Ismailova S.R.♦

DOI: 10.25108/2304-1730-1749.iolr.2018.57.203-219

Problems of correlation of international and domestic law to protect human rights

Abstract: International legal obligations of a state in an area of human rights are a matter of concern for the entire international community and constitute an issue of heightened importance. However, it does not mean that domestic relations in the area of human rights are directly regulated by international legal norms. Another approach would be contradicted the literal content of these documents and would be a manifestation of modern monism with the primacy of international law. Monism in this area would completely neutralize the role of the state in the regulation of human rights, which has been initially broader than international regulation.

Application of monism in an area of human rights is danger not only by the fact that it misleads concerning the objects of regulation of international and domestic law. Monism in the area of human rights directed to justify an arbitrary international interference into internal affairs of the states in the frames of the principle 'responsibility for protection' and as result, to substantiate a relevancy of one-sided humanitarian intervention.

Keywords: human rights; international law; domestic law; monism; international standards.

Despite the fact that development of human rights has changed, international law and it has become as major factor in intergovernmental relations, however,

♦**Ismailova Sevinj Rauf qizi** – Doctoral Candidate of the Academy of Public Administration under the President of the Republic of Azerbaijan, PhD in Law (Azerbaijan). E-mail: sevism@rambler.ru

until now a number of problems concerning the normative interaction of international human rights law and national law have not received a unified theoretical solution. In particular, there is no consensus on the distinction between the objects of regulation of international and domestic law in the area of human rights protection.

So, N.I. Matuzov asserts that human rights are out of territorial and out of national, and their recognition, ensuring and protection is an object of international regulation [5, p. 24].

Professor of the Durham University Fiona De Londras calls international law of human rights as 'new' international law, which directly regulates relationships between a state and individuals. She asserts that in the matters of mutual relation of individual and state international and national laws are applied simultaneously in one sphere [9, p. 5].

The same opinion is held by Professor of the University of Pittsburgh Ronald Brand. He believes that 20th century demonstrated a new evidence of direct application of international law to the relations between an individual and a state: in sphere of economic relations the international law forms the rules that provide the individuals with the rights in their relationships with the states. R. Brand ties the direct action of international law of human rights with the fact that development of this branch has established serious restrictions for behaviour of the states and their sovereignty [8, p. 290-294].

Similar argument is used by Milena Sterio who supposes that human rights has limited a state sovereignty as the states cannot anymore do everything they want in the frames of their bounders and new human rights require from the states (like from individuals) to refrain from certain actions, and to perform other one. She also believes that the norms of international law of human rights regulate domestic relations [11, p. 13-14]. In substantiation of her position Sterio refers to

the Report of International Commission on Intervention and State Sovereignty of 2001.

It is interesting the standpoint of the German Professor Nico Krisch who came to conclusion that classical division of the right to national and the European law of the human rights is no longer actual: they are not separate laws, but at the same time they have not become a single entity. Emerging order he calls pluralistic: relations between the parts are regulated by policy, often by judicial, but not the norms of law. This system is characterized as heterarchy, but not hierarchy. There is no the both main norms and supreme power that resolve the conflicts. Instead of this, there are various norms and various actors that fighting for power [10, p. 4].

It seems that recognition of the domestic relations in human rights as an object of international regulation, might be in somewhat linked with the content of some international and legal documents. So, in the judgement on the case of Barcelona Traction the UN International Court pointed out that obligations of the state are the care of all states to international community (erga omnes) and these obligations emerge in the modern international law, for example, from the principles and norms that concern the fundamental human rights.

The Preamble of the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE of 03.10.1991 says "…issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order. They [the participating States] categorically and irrevocably declare that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned" [2].

These provisions indicate that the international legal obligations of a state in the field of human rights are a matter of concern for the entire international

community and are a matter of heightened importance [4, p. 57-62]. However, it does not mean that domestic relations in the area of human rights are directly regulated by international legal norms. Another approach would be contradicted the literal content of these documents and would be a manifestation of modern monism with the primacy of international law. Monism in this area would completely neutralize the role of the state in the regulation of human rights, which has been initially broader than international regulation.

It is the state that bears the burden of identifying specific domestic ways of fulfilling international human rights obligations. Therefore, it seems to be fair the statement of L.Kh. Mingazov, who noted that "the realization (fulfillment) of human rights includes the obligations of states to respect, protect and realize human rights" [6, p. 91]. For instance, international law enshrines the right to labour. The national codes of labour, the laws and bylaws are dedicated to performance of this right. These documents regulate the both the common relations in labour law and a lot of private issues, which determine the terms and order of performance of the right to labour.

So, Article 14 of the Convention on Protection of Human Rights and Fundamental Freedoms of 1950 prohibit the discrimination only in the relations that are regulated by the Articles of the Convention. At the same time the legislation of the Great Britain describes in details the areas where discrimination is illegal. The 14th amendment to the US Constitution is the more open and wider: it establishes inadmissibility of denying anyone equal protection of the law [7, p. 112].

Thus, being performed the national legal regulation of human rights is often wider than international one.

As for the scientific views of M. Sterio, then their assessment is ambiguous. Her position based on the Report of International Commission on Intervention and State Sovereignty of 2001. According to paragraph 1.33 of the Report, "Evolving

international law has set many constraints on what states can do, and not only in the realm of human rights. The emerging concept of human security has created additional demands and expectations in relation to the way states treat their own people". The paragraphs 1.35 and 1.36 of the Report develop an idea that new understanding of like a responsibility is formed in international law: 1) externally – to respect the sovereignty of other states, and 2) internally, to respect the dignity and basic rights of all the people within the state [1]. The Report substantiates the idea that due to changed nature of the state sovereignty new principle has emerged in international law – the responsibility for human protection, i.e. 'the responsibility to protect', the core of which is the following: each country bears the responsibility to protect its own citizens from mass murders and ethnic cleaning; if the country unable or does not want to do it then international community must begin an armed intervention to protect human rights. The Report allows the adoption these measures even at absence of the UN Council Security consent. The term 'the right to intervention' has been replaced a softer notion 'the responsibility to protect'. However, there is no any difference between them in the content of the Report.

We believe that the international jurists tried to prevent this situation when developed the ideas of dialectic dualism and zealously defended the integrity of state sovereignty. Above described Report is the unconvincing attempt to raise the criminal policy and practice of some states to the rank of international law. It commonly known that state sovereignty is protected by the norms of jus cogens, which can be cancelled of changed only by similar norms. Currently, there is no happened such changes the rules on state sovereignty. The basic sources of international law unanimously demand to respect for state sovereignty and prohibit interfering in internal affairs. Moreover, the states have not refused of their sovereignty and have not adopted their interpretation stated in the Report. It is impossible to limit the state sovereignty in the absence of the declaration of will.

Otherwise, such limitation violates international law and entails the legal responsibility of delinquent. Thus, the ideas reflected in the Report contradict the international law. The Report is a threat of national security all countries without exemption. The Report is based on a gross theoretical error: it allows for the regulation of domestic relationships by international law.

In the light of said it seems to be right the thesis of V.D. Zorkin about the fact that the jurists, who support the concept of radical monism, actively develop an idea of 'dying off' of state sovereignty. According to this concept, the notions associated with state sovereignty should be fully eliminated from legal theory and practice [3].

Thus, the application of monism in of human rights is dangerous not only because it misleads concerning the objects of regulation of international and domestic law. Monism in human rights is aimed to justify an arbitrary international interference in the internal affairs of states within the frames of the principle "responsibility to protect" and, as a result, to substantiate the legality of unilateral humanitarian intervention.

Considering the issue on the objects of regulation of international and domestic law in protection of human rights, it is more preferable to proceed from dualistic tradition. In this connection, it should be addressed to the concept of S.V. Chernichenko on objective and subjective bounders of the legal systems. Recall that objective borders are always an existing dividing line, which does not allow the mixing of subjects of regulation of international and national law.

Subjective boundaries are the boundaries determined by the subjects of international law on the basis of an agreement, they mean the limits beyond which it cannot "step over". This theory is universal and fully applicable to human rights.

There are two spheres of relations on human rights: the first is regulated on international level, second – on domestic one. These spheres are the different objects of normative impact, which are divided by objective bounder and therefore

are not intersected. International and national laws are not interfered directly to the spheres of regulation of each other. At the same time, as a result of the emergence of social relations requiring a settlement, the volume of the international and domestic legal framework on human rights is growing. By virtue of the interaction of the two legal systems, an expansion of the scope of international regulation often entails a similar expansion in national law. This process can go in the reverse order. Figuratively speaking, the international and national systems "imitate" each other. With regard to human rights, these changes occur most dynamically and lead to a rapid and constant growth of the legal and regulatory framework, both international and domestic.

References

1. The Report of International Commission on Intervention and State Sovereignty of 2001 [Internet resource]. Available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf

2. Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE of 03.10.1991 [Internet resource]. Available at: https://www.osce.org/odihr/elections/14310?download=true

3. Zorkin V.D. Verkhovenstvo prava i imperative bezopasnosti [Supremacy of law and imperative of security]. Rossiyskaya gazeta [Russian Newspaper] - 2012, 16 May.

4. Malinovski O.N., Kubrak V.S. K probleme absolyutizatsii prav cheloveka i ikh ogranicheniyi v kontekste Konventsii o zaschite prav cheloveka i osnovnykh svobod 1950 g. i rossiyiskogo zakonodatel'stva [To the problem of absolutisation of human rights and their restrictions in context of the Convention on Human Rights and Fundamental Freedoms of 1950 and the Russian legislation]/

Obschestvo: politika, ekonomika, pravo [Society: policy, economics, law]. Issue no. 9, 2018, pp. 57-62.

5. Martuzov N.I. Teoriya i praktika prav cheloveka v Rossii [Theory and practice of umna rights in Russia]. Izvestiya vyshyikh uchebnykh zavedeniyi. Pravovedenie. 1998. No. 4, pp. 22-24.

6. Mingazov L.Kh. Problemy effektivnosti zaschity prav cheloveka v mezhdunarodnom i rossiyiskom prave [Problems of protection of human rights in international and Russian law]. Vseobschaya declaratsiay prav cheloveka i aktual'nye voprosy ee primeneniya v rossiyskom i mezhdunarodnom prave [Universal Declaration of Human Rights and actual issues of its application in international and Russian law]. Col. of materials of Sci.-Prac. Conf. 24-25 October 2008. Kazan, 2009, pp. 111-121.

7. Barendt Eric. The equal protection of the laws // Oxford journal of legal studies. 1982. vol. 2, № LP, pp. 111-121.

8. Brand A.R. Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century // Hastings International and Comparative Law Review. 2002. vol. 25. P. 279-295.

9. De Londras Fiona. Dualism, Domestic Courts and the Rule of International Law // SSRN.COM: Social Science Research Network. 2009. [Internet resource]. Available at: http://www.ssrn.com/abstractM393293.

10. Krisch Nico. The Open Architecture of European Human Rights Law. // SSRN.COM: Social Science Research Network. 2007. [Internet resource]. Available at: http://www.ssrn.com/abstract=1018991.

11. Sterio Milena. The Evolution of International law // SSRN.COM: Social Science Research Network. 2008. [Internet resource]. Available at: http://www.ssrn.com/abstract=1104723.