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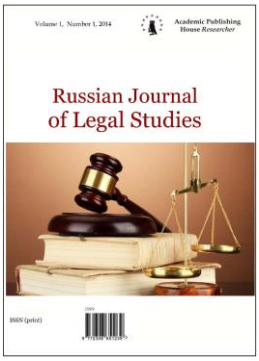

State, Corporation, Corporatocracy – the Relevance of the Congo Free State And Its Roots

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Abstract

The constant development of public international law witnesses a steadily growing tendency of various non-state entities performing increasingly important roles in global relations and governance. Majority of these entities are what private law labels as corporations. This phenomenon is assessed in various ways on the basis of social sciences. Oftentimes commentators and scholars alike indicate grave risks related to the processes of corporatization of power and the privatisation of channels of governance and public services alike. Frequently there subsists a belief that these tendencies are novel. The science of the history of law, however, provides numerous evidence of previous occurrences of such phenomena. Deep analysis of past experiences, coupled with a careful comparison of differences and similarities between modern and bygone corporatization processes, will prove to be a fruitful venture helping lawyers and other social sciences' scholars to hone their expectations and construct better. An interesting example regarding the modern era of international law's maturity is the history of the creation of the Congo Free State as a political entity organized and maintained by a private-law body corporate, and its subsequent recognition by what undoubtedly had been and would still be recognized by international law as traditional states. The article presents its history, also showing the historical context of corporate persons' participation in social and economic history as well as in international relations. The application of legal sciences research methods will include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, critical-legal dogmatics.

Keywords: Congo, corporations, colonization, public law, international law, legal history.

1. Introduction

The status of corporate bodies of private-law in international relations in light of the public international law is dynamically evolving (Wouters, Chagne, 2015: 225-251). Private entities have, in the last decades, risen to the rank of serious players in international trade and politics (Bianchi, 2009: 4). History, especially the historical development of law and economy, has taught us that such processes had happened before. The existence of corporations has often resulted in the emergence of *corporatocracy*, understood as the exercise of power by private entities, reaching as far as establishment of quasi-state organisms by them.

Contemporary states, in particular Western ones, are subjected to serious criticism in the context of the excessively high degree to which the power-yielding processes and political activities are influenced by international corporations. Much attention is paid to how the functions traditionally ascribed to the state are assigned to private law entities, whether by virtue of

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conscious policies (one can easily point to such evidence as public-private partnership or the approach to public services dubbed the New Public Management) or as a result of a practical retreat of political bodies from certain areas traditionally reserved for the state (understood in the context of its political and administrative capacity).

Given how deeply connected to the issues of today and tomorrow the problem of corporate sovereignty or corporatocracy may seem, it may be surprising to realize how far its historical roots reached. Of the plethora of sovereign or quasi-sovereign corporate entities, the Congo Free State is undoubtedly a special case.

2. Materials and methods

The application of legal sciences research methods will include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, critical-legal dogmatics.

Among the sources examined by the authors a seminal positions is occupied by the relevant legal text – Conventions and general acts (quasi-convention instruments) summarizing the relative conferences. The authors also analyzed the broad body of scholarship work – legal literature both modern and contemporary.

Formal dogmatic method will be employed to analyze the relevant law – statutory material and treaties. Fruitful to that extent will be the use of the comparative legal analysis, with its potential to seek and find the peculiarities of a decisive magnitude, defining specifically the researched processes. Historical analysis will be utilized analyze the relevant historical legal sources against the historical context and contemporary academic and practical legal responses thereto, as well as to depict a broader historical course of processes that led to the developments researched in the text. Critical legal analysis shall then serve as an instrument aiding the authors in presenting and commenting on the results of their research.

3. Discussion

3.1. Military orders and trade companies - corporations until the 19th century

The competition between the public and the private is as old as the existence of private corporations – thus it dates back at least to the medieval period. The mature Middle Ages was an era of blooming social and economic growth, as a result – also of substantial development in the field of law; the latter was greatly catalysed by the rediscovery of Roman law's heritage (Dziadzio, 2008: 112-120). Along with flourishing secular corporations (guilds, early banks), this period witnessed also the rise of military orders (Potkowski, 2004: 167 et seq.). Some of them achieved crucial political and economic power, enabling them not only to achieve actual independence from the authorities both episcopal (especially the Papacy) and secular, but also to gain their own territory.

A model example, commonly known from the history and culture of Eastern Europe, is obviously the Teutonic Order. Like its twin Livonian Brothers of the Sword, the Teutonic Knights managed to establish their own state. Characteristically, however, the Order (as a corporation) retained its separateness from the state it ran (being, legally and practically, a corporation of ecclesiastical and private law managing a state known as Deutschordensstaat (France, 2005: 380). This allowed it to survive the secularization and loss of territory in the 16th Century and to exist till the times modern.

A particularly interesting example of a monastic corporation, which not only for centuries has operated on the very limits of the state, ecclesiastical and private spheres, and also exists nowadays, is the Sovereign Order of Malta (*SMOM, Knights Hospitaller*) (Bokwa, 2016: 17). Having been established in the 12th century in the Holy Land, the Order, from the 1400s for over four centuries, had maintained what in fact had been an independent state – first in Rhodes, then in Malta. Particularly interesting is that, much like in the case of the Teutonic Order, that Knights Hospitaller ultimately lost the territories it had controlled did not lead to the Knights Hospitaller losing their international subjectivity; nowadays, the Order of Malta is recognized as a subject of international law (Cox, 2006: 9), with its foreign policy and diplomatic missions (embassies in multiple countries, a special envoy in Russia, a non-state observer status to the United Nations). It has extraterritorial exclaves, a judiciary and a legal system; in the modern world it is therefore an unprecedented example of a corporation recognized, despite the lack of territory, as a sovereign entity of international relations, with its rank equal to that of a state.

The era of geographic discoveries and colonization opened new perspectives not only for European powers crafting their colonial empires, but also brought about a completely new scale of trade. The possibility to launch overseas expeditions was connected, on the one hand, with the possibility of tremendous profits, and on the other hand, with a high risk and the necessity of very significant investments (to set about and equip a far-reaching expedition). This gave an impulse to the establishment of the first stock exchanges and joint stock companies – the trading companies (Bratkowski, 2010: 145).

The first and the most spectacular example of this type of institution is the Dutch East India Company (under the acronym VOC – *Vereenigde Oostindische Compagnie,* i.e. the "United East India Company"), recognized as the world's first corporation . Established in 1602, the VOC obtained a monopoly on Dutch trade with the Far East (Niestrasz, 2015: 4 et seq.). Existing for nearly two centuries, VOC quickly became a political power with its own territorial base, including a large part of what is now Indonesia, minted a coin, maintained naval and land forces, pursued its own foreign policy (Weststeijn, 2014: 13-34). At the same time, it had always maintained the status of a joint-stock company, regularly paying dividends and independent of the state authority. Its existence was brought to an end by the occupation of the Netherlands by the French in 1799.

The so-called *Company Raj* in India - a hundred-year period of effective wield of power over a large part of the Indian subcontinent by the *British East India Company (*EIC), ended only with the Sepoy Mutiny in 1858. It was established in 1600 under the Royal charter of Elisabeth I, the Company was initially primarily a trading venture. Its victorious wars in the middle of the 18th century, however, led to the Company arriving at the position of *de facto* sovereignty over large stretches of Indian territories, which were then divided into three presidencies – each with its own army, administration and judiciary.

Although the Company was formally rooted in the sovereignty of the English state, which was emphasized even by its motto: *Auspicio Regis et Senatus Angliae*, in fact it maintained statehood (Stern, 2011: 142). At the height of its power, the EIC controlled standing armies of a manpower of over a quarter of a million – twice as many as the armed forces of the British Crown. *Company Raj* was replaced by *British Raj* as a result of the *Government of India Act 1858*. By this statute, the Crown took over the territory, property, armed forces and the administration over EIC. EIC, thus in fact nationalized, having paid its ultimate dividends, ceased to exist in 1873 (as per the East India Stock Dividend Redemption Act 1873).

Until the 19th century, European colonization in Africa was mainly limited to maintaining coastal trading posts (with the exception of South Africa). With time, however, it was the African interior that became the last "no man's land", the exploration and exploitation of which appeared to be more and more attractive to Europeans of the *Belle Époque* – both for state authorities and private individuals. The Congo Free State was to be born on the wave of such tendencies.

3.2. The birth of the Congo Free State

In the 1870s, the scramble for colonial land was entering its last phase. King of the Belgians, Leopold II, employed the growing interest in African territories for his own benefit by convening the Brussels Geographic Conference in 1876. Scientists and philanthropists gathered under the conference's auspices established the International Society for the Study and Civilization of Africa (French: *Association Internationale pour l'exploration et la civilization de l'Afrique*), better known under the shorter name of the International African Association (French *Association internationale africaine*, AIA) (Reeves, 1909: 103). It had initially maintained to have assumed humanitarian, research and philanthropic goals; king Leopold was elected its chairman. National committees were established as part of the Association, of which the Belgian committee was particularly active. On its commission, the famous researcher Henry Morton Stanley travelled to Congo in the following years, with an unofficial mission to organize the colonization of the Congo basin (Hochshild, 1998: 81).

Independently of the AIA, king Leopold II chartered the Committee for Research of Upper Congo (French *Comité d'Études du Haut-Congo*) equipped with purely mercantile goals; British and Dutch entrepreneurs were financially involved together with a Belgian banker, who in fact represented Leopold himself. However, as early as 17 November 1879, the Committee was replaced by the International Society of the Congo (French: *Association internationale du Congo,* AIC), in which the King Leopold II held, through colonel M. Strauch, a controlling interest; AIA was merged with AIC in 1882 (Cornet, 1944: 73-80).

King Leopold contributed to the AIC not only financial support, but also seemingly lend to it his agility and business prowess. AIC's representatives were far from idle, from the very moment of the Society's establishment they explored the *terrae nullae* of the Congolese interior, striving to conclude agreements with representatives of indigenous peoples. Under agreements with these indigenous *quasi*-political entities, AIC acquired vast tracts of land. The above-mentioned HM Stanley played a leading role in this activity (Gondola, 2002: 51). The legal implications of these agreements were unclear, as described below. The fact is, however, that they resulted in AIC taking actual control over the areas on which a new entity – the Congo Free State – was soon to be established.

The intense diplomatic efforts of Leopold and his henchmen, aimed at international recognition of the AIC's sovereignty over the acquired areas, have brought satisfying results. International conditions were not without significance, characterized by increased efforts of the great powers (to which Belgium did not belong) to check and balance each other, in order to facilitate a situation of equilibrium. The logic of the international relation led each of the powers preferring the instead of one of its other rivals colonising Congo themselves, a politically neutral state emerge, stemming from another neutral organism – Belgium.

First to recognize the statehood – of what still had been AIC – were the United States, doing so on 22 April, 1884. The next power that recognized the existence of the Congo Free State was, on 8 November, 1884, Germany, to conclude the preparations for the upcoming Berlin Conference. Ultimately, this process was crowned with the General Act of the Berlin Conference, whose signatories were, inter alia, the Kingdom of Belgium and the Congo Free State itself. The key provisions of the General Act include, in addition to *de jure* acceptance of the existence of the Congo Free State – a peculiar entity that was, systemically, a legal amalgam of Leopold's private property under his absolute power, military and political neutrality – the formulation of the principle of effective occupation (Article 35 of the General Act). According to this principle (yielded with a prospective nature), the occupation of African territories could be considered effective (only then would it bear legal consequences) as long as the occupied territories were to be seized by a power capable of protecting acquired rights and the freedom of trade and transit.

The circumstances outlined above show the unusual nature of the colonization of this vast stretch of Central Africa, which was to become the Belgian Congo. Contrary to the aforementioned trade companies, the Congo Free State not only did not arise from the colonization action organized by the state; on the contrary, in this case the private (at least in theory) colonial activities resulted in the creation and recognition of a new, peculiar statehood. As it was aptly pointed out, "Leopold II, skilfully exploiting the disputes between the leading imperialist states, led to the recognition of the International Congo Society as a state organization having the right to manage the seized territories" (Jaremczuk, 2006: 46).

Indeed, the Congo soon became a site of successful colonization; "there was functioning postal system, highways and railroads were built, communication between the cities was provided (connection between Leopoldville and Matadi). The exploitation of the abundant riches of these lands – rubber, ivory, gold, tin, diamonds, uranium – commenced, which awarded huge profits to those daring to invest, which, in turn, attracted the attention of the Belgian industrial circles" (Lechwar-Wierzbicka, 2011: 189). The Free State also had an armed force – the *Force Publique*, composed of local soldiers and European officers. In the 1890s, they even fought a victorious guerrilla war with Arab slave traders (Nzongola-Ntalaja, 2002: 21) – notwithstanding the fact that slavery flourished in the Free State itself.

The ruthlessness and brutality of the new "corporate" powers that held the Congo basin was so unprecedented that it was met with an increasing indignation from what can be considered a germinating "international community". The abuses and atrocities in the Congo area found a wide resonance even in the literary world – Arthur Conan Doyle and Mark Twain wrote about the situation in the Congo (Lechwar-Wierzbicka, 2011: 193), and above all – Joseph Conrad, immortalizing the conditions he witnessed in the "Heart of Darkness".

In 1904, Leopold II allowed an international commission to conduct an investigation, and in 1908, under international pressure, consented to the annexation of the Free State by the Kingdom of Belgium, previously unsuccessfully having attempted to keep a strip of the Free State's land in his hands as private property of the monarch (Senelle, Clement, 2009: 153).

After stormy disputes, seven years after the creation of its first project, on October 18, 1908, the Belgian Parliament adopted the Colonial Charter (*La Charte Coloniale*). Under it, on November

15, 1908, the Congo Free State ceased to exist, replaced by the Belgian Congo – a colony in the classic sense of the word, which was to exist for more than half a century.

3.3. The Congo Free State – what was it?

The issues of the existence of a state and, in particular, its recognition, are of a great importance for the Congo Free State history. This issue vital in Belgian politics in the context of the pressures to abolish the independent statehood (separate from Belgium) of the Congo Free State. If the statehood of this entity was established by the decision and will of the powers assembled at the Berlin Conference, then these powers, it was argued, could enforce other decisions in relation to the Free State (Reeves, 1909: 101). In turn, the Belgian scholarship emphasized the status of the Free State as a *de facto* state existing in fact prior to its, in this view: purely declaratory, recognition. However, compelling arguments exist that in the territory of the Congo prior to the Berlin Conference, there existed nothing amounting to statehood as it was then understood: not owing to non-recognition, but due to their lacking any political entity capable of exercising power in respect of the area of the Congo basin (Reeves, 1909: 100). Such an entity was created only by the Final Act of the Berlin Conference.

The participation of non-state entities (separate from the country of incorporation, at least: partially private) in the factual process of establishing the Congo Free State should be considered a typical phenomenon and perceived as unremarkable in the context of the era. However, what was peculiar about the activities carried out under the auspices of king Leopold was the status of the entities that carried them out. With the exception of the Upper Congo Research Committee, they were devoid of any legal personhood – they were not legal persons neither under Belgian nor any other jurisdiction, nor internationally (Reeves 1909:105). They were not incorporated in any state and therefore did not have their national statute within the meaning of the conflict of laws.

Also, the International African Association established in the course of the Brussels Geographical Conference in 1876 has not been formally incorporated. In the legal sense, it was merely an informal grouping. The subsequently created International Committee for the Study of Upper Congo was the only body established during the period of colonization of the Congo that had been organized as a legal entity known to its contemporary Belgian law. Namely, it had been a Belgian silent partnership (*Société en participation*) (Reeves, 1909: 104). This entity, however, proved to not play a greater role, at least *in nomine suo*, in the history of the formation of the Congo Free State, as it was quickly replaced by the then established International Society of the Congo (AIC). AIT, in turn, did not have any national legal form, though it had a formalized – and respected – internal structure. Only *ex post* was it awarded what amounted to international recognition of its subjectivity, as the territorial acquisitions and other agreements concluded by AIC were recognized as valid and binding during the Berlin Conference. Until then, however, the Association itself undoubtedly had no form known to any national law, including the laws of Belgium. As one author described it: "The International Society of the Congo is a purely fictional entity: nothing more than a name for which only Leopold II is hidden" (Stengers, 1985: 3).

The fact that the political power of the Congo Free State extended to the territories it seized or acquired is not in doubt, just as the extension of such power over local indigenous peoples. One criterion of statehood known to international law then: effective power (self-control) (Ehrlich, 1947: 104; Phillimore, 1879: 81) can be attributed to the Free State indisputably. Its international recognition in the context of the decisions of the Berlin Conference is also not a subject of controversy. However, the international legal status of the AIC is not clear. First of all, it should be noted that the borders of the Congo Free State were only finally defined at the Berlin Conference. It is also doubtful, due to the low level of influence of the colonizers on the indigenous population, that AIC, during its rule, could be declared to exercise political power over the local peoples. However, above all, the most serious doubts concern the sovereignty of the AIC in the pre-Berlin period. This entity did not have the features of Belgian statehood.

4. Results

Three theories existed that could explain the AIC's acquisition of *sui iuris* statehood traits. First, the theory of the assignment of sovereignty made by the representatives of the indigenous African tribes, secondly: the appropriation of no-man's territory, and thirdly: the long-term occupation. As indicated above, AIC did not have legal personality under Belgian (or any other) law. However, its legal nature is much closer to a private law corporate person than to a public entity. This feature disallows assumption that the land acquired by the representatives of King Leopold was acquired for

AIC as a sovereign, but for a private law actor. Then-binding international law barred the acquisition of political powers belonging to a state by private persons (Reeves, 1909: 106). On the other hand, the representatives of AIC lacked *animus rem alieni acquirendi*, the necessary intent to acquire in the name of a third person, which precludes the conclusion that the territories in question were in fact acquired by Belgium. Nb. the constitution of the Kingdom of Belgium (article 64), moreover, precluded the acquisition of territory by means other than statutory. Therefore, it should be recognized that the effects of the agreements in question extended only in the private-law sphere.

It is also interesting to note how the status of the political entities formed by the indigenous peoples under international law of the era prevented AIC from gaining *de facto* statehood in two of the above-mentioned ways. Referring to these indigenous entities, weakly organized as they were, lacking a satisfying level of social development from a Western perspective, but undoubtedly political, the public international law in the second half of the 19th Century refused to recognize their status as states and to ascribe them political rights (Reeves, 1909: 102, 106). They were not considered members of the international community. At the same time, however, it granted the members of indigenous peoples themselves certain "moral rights" and granted them a *sui generis* title to the territory they occupied. However, it was not an international law title, it was closer to a private law title. An effective – under international law – cession of such territory as made between two sovereign entities was inconceivable. On the other hand, it did not preclude the acquisition of land ownership in the private-legal aspect.

This was insignificant in the case of Congo and Belgium, as Belgian law ascribed no further consequences to the acquisition of land by Belgian nationals, but in the case of the United Kingdom would prove vital: the law of the UK stated that the acquisition of land from indigenous persons by British nationals resulted in (i) them receiving interests in land, and, simultaneously, (ii) the United Kingdom acquiring sovereignty over the land in question. At the same time, due to aboriginal moral rights and, as a result, the at least *quasi-private* legal title to the land of the indigenous peoples being accepted, the theory of original acquisition of statehood by appropriation, as well as prescriptive acquisition stemming from of long-term occupation, was ruled out in the case of the Congo Free State.

Complementing the considerations on the international recognition of the Congo Free State and treating it as a sovereign entity, it is worth mentioning that for almost a quarter of a century of its separate history, this state concluded unquestionable and implemented international agreements, which were later taken over by Belgium by succession. In addition to multilateral treaties, such as the General Act of the Brussels Conference of July 2, 1890 or the Brussels Convention of June 8, 1899, there were also bilateral agreements (among others: a friendship, trade and navigation treaty concluded with the United States on 24 January, 1891, an agreement on preferential treatment of French nationals concluded with France on 5 February 1895 or a convention made with the Kingdom of Belgium (sic!) on 3 July, 1890.

5. Conclusion

As indicated in the introduction – and hopefully shown in the article – private-law entities (corporations) entering major political arenas is hardly a novelty. Such evolution of global governance sparks criticism, referring in particular to the USA, highlight the soon-to-happen change of political and commercial control, some elements thereof at least, by corporations. Would an establishment of a sovereign state effected by a corporation be possible? The example of Congo Free State and, in particular, the private-law entities preceding it seem to prove that such possibility may not be excluded. If we may say that the conceptual framework and the landscape of legal forms and their relations has changed in the public international law since the 19th century, it is a change directed at the liberalization, the emergence and prevalence of soft law and non-state actors in ius gentium. Also gaining substantial traction is the notion of separation of statehood from national issues (let it be said that it is disputable here whether such tendency is more of a novelty or actually a return to normalcy preceding the emergence of nationalisms and mass politics). Abstaining from resolving these non-legal issues, it is worth noting that in the fascinating story of the colonization of Congo Basin, private entities played a prominent role in an executive aspect, where political elements played were a propelling factor. Also the ultimate granting of sovereign status to the Congo Free State was but a result of a favorable political situation.

The history of the West seems persistently to indicate that the political prevails over the private. The history of Congo Free State is no exception. Open remains the question whether,

should the phenomenon of old statehoods giving up sovereignty to corporations really happen, we will recognize the paradigm shift in the substitution of political organism by non-political entities, or rather identify a transfer of political importance to other subjects? It seems that, all in all, politics may change but never yield.

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