

THE DILEMMA OF INTERRELATION OF INSTITUTIONAL COSMOPOLITANISM AND STATE SOVEREIGNTY UNDER HUMAN RIGHTS DEFENSE

ДИЛЕМА ВЗАЄМОЗВ'ЯЗКУ ІНСТИТУЦІЙНОГО КОСМОПОЛІТИЗМУ І ДЕРЖАВНОГО СУВЕРЕНІТЕТУ У КОНТЕКСТІ ЗАХИСТУ ПРАВ ЛЮДИНИ

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This article reveals the problem of the correlation between the theory of institutional cosmopolitanism and national sovereignty in the context of human rights defense. The question of the modern dimension of state sovereignty, the peculiarities of coexistence of international and national human rights mechanisms, solutions to current dilemmas in this area are described. Within this issue it is examined the practice of implementation of international legal protection of human rights in national legislation.

Key words: institutional cosmopolitanism, state sovereignty, human rights, globalization, international law.

Стаття розкриває проблему співвідношення теорії інституційного космополітизму та державного суверенітету в контексті захисту прав людини. Розглядається питання сучасного виміру державного суверенітету, особливості взаємного існування міжнародних та національних механізмів захисту прав людини, шляхи вирішення існуючих дилем у цій сфері. У межах зазначеного питання аналізується практика імплементації норм міжнародно-правового захисту прав людини в національне законодавство.

Ключові слова: інституційний космополітизм, державний суверенітет, права людини, глобалізація, міжнародно-правовий захист.

Данная статья раскрывает проблему соотношения теории институционального космополитизма и государственного суверенитета в контексте защиты прав человека. Рассматривается вопрос современного понимания государственного суверенитета, особенности сосуществования международных и национальных механизмов защиты прав человека, пути решения существующих дилемм в этой сфере. В рамках данного вопроса анализируется практика имплементации норм международно-правовой защиты прав человека в национальное законодательство.

Ключевые слова: институциональный космополитизм, государственный суверенитет, права человека, глобализация, международно-правовая защита.

The actuality of this topic is an increasing role of universal and regional system of human rights defense, that embodies in practice the idea of institutional cosmopolitanism in the field of making modern international legal regulation of social relations.

In order to gain the effective functioning of international legal mechanism of human rights defense it is essential to implement its norms into the national legislation. Consequently the problems of inconsistency between national legislation and common norms of human rights defense are usually taking place. The character of the activity of international institutions implies the functions of sovereign states, that gives rise to the issue of correlation of institutions' roles and the state and the possibility of international institutions to cope with execution of the accepted sovereign rights.

The similar problem forms a part of one of the most important modern concerns in international law – issues on interrelation of sovereignty and international law. In this case the legislation doesn't comply with declared standards of human rights defense by the international law, hence, the point will be made about interrelationship between ideas of national sovereignty and the conception of institutional cosmopolitanism.

Thus, the investigation of given topic has significant meaning, as long as, the successful implementation of international norms into national legislation is one of the means that increase the efficacy of international law action.

In the light of the development of a significant regime of universal human rights, the respect for human rights became one of the fundamental principles of international law. However, as Habermas, states, this has come into conflict with the historic bedrock of modern international law – the sovereign equality of states and principle of non-intervention in national affairs. Some elements of the international human rights regime – for example the Genocide Convention – in fact, have risen to the status of *jus cogens*. These norms are used to justify intervention to stop an offending state activity, thus, it establishes, a level of international law that supersedes the sovereignty of national states [1, p. 56].

It is essential to define the dimensions of modern sovereignty and its correlation with human rights in order to identify the extent of the dispute between state sovereignty and international human rights regime and to figure it out. The classical conception of sovereignty based on «Westphal system» is being under changes.

The conception known as «perforated sovereignty» was represented by the USA and presupposes that

processes of globalization and regionalization took the basic functions of a state and replaced it by the activities of international institutions under motto «Think globally, act locally». Professor Duhachek claims that there are four groups of sovereignty penetrations: opposition group, «private interests group», migrants, subnational entities (regions) [2].

A slightly different understanding of notion of state sovereignty is placed by professor Habermas. He sees a modern sovereignty as general principles that structure the procedures by which the people can freely formulate the opinions and express their will - such as rights to equal participation and due process – and it guides the institutionalization of the conditions in which democratic will-formation is made possible. In order the rights to gain the specificity necessary for their effective implementation, they must be articulated and justified publicly.

Nevertheless, Habermas insists that the concern with sovereignty and international human rights is not about that such norms transcend the nation-state but is about the absence of strong publics in the transnational sphere, hence rights develop without the necessary correlation with popular sovereignty. This controversy, however, the creation of the principle «responsibility to protect, to respect, to fulfill» resolved a dispute in a positive way. Thus, it was tried to ignore the negative side of international regime of human rights – threat of military intervention against outlaw regimes to be opposed. The best example of R2P is NATO bombing of Serbia 1999, when the UNSC has helped to shrink the domain of absolute and defensive state sovereignty, while expanding the rights of international action under the notion of a community responsibility to protect individuals.

Habermas insists that institutionalization of international human rights challenge the nation-state in each of four basic components: administrative power, territorial jurisdiction of the state, collective identity of nations, democratic legitimacy. Habermas suggests democratic states a way of a new political-institutional enclosure by which the democratic capacity for making collective binding decisions could be extended to the transnational sphere [3, p. 98].

Ukrainian scientist A. Merezko highlights main conceptions of modern sovereignty. They are as follows: 1) the sovereignty as a certain rules for participants of international sovereignty; 2) sovereignty as a regulatory idea; 3) sovereignty as a right to make a decision on existence of exceptional circumstances; 4) the conception of «shared sovereignty»; 5) the sovereignty as a legitimate realization of power and interpretation of international law by states [4, c. 110].

A modern concept of sovereignty as a form of final authority is put into question under the reason of globalization. The decentering and proliferation of authority structures challenge the very notion of sovereignty as historically understood, while the accelerated mobility and diversity of citizen bodies and transnationalization of interest groups have called into question the traditional image of unified national people.

Thus, globalization presents challenges for each of the primary dimensions of popular sovereignty: constitutive authority, collective self-determination and protective capacity.

Basing on the ideas of prominent scholars in the field of institutional cosmopolitanism and some latest facts it is possible to underline the brightest controversies that modern state encounters dealing with international human rights:

- rights became more declarative without substance and strong institutional backing. Without coherent authoritative structure of supranational institutions that operate according to a regular procedure, «human rights provide the sole recognized basis of legitimation for the politics of the international community». While the Universal Declaration of Human Rights has been in principle accepted by most every state in the world, the specific meaning of each right remains to be in a bitter dispute for every country to interpret, hence, is insubstantial, too general and ineffective. Philip Alston claims that Millennium Declaration «references to human rights are relatively fleeting» and «rarely rely on any precise formulations». Pogge also emphasizes that the goals themselves were watered down between the Rome Declaration on World Food Security in 1996 and the Millennium Declaration in 2000. While the Rome Declaration sought to halve by 2015 the number of undernourished, the later Millennium Declaration sought to halve by 2015 the percentage of people suffering from hunger and extreme poverty. The 1948 Treaty Against Genocide did not specify which actor should take what particular action when confronted with genocide, so R2P – as endorsed at the UN – did not specify any details about implementing the principle. As in the Rwandan genocide of 1994, within the Council the problem of generating the political will and political consensus to act in difficult circumstances remained [5, p. 10];

- in the absence of legally constituted procedures for the articulation and application of rights, the legitimation gap could be filled on the domestic level by authoritarian populist leaders, and internationally by an imperial power asserting the prerogative to intervening the name of rights define to suit its own interests. The Kosovo intervention in 1999 is a bright example of a future cosmopolitan order due to Habermas' observing. Unlike this, the 2003 of Iraq suggests another possible development. In the absence of a strengthened system of international law and the articulation of clear procedures for the enforcement of human rights, the weakening of the state sovereignty may lead not to cosmopolitan legal order but to the rise of imperial domination;

- difficulties with implementation and enforcement, lack of obligations. The problem with human rights international law is the weak forms of enforcement for most human rights or, even where there are empowered institutions such as the International Criminal Court, the problem is sparse or heavily qualified membership and participation by states. Many of the conventions, such as the Rome Statute or the Convention on the Rights of Migrant Workers and Their Families, have not been ratified by central players, such as the United States [6, p. 9, 17];

– negligence of international obligations is difficult to penalize;

– the UN Charter promotes «fundamental freedoms», for example, but also affirms that nations cannot interfere with domestic matters. The utility of accountability measures, such as sanctions or force, and under what conditions, is also debatable. At times, to secure an end to violent conflict, negotiators choose not to hold human rights violators accountable. Furthermore, developing nations are often incapable of protecting rights within their borders, and the international community needs to bolster their capacity to do so – especially in the wake of the Arab Spring [7];

– problems in the process of implementation. Even if a rights document is ratified, states often use reservations, understandings, and declarations to evade obligations, especially those of legally binding documents. They do so to avoid negative press or the potential for imbroglios from even moderately intrusive monitoring mechanisms. Saudi Arabia is an apt example. The country has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but one reservation states that the convention is not applicable when it conflicts with sharia law, which allows Riyadh to continue denying basic rights to women. Similarly, many have argued that the United States has undermined its already limited commitments on human rights by invoking complex reservations. For example, Washington ratified the Convention on the Elimination of All Forms of Racial Discrimination, but with the qualifier that it would not trump U.S. constitutional protection for freedom of speech, and therefore not require banning hate groups such as the Ku Klux Klan [7];

– consensus over implementation and compliance has not kept pace. In particular, whereas the global North has largely focused on advancing civil and political rights, the global South has tended to defend economic, social, and cultural rights. Furthermore, developing nations are often incapable of protecting rights within their borders, and the international community needs to bolster their capacity to do so—especially in the wake of the Arab Spring [7];

– incapability of agents to defend international human rights. Meckled-Garcia argues that no agent presented by state institution or international organization is capable of delivering this background adjustment at the global and transnational level, no agent, therefore, can be assigned perfect obligations of global justice, because cosmopolitans misinterpret the point of global justice. Anti-cosmopolitans argue that category of obligations – of justice, is restricted to the community of residents [8, p. 167–168];

– the immaterial importance of human rights institutions: most human rights practices are explained by coercion or coincidence of interest [9, p. 134].

Referring to the modern consideration of nation state and its peculiarity of correlation with the supranational institutions promoting human rights, would be desirable to find the ways that could improve any arising dilemmas.

The solution must be a greater constitutionalization of international domain, such that human rights may

become situated in the legal democratic order that could limit the abuse of power. The primacy of sovereign territorial states in international society can be opposed. The more power the state gets in international society the more difficult procedure of implementation and application of international human rights it will be. However, the future of international human rights will always be linked with questions of state power.

Stewart M. Patrick, director of the International Institutions and Global Governance program in America, and Mark P. Lagon, Council on Foreign Relations adjunct senior fellow for human rights tried to make a recommendations on the Strengthening the Global Human Rights Regime and its promotion within institutions. They are separated beneath:

– to empower regional organizations and NGOs to act: nongovernmental and civil society organizations committed to liberal values must be further empowered as agents to implement human rights. Many leading liberal powers – Mexico, Japan, and India – do not fully embrace and trust NGOs as partners to governments. Each state should encourage other leading liberal powers to fund and rely on NGOs as partners where applicable, both within their own territory and internationally. It should also help IGOs find inventive ways to sidestep member state politics to empower NGOs. A model to scale up and replicate is the UN Democracy Fund, which funds responsible and reliable civil society organizations to advance a wide array of political, civil, economic, and women’s rights;

– to encourage intergovernmental organizations’ technical assistance to states: each state should make a concerted effort to urge intergovernmental organizations to devote more time and resources to help developing countries expand their capacity to protect human rights on the ground. For instance, the UN Office and Drugs and Crime’s resources should provide more technical assistance to help countries enforce the Palermo Protocol on Trafficking in Persons, rather than only help them draft suitable laws;

– to make democracy a touchstone of multilateral human rights policy: human rights and democracy are not one and the same. Multilateral institutions should premise their declaratory, diplomatic, and aid policies on democracy as the foundation, as the UN Development Program did between 1999 and 2005. Human rights benefits not only from good governance but also from democratic governance – advancing horizontally among states and vertically by planting deeper institutionalized roots within states and societies;

– to use economic institutions to promote and protect human rights: global economic institutions, given adequate political will, can also help promote and protect human rights. In particular, these institutions should promote the notions of equal access to justice and real-time freedom of information as catalysts for economic development. For instance, the World Bank, International Monetary Fund, and regional development banks should extend their anticorruption and good governance work to promote equal access to legal rights for all groups with the objective of expanding developing

nations' productivity and prosperity. This effort should include streamlining and expanding projects related to rule of law, bolstering emerging judicial institutions, and promoting the functioning of civil society within countries.

The international community, thus, remains at serious risk of overemphasizing the creation of international norms. For these to be effectively implemented, the language in international treaties must be transplanted directly into domestic legal structures, but this process is often quite slow. Furthermore, rather than pursuing broader protections, the international community should at times focus on securing transparency guarantees from governments and assurance that nongovernmental organizations and UN rapporteurs can freely monitor human rights within national borders. Implementation of existing rights treaties and agreements might have more concrete effect than expanded protection on paper [7].

Thus, it is obvious that state sovereignty is challenged under the trend of globalization. The specific features of modern state sovereignty can be highlighted as the effect of cosmopolitan trend and as the indicators of following encountering issues. Habermas accents that rights develop without the correlation with sovereignty due to lack of their articulation by international institutions. However, the controversy is covered by the creation of new principles of the human rights obligations to states – right to respect, protect and fulfill. The paradox of state sovereignty, thus, that state is potentially not an abuser of human rights but the best agent to protect them. The idea of distributive justice views the state as the primary actor in the international relations, but referring to

the human specifically. That clearly contradicts as the sovereign theory so the cosmopolitan one.

The global citizenship shifts the balance in the international relations of the state sovereignty and international law, challenging the capacity of the state to comply with the international human rights. These challenges have its separate issues, regarding the absence of legally constituted procedures the application of rights, non-ratification of essential international treaties, no penalties for the negligence of international obligations, obstacles in the process of implementation, no consensus over implementation and compliance among states, suspicious ability of supranational institutions to defend international human rights, the use of human rights defense as an articulation of state's interests.

All at all, many scholars stand for the idea that the state power should be reformed in order to gain the effectiveness institutional cosmopolitan order. The possible system could be one in which human rights form part of the law and practice of transnational civil society, in which the state loses its privileged place and becomes one participant in a broader social process. However, international human rights will be always faced with the problem of state sovereignty there are still some ways how to get the balance on that. These recommendations concern increase of the effectiveness of regional organization and non-governmental one, encouraging intergovernmental organizations' technical assistance to states, penetration and enclosure of institutions with states through democratic values, use of economic institutions to promote and protect human rights.

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