used in XIX-XXth Centuries*

Evolutionism usually is described as a theory in which all human societies pass through the same and identical stages in economic, social and legal development. In 1862 H. Spencer defined Evolutionism as " Evolution is a passage from a relatively undefined and non-coherent heterogeneous state, through successive stages of differentiation and integration" This definition represents a classic perception and differentiation between traditional and modern societies.

Nineteenth century international law scholars based on this theory and concept classified all societies as a state or non-state. This classification was used as a basis for classification of nations as 'civilized" or "non-civilized" describing nations as "ascending" in development or "descending" and if "descending", required colonial governance and external rule.

### *Method of Comparative Law analysis Within International Law*

The main problem for researcher is that the international law scholars are not impartial and the legal analysis of the problem was affected by their own perception of situation. It can be said that this conclusions tells us more about the researchers themselves rather then containing actual analysis of the problem

presented. This means that current methodology of research does not serve its' purpose and another method is required.

The method required must be similar to the method for research in the field of history- a researcher must avoid ethnocentric preconceptions.

The method of comparative law offers the solution for this problem. The method offers two approaches to analyze legal phenomena:

A. The analysis of institutions, related to the analysis of existing/visible aspects of legal process and legal relations;

B. The observation of behavior; with regard to the fact that institutional information can often not be compared, and the similar features of the legal behavior, associated values and beliefs.

This method, that is similar to method of legal anthropology is based on the assumption that all societies developed a way to characterize all issues as "just" or "unjust" through the process of "jurudicization".

The proposed framework calls for the finding of a "homomorphic equivalent": a similar concept or idea serving as functional equivalent. In this case the western international law system does not need to implant or reinterpret the concepts of nation, general principles of law and sovereignty into other international law systems, but the assignment of the international law scholars is to determine these concepts within all existing international law systems.

International law developed a method for the comparison of legal systems describing how they are different from the West. Contemporary international law must develop a methodology for the analysis of social structures, beliefs and

value systems. The proposed framework and method allows one to overcome existing ethnocentric prejudices.

The analysis of the doctrine of self-determination demonstrated that its' development changed institutions of international law *De Facto*. Further development and changes within the traditional institutions of international law is required. The international law of the self-determination cannot be based on political arguments as it was before, but must take into consideration the existence of new subjects of international law- such as peoples and nations. Further development of the law of self-determination must be concentrated on the analysis of this right as a developing right, not a static one. A legal reappraisal of the right of secession is necessary to develop the level of the rules of international law. It is necessary to provide a forum for non-state actors, such as non-recognized peoples, nations and minorities for participating in the discussions regarding current issues and problems of international law.

# CONCLUSION

## SUMMARY

In conclusion, the thesis can be summarized as following :

**The Thesis:** the research concentrated on the analysis of development of the right for self-determination from external to internal aspects. In the thesis I try to demonstrate that this pattern can be considered as a historical way of development of this right and a way for further analysis and development of international law of self-determination.

The argument is based on the analysis of history of formation of states and on analysis of influence of social science on development of doctrine of the self-determination: how the change from concept of traditional nation-state to post-modern theories of modern societies changed and defines development of the idea and contemporary law of self determination. Also, the thesis demonstrates that analysis of these matters today requires application of historical and comparative law method for research of contemporary law of self-determination.

**Novelty of research** can be described as: that the crisis within international law of self-determination cannot be ignored. This dissertation analyses and discusses the reasons for the crisis which are: the lack of analysis of the correlation of legal doctrines with doctrines of social science; a general absence of analysis of the changes occurring within contemporary international law due to the changes of doctrines of social science (particularly on the topics of the subjects of international law, and on the law of self-determination; the absence of a development of a methodology for the purpose of research and analysis of the

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current issues within international law (especially since the nineteenth century). Using the European family of nations as case study, this paper analyzes the history and development of nation states, will propose a historical and comparative law method as a method both for general comparative research, and further research on the development of the law of self-determination as interrelated doctrine with the doctrine of constitutionalism. This dissertation will introduce the theory of constitutionalism within that framework of analysis, and will use it as a mechanism for the furtherance of the law of self-determination, the principle of peaceful coexistence; and finally, for the development of international law generally.

**Roots of the theory of self-determination**s:

The development of the principle of self-determination was one of the most prominent and significant doctrines in the theory of international law in the 20th century. Today, it becomes one of the cornerstones in international politics and foreign relations.

The key to understanding the Western theories are the underlying theories of social science and international law that were developed in the 18-19th centuries. The roots of these doctrines must be discovered in analysis of development of legal traditions and philosophy. The Western doctrines and perceptions of international law originally existed since the Roman and Byzantine Empire and were based on different notions that will be demonstrate in this analysis; after that period of time development of these doctrines were influenced by transfer of international law studies to Eastern part of Europe from Western Europe in a later

times, that evolved further and are still defining attitude of international law scholars toward the processes of self-determination and recognition of newly organized states after the World War I.

**Self-Determination as a legal principle:**

Article 1 of the UN Covenant on Economic, Social and Cultural Rights and the UN Covenant on Civil and Political Rights states:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

All peoples may, for their own ends, freely dispose off their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

The principle VIII of the Helsinki Final Act further developed a principle of self-determination of peoples. The Principle VIII can be read as follows:

> "The participating States will respect the equal rights of peoples and their right to self determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.
> The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly

relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle. "

**The right to self-determination has to aspects: external and internal**

In the theory of international law the external aspect of the right to self-determination guarantees a right of the peoples and nations "to be free from foreign interference which affects the international status of that state"

At the same time the right to internal self-determination entitles peoples and nations to participate in the political decision-making process which affects their economic, political, cultural conditions of their lives.

**The concept of Sovereignty** is a fundamental concept for the theory of self-determination:

Jean Bodin was the first philosopher who tried to analyze the concept of "sovereignty." It was noted: "...no jurist or political philosopher has in fact attempted to define sovereignty...[170]". He defined the sovereign power as

> "Maiestie or Soveraigntie is the most high, absolute, and perpetuall power over the citisens and subiects in a Commonweale...that is to say, the greatest power to command.

After Bodin, Hobbes in his "Leviathan" declared: "the Rights, which make the Essence of Sovereignty... are incommunicable and inseparable.[171]"

Hobbes, in Leviathan, wrote that the Leviathan or Commonwealth or State is "but an artificial man... in which the sovereignty is...an artificial soul, as giving life and motion to the whole body[172]".

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[170] Six Books of the Commonwealth (tr. M. J. Tooley; Oxford, Basil Blackwell; no date), i, 8, p. 25).
[171] Hobbes, Leviathan, ch. 18. (London, J. M. Dent & Sons (Everyman's Library); 1914, p. 3).

**The concept of "State"** as a main actor of international law is a corner stone of a classical theory of international law; definition of a "state" refers to Grotius: "a complete association of free men, joined together for the enjoyment of rights and for their common interest[173]"

Francisco Vitoria defined a State as a: "A perfect State or community...is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon and the Republic of Venice and the like..[174]"

Vattel further developed the definition of States: "Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security.[175]"

**Changes in disposition of actors in the area of international law.**

Modern theory of state describes the current crisis leading to the change of social development.

"For the modern state to be heading towards crisis, or significant long-term change, at least one of three things would have to be true:

consent to particular and reasonably long established sites of authoritative rule is breaking down either through large-scale resistance to the rule of law, or through the rejection of the rules of rule of such a state by a significant section of the political community constituted by it, and those who command the state's power cannot contain such developments; secondly, previously capable states are unable

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[172] Id.

[173] Grotius, De Jure Belli ac Pacis, Book 1, Ch. 1, (1646)

[174] Vitoria De Indis ac de Iure Belli Relectiones (1696)

[175] Vattel Le Droit des Gens, Vol 1, Introduction, (1758)

to command coercive power against those over whom they rule and against their

external enemies;

thirdly, the laws and demands of international institutions and organizations have

enforceable claims against historically sovereign states.[176]"

All three described phenomena must be subject to research by international

legal scholars as this is evidence of changes in the established order of nation-

states.

**Development of a theory known as "constitutional pluralism"**

As a response for this crisis the theory of "consitutional pluralism was

developed. The theory supposes that:

> "almost equally uncontroversial, a revised conception of
> constitutionalism should of course then also be open to the
> discovery of meaningful constitutional discourse and processes in
> non-state sites . . . Even for those who are most skeptical or
> pessimistic about the viability of constitutionalism beyond the
> state, their position is based either upon an incapacity to imagine
> the form in which such post-state constitutionalism might be
> effectively articulated and institutionalized or upon an
> unwillingness to concede that the time is yet ripe for such an
> enterprise, rather than upon a refusal in principle to contemplate
> that a constitutional steering mechanism, or its functional
> equivalent, might be appropriate for significant circuits of
> transnational power.[177]"

Not arguing with the fact that states today are still are the main actors of

international law and the main subjects of the international system, in order to

move forward with the development of the theory on the international law of self-

determination and recognition, all these trends must be analyzed

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[176] Thompson 'The modern state and its adversaries' (2006) 41 Government and Opposition 23, 26,
[177] Walker, The idea of constitutional pluralism' (2002) 65 MLR 317 p 334.

**Formation of Sovereign European Family of Nations**

The formation of subjects of international law and development of the law-based community of nations from which the development of contemporary international law started in the second half of Middle Ages. From the historical point of view it required a demolition of universal Papal-Imperial system and development on it foundation of states in its modern meaning.

Development of institutions- main actors of that period- the Empire and Papacy and strengthening of the feudalism was a mainstream of historical development. These three institutions in the Europe of the XI, XII and XIIIth centuries did not allow development of international law institutions as we know it today

**Formation of sovereign states is "a matter of fact"**

It was noted by Oppengheim that " the formation of a new state is ...a matter of fact, and not of law.[178]" The entire mediaeval world of Western Europe was, as a special cultural historical type, a product of three main factors – Ancient civilization, Christianity and Teutonic's. Antique world had a notion of state equal to modern meaning. In the Middle Ages it was not know about it. So it was lost temporarily due to the influence of Christianity or of Teutonic's the spirit of which was brought to Western Europe by new tribes that occupied it.

**Contemporary (postmodern) theories of internal self-determination** replaced the traditional theory of nation-state and consequently changed a basis for claims for self-determination.

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[178] Oppenheim, (8th Ed.), vol. 1 p. 677

Development of international constitutional law changed the international

legal environment and the whole system of international law. According to the

theory of constitutional law as applied to international law:

"The real constitution of a country exists only in the true actual power-

relations which are present in the country; written constitutions thus only have

worth and durability if they are an exact expression of the real power-relations of

society.[179]"

## Postmodernism

It is necessary to introduce the current state of the theory of constitutionalism

and how constitutional theory is affected by the theory of postmodernism

prevailing today in social science. Postmodernism is currently a dominant theory

in legal philosophy and its concept in the area of constitutional law can be

summarized as follows:

A. The absence of a particular single principle in the theory that can be used to

describe its essence. Several concepts are employed to define and explain any

process. These concepts are:

1. Anything in existence does not exist as itself, but its existence can be described

as cultural, historical, linguistic or social body.

2. Not any proof of any existing principle as a founding or main principle can be

presented. It means that certainty of conclusions or truth in its essence cannot be

achieved.

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[179] F. Lassalle, "Uber Verfassungswesen" (On the nature of the constitution) (1863), in
Gesammelte Reden und Schriften (ed. E. Bernstein; Berlin, P. Cassirer; 1919), ii, p. 60 (Phillip
Allott translation)

3. Knowledge of reality is impossible, all conclusions and facts are results of beliefs and these beliefs can help to explain the solution of a problem closely related to this particular situation.

4. The use of language is not a way to describe a problem or even to explain a solution- language does not correspond to reality. Language is formed by social and cultural conditions and can not refract truth and objective reality.

This approach to the development of modern constitutional theory resulted in a nihilistic approach to the existence of international law.

**Constitutionalism**

Edmund Burke in "Reflections on the Revolution in France (1790)" referenced to a work of Hegel, and a framework of analysis of German constitutional psychology. Montesquieu also described "the spirit of the constitution" of France, Germany and Britain. "It follows, therefore, that the constitution of any given nation depends in general on the character and development of its self-consciousness, . . . The proposal to give a constitution – even one more or less rational in content – a priori to a nation would be a happy thought overlooking precisely that factor in a constitution which makes it more than an ens rationis. Hence every nation has the constitution appropriate to it and suitable for it.[180]"

One of the inventors of a new science -Giambattista Vico, observed: "There must in the nature of human institutions be a mental language common to all nations, which uniformly grasps the substance of things feasible in human social

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[180] G.W. F. Hegel, Philosophy of Right (1821) (tr. T. M. Knox; London, Oxford University Press; 1952), § 274, p. 179.

life and expresses it with as many diverse modifications as these same things have diverse aspects[181]"

## Self-Constituting of peoples

Based on this theory, in order to understand the real or unwritten constitution of peoples, changes that happened during throughout a period of time must be analyzed. A constitution is made at the following levels:

at the level of ideas- values of society, philosophy and ideas;

at the level of historical events, which affect the creation of social institutions and system of government;

and on the level of the formation of legal systems- as written laws and laws of constitutional authority.

It can be said that society constructs itself, its reality and its ideal constitution based on ideas of what it might be, recreating itself through the everyday life achieving what it should be and "becomes what it has chosen to become."[182]

the theory of constitutional development defined the three ways of constituting:

- Self-identification as a nation- that was main idea of the French revolution;

- Self-identification as a society- that became a basis for British constitutionalism;

- Self-identification as a state- basis for the Germany's development as it was seen by Hegel.

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[181] The New Science of Giambattista Vico (3rd edn, 1744) (tr. T. G. Bergin and M. H. Fish; Ithaca, Cornell University Press; 1970), p. 21.

[182] Allott, at p.209

**Development of International Law with regards to Constitutionalism as a New Social Paradigm**

The process of development of contemporary international law of the twenty first century is under the great influence not only of the foreign policies and diplomatic practiced of the new "great powers", developed and even newly emerging states. International law theories are be based on underlying research of historical materials and diplomatic documents using social science method in order to establish a proper foundation.

**Contemporary law of self determination with regards to the interrelated principle of a right to secession** developed principles that no right to secession exists:

" It has been widely accepted at the United Nations that the right of self-determination does not give any distinct group or territorial sub-division within a State the right to secede from it and thereby dismember the territorial integrity or political unity of sovereign independent states.[183]"

This position results in the situation, when the peoples and nations claiming the right for self-determination seeking for a different ways to resolve the legal and political problem of secession. These means includes such solutions as plebiscites, the will of peoples and nations can be implemented through the adoption of national legislation allowing secession, or even these attempts can result in civil wars and civil disobedience.

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[183] British Yearbook of International Law, 1983, 409

**In order to conduct further research for the claims of self-determination it is necessary to introduce a new method for international law scholarship;** the following questions must be answered:

1. What assumptions does the method make about the nature of international law?

2. Who are the decision makers under the method?

3. How does the approach address the distinction between lex lata and lex ferenda? Is it concerned with only one, both, or neither?

4. How does it factor in the traditional "sources" of law, i.e., prescriptive processes?

5. Is your method better at tackling some subject areas than others, both as regards the issue noted above and as compared to other subjects?

6. Why is your method better than others?

**Two approaches** can be used for the analysis of these types of problems. The first approach can be described as a "historical approach." This method is common in the science of international law worldwide, and was especially popular in XIXth century. This method will be applied to trace the roots of modern notions and doctrines of public international law in the science in the twentieth century, and in the international law of nineteenth century.

The method of comparative law offers the solution for this problem. The method offers following approaches to analyze legal phenomena:

A. The analysis of institutions, related to the analysis of existing/visible aspects of legal process and legal relations;

B. The observation of behavior; with regard to the fact that institutional information can often not be compared, and the similar features of the legal behavior, associated values and beliefs.

This method, that is similar to method of legal anthropology is based on the assumption that all societies developed a way to characterize all issues as "just" or "unjust" through the process of "jurudicization".

The proposed framework calls for the finding of a "homomorphic equivalent": a similar concept or idea serving as functional equivalent. In this case the western international law system does not need to implant or reinterpret the concepts of nation, general principles of law and sovereignty into other international law systems, but the assignment of the international law scholars is to determine these concepts within all existing international law systems.

### Conclusion: Lex Lata and Lex Ferenda: Constitutionalism as a Basis for the Development of the Law of Self-Determination

Probably, it can be concluded that different approaches to the theory of self-determination and practice deeply rooted in the history and different philosophical approach.

At the same time, the legal theory beyond the process of the formation of new states did not develop at the same speed as the actual process. Contemporary analysis of the problems associated with the claims for self determination and recognition of newly formed and established states is not supported by the recent development of both social science and philosophy. The theory of the formation and the nature of the state itself must become a subject for research for

international law scholars in order to move forward the development of the doctrine of self-determination and recognition.

The following approach in resolving the issues of analysis of self-determination and recognition seems necessary:

A. Further research of concept of self-Identification as a way for self-determination of peoples and nations;

B. Implementation of the theory of the self-constituting of peoples and development of customs as norms of the law of self-determination;

C. Development of theory of constitutionalism as a framework for the law of self-determination and as a condition for preservation of the peoples' and nations' identity;

D. Further research of the process of creation of states as one (and not only) form of social organization;

E. Development of the principle of peaceful coexistence as an ultimate goal of international law. Development of the principle of peaceful coexistence through the development of the theory of self-determination and recognition can be based on the stated above approach.

It can be concluded that crisis within international law doctrine and science cannot be ignored any more. The reasons for this crisis are: the ignorance by international law scholars the theory of political science and international relations; the absence of analysis of changes in contemporary international law in the area of subjects of international law and related doctrines of self-determination and recognition; a lack of interdisciplinary research within

international law, and the absence of the development of a method for research and analysis of current issues since nineteenth century.

The history and process of the development of Families of Nations and system of states- shows existence of pattern for realization of the right for self-determination- from external to internal. This conclusion reached through the application of the historical method as a method for comparative research and the analysis of international law issues.

Development of the theory of constitutionalism that replaced the doctrine of nation-state in the end of XXth century must be studied by international legal scholars and, as proposed by this paper, can be applied to the development of the law of self-determination; and for the further development of the principle of peaceful coexistence and the development of the general theory of international law.

The path toward the development of the science and doctrines of international law is in the development of principle of peaceful coexistence as a main principle of international law.

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