Globalization, the State and the Individual, No 2(14)/2017, s. 53–59

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The mission of the state in the context of the international human right protection

Summary

The report looks at the intersection between modern international human rights law and the role of the state for their protection. The study is motivated by the fact that the state has a dual role. On the one hand, her mission is to protect the ethno-social substrate; On the other hand, the application of certain norms of international law puts it in the hypothesis of assuming security risks. The main conclusion that needs to be made is that the current international legal framework for this problem needs to be updated in the light of the changes in the security environment.

Аннотация

В доклада се търси пресечната точка между съвременната международноправна уредба на правата на човека и ролята на държавата за тяхната закрила. Изследването е мотивирано от обстоятелството, че на държавата се пада двойнствена роля. От една страна, нейната мисия е защитата на етно-социалния субстрат; от друга страна, прилагането на някои норми на международното право я поставя в хипотезата за поемане на рискове за сигурността. Основният извод, който се налага, е,че действащата към момента международноправна уредба на този проблем се нуждае от актуализация с оглед настъпилите промени в средата за сигурност.

Keywords: convention, individual, mission, rights, security, state

Ключевые слова: държава, конвенция, индивид, мисия, права, сигурност

The codification and progressive development of international human rights law is primarily based on the generally accepted principles of contemporary international law – the principle of equality and the prohibition of discrimination. The foundations of the international instruments devoted to this minimum of rights began to take place at the beginning of the World War II: the signing of the United Nations Declaration, the Moscow Conference of Foreign Ministers, The Dumbarton Oaks Conference, the Yalta Conference.

From 25 April to 26 June 1945, the International United Nations Conference was held in San Francisco, which resulted in the signing of the UN Charter on 26 June. Article 1 (3) states that one of the objectives of the organization is to develop cooperation between Member States on issues related to fundamental human rights and freedoms, without distinction of race, sex, language and religion. The Statute provides the individual with the so-called „international rights", which are protected not only by domestic law but also by international law. States that join the organization accept that respect for these rights is not solely within their jurisdiction and is subject to particular international protection. [1, 2]

In connection with the rights and freedoms proclaimed in the Charter, a number of conventions have been adopted. A fundamental act in this regard is the International Charter of Human Rights. It consists of 5 documents: The Universal Declaration of Human Rights; The International Covenant on Social, Economic and Cultural Rights; The International Covenant on Civil and Political Rights; two optional protocols. These documents contain four types of rights and freedoms: fundamental, civil, political rights and freedoms and economic, cultural and social rights. In general, they oblige signatory states to secure the right to life, freedom, privacy, thought, conscience and religion, active and passive electoral law, equal labor rights for men and women, social security and insurance, medical assistance, right to education and participation in cultural life, right to set up professional organizations, etc. In December 1950, a Convention on Women's Political Rights was signed in Rome. Several conventions are devoted to the prosecution and punishment of the most important international crimes related to the violation of fundamental rights - the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination (1960) The Convention on the Suppresion and Punishment of the Crime of Apartheid (1973) [3].

One of the fundamental human rights, proclaimed in the Universal Declaration of Human Rights, is the right to asylum. Art. 14 regulates the right to territorial protection. On July 28, 1951, the Convention relating to the Status of Refugees was adopted, creating the legal basis on which the work of the United Nations High Commissioner for Refugees was based. This is the first international treaty covering almost all fundamental aspects of refugee life. It defines the term „refugee" as a person „as a result of events occurring before 1 January 1951 and

owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" [4]. The Convention texts provide for two important limitations on its application – temporal and spatial. The first concerns people who have become refugees as a result of acts that have occurred since 1 January 1951. The second restriction concerns the ratification of the Convention by States granted the opportunity to restrict protection only to European refugees. This indicates the aspirations of states to maintain their sovereign right to grant permission to enter their territory. Other Convention texts outline refugee rights on issues such as occupation, housing, education, social security, personal documents, and freedom of movement. Most fundamental rights for the protection of refugees are also fundamental human rights, as proclaimed in the Universal Declaration of Human Rights of 1948.

The rights of refugees can be divided into two groups: common rights guaranteed by international human rights standards and rights that derive specifically from their refugee status and are governed by the national laws of the host country. Most of the fundamental rights related to the protection of refugees are part of the fundamental rights enshrined in the Universal Declaration of Human Rights. With the transformation of the refugee problem into a global one, it becomes obvious that the Convention needs improvement and strengthening. In 1967, the UN General Assembly adopted a Protocol on the Status of Refugees, abolishing the time and geographical constraints of the original 1951 document.

By granting territorial asylum, the host State admits the alien to its territory and places him (her) under protection. This leads to the emergence of two types of legal relationships. The first type of legal relationship is between the asylum seeker and the state from which he / she seeks asylum. This attitude has an internal character and is related to the national legislation of the state, built on the principle of independence and sovereignty. The second type of legal relationship arises between the state that granted asylum and the other countries[5].

The voluminous catalog of human rights corresponds to the obligation of the state to ensure their observance. When citizens are subject to these rights, within parliamentary democracy, there are enough mechanisms to fulfill this duty, stemming from people's sovereignty and public contract. In such a case, it is realized firstly on the basis of the domestic law of the state. Where the right-holders are foreign nationals seeking asylum, the host State shall apply international law as a matter of priority, even when it conflicts with national law. For example, under Article 31 (1) of the Geneva Convention, States undertake not to impose penalties for the illegal entry or residence on their territory of refugees who arrive

directly from a territory where their life and freedom have been threatened. In practice, the requirement to submit to the authorities *immediately* and to provide valid reasons for their illegal entry or *stay* on the territory of the country remains difficult to apply, because of the contradiction in the text of the Convention (the incompatibility between ‚immediate' and ‚stay'). According to section 2, the contracting states undertake not to impose restrictions on the movement of such refugees beyond what is necessary. Art. 32, section 1 obliges states not to expel a refugee, legally residing in their territory. Art. 33 prohibits the expulsion or refoulement of a refugee to the border of the territory where his or her life or freedom has been threatened by reason of his or her race, religion, nationality, belonging to a particular social group or political views. The refugee is extraditable because of, considerations of national security or public order' – art. 32, section 1.

Difficulties in the realization of the right to asylum increase when the subject of rights is foreign citizens, especially if foreign citizens have different cultural identities. The reasons for this are complex. The first is related to the emergence of a „new world order based on civilization", in which the enemy acquires a paramount importance especially for nations seeking their identity and rediscovering their ethnicity, and societies that have cultural similarities cooperate [6].

The other reason for the aggravation of the refugee problem is the result of the expulsion of the state and, accordingly, of the national legal order, in favor of international law, human rights and tolerance. Globalization, modern mobility of people and new forms of inter-state communication lead to the lifting of a number of restrictions in the implementation of economic and civil exchanges. This necessitates a corresponding adjustment of the legal order and deepens the bilateral dependence between national legal systems and the system of international law, triggering not only interaction and harmonization, but also contradictions. In addition to other objective factors, the changing attitude towards state sovereignty, which is a basic criterion for the limits of the law [7].

The changing attitude towards state sovereignty provokes a natural reaction in the opposite direction, based on rediscovery of identity and, respectively, of old enmities. This calls for recalling what is the „ethical purpose", the mission of the state. The state is a form of social grouping. The first forms of social collectivity arise naturally as a result of the inability of individuals to achieve their goals independently, i.e by the action of one of the basic social laws – the law of synergy. Predominant forms of social collectivity arise on the basis of the common interest that leads people to unite in order to acquire means of subsistence and survive.

The state is the last historically emerging kind of organized social community. All theories, seeking an explanation of the reasons for its existence, actually seek to answer the question of the „ethical capacity of the state". In his study of the early history of the state, R. Herzog assumed that „the state tasks are the true (if not the only) reasons, justifying the existence of the state." [8]. In view of this criterion,

he differentiates two types of states. The first type is the so-called «state of duty» arising from objective circumstances and the raison d›être of the state stems from food care for the population. The second type is so-called «states of power». In that case the state›s task is to protect against danger. This typology is relative and it is a transfusion and even reciprocal dependence between the two types: neither the «state of power» could develop without engaging the people, nor could the «state of duty» survive and develop, if it does not provide protection from external enemies.

Unlike the previous social collectivities, the mission of the state, that is, the meaning of its existence, is not limited to protection but also to the preservation of the community. The pursuit of preservation implies the existence of consciousness of community among its members, which speaks of the development of ethnic processes within the social organism.

The state is one of the organizational structures of society and brings all their common qualities. The nature, content and structure of society predetermine the universal organizational form of the state. In theory, it has long been likened or defined as a legal personality. Each social organization has the characteristics: social unity, power, rules, and is caused by the joint action of the people, in order to more easily achieve the basic purpose of the community. There are private and common interests in every organized community. Finding the optimal ratio between them is a prerequisite for successfully achieving the organization›s goals. The common interests are related to the mission of the organization and this necessitates the coordination and subordination, if necessary, of private interests. Based on the presence or absence of a mission, communities may be temporary or sustainable. Temporary organizations are disintegrated after the goal is attained, and sustainable ones continue to exist, and then, setting new objectives under the mission.

The objectives of human communities are achieved by reconciling the interests of individual members of the community, but they all derive from the mission of the community in which the common interest exists – the existence and preservation of the community. In the earlier forms of organization, the common interest is limited to survival, and consequently increasingly focuses on securing a common future.

That, what distinguishes the state from other forms of social collectivity, is power. Unlike any other authorities, the state power have mechanisms to secure coercion. The division of different strands into the definition of state goals leads to the question of its functions. The activities of the State in pursuit of its objectives are the connotation of various functions. According to the functions they perform, there are different types of states and each type has certain functions. Each state, regardless of its type, performs universal functions which are mandatory and portray its essence as a state organization. These functions are: protecting the population

and the territory; regulation of economic relations; affirmation and protection of property relations; resolving disputes between citizens or their institutions. The functions are determined by the social essence of the state and by the specific historical tasks it has to decide at a certain historical moment. Depending on the historical stage of its development, the state prioritises certain functions and, depending on the priority of one or another concept (eg, liberal, conservative, social democratic), the functions of the state are manifested with different intensity.

Regardless of its diversity and dependence on various factors, the functions of the state correspond to its objectives and tasks and express its essence and social purpose. More broadly, all state functions are subordinate to the mission of the state – the preservation of the ethno-social substrate – and correspond to the common interest of groups and individuals in the community. In the different historical periods, the common interest acquires different nuances, but it is always connected with the meaning of the existence of the state, with that what gave rise to its appearance as a social organization, with its «ethical purpose»: integrating the naturally free individuals with an organizational power, to ensure their existence, and then – their common future.

These arguments are intended to lead to several conclusions on the state›s social purpose, in the context of the human rights institution, in particular the right to asylum. The first one is based on the historical context in which the main corpus of international legal regulation relevant to this issue was adopted. In the years immediately after the World War II and during the Cold War, the values and principles proclaimed in it were a natural response to the mass suppression of human rights by the totalitarian state. This conclusion is made if we assume that in the dynamic system of international relations operates the «pendulum principle», the purpose of which is to preserve its homeostasis. Within this dynamic one pole is the state (understood as the embodiment of power), and on the other pole is the human individual whose purpose is to win and preserve its autonomous zone, which is untouchable to the intervention of the state. In this sense, the rediscovery of human rights after the war is reminiscent of the situation in which the ideas of liberalism originate – in response to royal absolutism. This reaction, however, led not only to the victory of the Great French Revolution but also to the guillotine. By virtue of the same regularity, the reaction to the ugly manifestations of the revolution has led to the shaping of conservatism as ideology and political practice - and so on.

Since the adoption of the UN Charter and the Universal Declaration of Human Rights have gone on for more than 70 years, and the last of them has seen dynamic changes in the security environment. Without neglecting the complex of reasons for these changes, it can reasonably be argued that the root cause is the radicalization of human rights [9] (of course, it also has its own reasons). In this context, it

is imperative to edit the international legal regulation of these rights in the direction of giving more power to the state. This conclusion is also due to the fact that the meaning of the existence of the state is to protect and secure the future of the ethno-social substrate. Without neglecting the norms of international law, it should be recalled that it is the State which is its main subject, and it is precisely that the state ensures its application through the rules of its domestic law.

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