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THE DIPLOMATIC ASYLUM: WARRANTIES IN THE NATIONAL LAW AND MULTILATERAL TREATIES

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The institution of diplomatic asylum has been existing for centuries. Its evolution has accompanied the course of development of permanent diplomacy. However, it is appropriate to say that the level of development of the institution of diplomatic asylum does not correspond with the time of its existence.

The history of international law has formed regional divergences in legal regulations on granting diplomatic asylum. Thus, the states of Latin America offer more developed and comprehensive basis for the asylum in diplomatic and other premises which will be characterized further.

The research into the institution of diplomatic asylum has elaborated classification of the states in accordance with their attitude to the diplomatic asylum. There are:

- States which do not recognize the institution of diplomatic asylum and do not grant it. Non-recognition is regarded as absence of permission to grant diplomatic asylum on the territory of the receiving state. This is the most numerous group of states.
- States which do not permit diplomatic asylum on their territory, but they grant it in their premises abroad.
- States which allow granting asylum on their territory and grant it by themselves. Latin American States fall into this category.
- States which do not grant asylum, but allow doing it on their territory.

The evolution of permanent diplomacy and the development of the institution of diplomatic asylum are parallel processes. Nevertheless, each of them has its own extremums on developmental line. Therefore, it is appropriate to divide the development of the institution of diplomatic asylum into several periods.

I. First period extends from the fifteenth century, covering events in the Italian States, to the Congress of Westphalia in 1648. This period can also be characterized by the formation of a national government and elaboration of the first principles for the international system`s functioning.

II. At the end of the seventeenth century down to the eighteenth century the institution of diplomatic asylum faced changes in public attitude to it. Particularly, its reputation was tarnished as a consequence of abusive acts, which showed negative side of the government permission for ambassadors to grant diplomatic asylum.

As a result of the abusive practice authorities made attempts to limit and even to abolish the right to grant diplomatic asylum.

III. The third period includes the nineteenth century. It can be described, however, by two opinions representing two different geographical regions: Europe and Latin America.

The European tendency towards negative criticism against the institution of diplomatic asylum and the absence of its legal regulation had almost resulted in cessation of the granting of asylum.

On the contrary, the institution of diplomatic asylum made a breakthrough in Latin America. It can be explained by two reasons: «First, respect for the individual and for freedom of thought; second, the unusual frequency of revolutions and armed struggles which, after each internal conflict, have often endangered the safety and life of persons on the losing side».

IV. In the nineteenth the theory of diplomatic asylum was developed. The majority of legal writers inclined to the opinion that granting diplomatic asylum to the criminals is not appropriate practice in the international relations, but they defended the idea of giving asylum for political offenders.

The development of the theory of diplomatic asylum also became apparent in the twentieth century. Agreements and convention describing further demonstrate the progress in the formation of the institution of diplomatic asylum.

To conclude, the fourth period starts from the beginning of the nineteenth century and continues up to the present time.

Revolutionary changes in the countries of Latin America gave rise to the elaborate legal regulation of diplomatic asylum. Such detailed regulation does not have analogies in other regions of the world.

The right of diplomatic asylum in Latin America is represented by the several key legal documents:

- The Bolivarian Agreement on Extradition signed at Caracas in 1911
- The Convention on Asylum signed at Havana in 1928
- The Convention on Political Asylum signed at Montevideo in 1933
- The Treaty on Political Asylum and Refuge, signed at Montevideo in 1939
- The Convention on Diplomatic Asylum signed at Caracas in 1954

There is a variety of sources which, however, are not so elaborate as aforementioned legal documents. One of the main and most disputable sources is the Vienna Convention on Diplomatic Relations. Arguably, it provides the basis for the institution of diplomatic asylum – the inviolability of premises (article 22) and also the impossibility of using premises in any manner incompatible with the functions of the mission (article 41).

Furthermore, among the other legal sources there are multilateral conventions and treaties, which regulate the status of refugee and asylee and operate at global level, customary law evolved from the Universal Declaration of Human Rights, decisions of the International Court of Justice (more information in Chapter 2, section 2.1), bilateral agreements, which in part deal with the matter of asylum, and resolutions of the United Nations on the matter.

According to the aforementioned sources, the whole definition of the diplomatic asylum contains necessary points:

- The principle of extraterritoriality in the institution of diplomatic asylum is not limited by premises of the mission. It also includes war vessels, military camps or aircraft and other premises for asylees provided by heads of mission.

- A person, who intends to get diplomatic asylum, is to be charged with political offence or to be sought with political reasons in his/her country.

- The diplomatic asylum can be given only in the case of urgency. The urgency should be interpreted as presence of the political persecution.

- The diplomatic asylum can be granted not only by the head of the legation, but also by the commander of a warship, military camp, or military airship.

- The absence of discrimination on grounds of nationality is guaranteed.

- Asylum shall be respected by the receiving State. The non-recognition of it by the receiving State does not affect the general principles governing the institution of diplomatic asylum.

- The head of the legation is to report to the receiving State about granting asylum to a definite person.

- The government of the receiving State may require the withdrawal of the asylee from the national territory (Article XII of the Convention on diplomatic asylum, Caracas, 1954).

The decisions of international tribunals are regarded as subsidiary mean for the determination of rules of law, including those regulating diplomatic asylum.

The Columbian-Peruvian case (the Asylum Case) presents the incident when a head of American Popular Revolutionary Alliance, Victor Raul Haya de la Torre, was granted asylum by the Colombian Ambassador in Lima. The Peruvian authorities insisted on Torre`s connection with the military rebellion and classified it as the criminal offence. The most significant points of the Judgment, which was delivered on 20 November 1950, were:

- The illegality of the unilateral decision of the country of asylum on the qualification of the offence: «The conclusion reached on the nature of qualification cannot, however, attribute the value of res judicata to a unilateral decision of the country of asylum, even if this qualification should assume a definitive character».
- The necessity of legal confirmation of all actions in the process of granting diplomatic asylum**.**
- The separateness between the inviolability of diplomatic premises and the institution of diplomatic asylum. The diplomatic asylum is regarded as the independent institution, which shall be regulated by the appropriate deeds.

The European Court of Human Rights considered the application No. 17392/90 by M. against Denmark. The applicant attempted to leave German Democratic Republic and to move to the Federal Republic of Germany. In order to do it, the applicant entered the premises of the Danish Embassy in East Berlin in 1988. The Danish Ambassador called the police, which immediately arrested the applicant.

Thus, the European Commission of Human Rights decided that «authorised agents of a State, including diplomatic or consular agents, brought other people or property within the jurisdiction of that State to the extent that they exercised authority over them. Therefore, the acts of the Danish ambassador, of which the applicant had complained, had affected people within the jurisdiction of the Danish authorities».

The Case of «the Durban Six» should be taken separately because international tribunals did not assisted in the proceedings. Judgments were pronounced only by the Supreme Court of South Africa. The Case of «the Durban Six» established the opportunity of the asylum in the consular premises. Nevertheless, the legal regulation of the institution of diplomatic asylum in Latin America does not regard consular premises as the possible places for asylees.

However, the practice of granting asylum in the consular premises can be also regulated by the bilateral consular conventions. States have a right to determine granting asylum in consular premises as illegal action in the bilateral conventions.

The Constitution of the Russian Federation holds the guaranteed possibility to get political asylum. In accordance with article 63(1), Chapter 2 «Rights and Freedoms of Man and Citizen»:

«The Russian Federation shall grant political asylum to foreign nationals and stateless persons according to the universally recognized norms of international law».

The diplomatic asylum is regarded as political asylum because it is granted to people exposed to political persecution or endangered by it.

Moreover, article 63(2) regulates the question of extradition and political asylum:

«In the Russian Federation it shall not be allowed to extradite to other States those people who are persecuted for political convictions».

Nevertheless, there are five reasons which deny the existence of diplomatic asylum in the Russian Federation.

1) Commentaries on the Constitution edited by L.V.Lazarev argue that political asylum is granted on the territory of the Russian Federation. Thereupon the diplomatic and consular premises, which enjoy the extraterritoriality, cannot be considered as the territory of the Russian Federation.

The author also points out the disputableness of the Vienna Convention on Diplomatic Relations: according to article 41(3) «the premises of the mission must not be used in my manner incompatible with the functions of the mission».

2) The Regulation on the Procedure for Granting Political Asylum in the Russian Federation (approved by the decree of the President of the Russian Federation on 01.07.1997) introduces in article 41(4): on the territory of the Russian Federation the person, who was granted political asylum, enjoys rights and freedoms and bears responsibilities on a par with citizens of the Russian Federation except for the cases determined by an international treaty of the Russian Federation or a federal law.

The term does not include extraterritorial matters: diplomatic and consular premises.

3) The above-mentioned legal document explains in article 41(8) that a person wishing to obtain political asylum on the territory of the Russian Federation is obliged within seven days to address personally to the territorial office of the Federal migration service.

It is impossible to address personally to the territorial office of the Federal migration service staying in the diplomatic and consular premises.

4) The Federal Law «Consular Statute of the Russian Federation» of 5 July 2010 establishes in article 6(5) that Consular premises, including buildings or parts of buildings and land, irrespective of the ownership must not be used for a purpose incompatible with the performance of consular functions.

The granting diplomatic asylum is not part of consular functions (The Vienna Convention on Consular Relations and Consular Statute of the Russian Federation provides the list of the consular functions).

5) As an example of bilateral treaties of the Russian Federation:

- The Consular Convention between the Russian Federation and the Republic of Poland (22.05.1992)
- The Consular Convention between the Republic of Korea and the Russian Federation (18.03.1992)
- the Consular Convention between the Russian Federation and the Kingdom of Belgium (22.12.2004)

«“consular premises” mean the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post».

Thus, it is possible to assume that the institution of diplomatic asylum is not developed in the Russian Federation. The political asylum as territorial asylum is elaborated. The municipal legal documents considering the regulation of political asylum prove it.

Список источников

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