DISCUSSION

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THE RIGHT OF ASYLUM IN THE PERIOD OF MODERN STATES FORMATION – SHORT HISTORICAL EXCURSION

Abstract:

This article outlines the right of asylum as a judicial institute in the early modern period, when modern states have been forming. Special attention is given to the dynamic struggle between the church asylum, as well as the church judicial system in general, and the state's secular power. Specific attributes of the right of asylum and its evolution in time are studied from different viewpoints; understanding of the term and its content, legal continuity of the right of asylum, conditions, under which asylum was granted and the different forms of asylum. General observations and supported by specific historical examples and references.

Keywords:

Asylum, right of asylum, church asylum, early modern period, diplomatic asylum.

I. Introduction

The foundations of modern legal states and the modern concept of human rights were laid in early modern period. When dealing with the right of asylum of that period we will certainly be interested in the nature of this right in the modern states that were undergoing the process of formation in this period. We can say that the right of asylum of that time had many forms; it was open, but also ambivalent, burdened with a number of problems and conflicts.[1])

The major conflict, it seems, was the power struggle between the Church and the newly formed modern state. Arguments are heard claiming that the Church asylum interfered with the rule of law of the state and therefore the state started putting more pressure on the Church in effort to limit and even abolish the Church asylum.[2])

This power struggle can be seen also in the process of handing over asylum seekers to state authorities. According to the canonic law it was not permissible to pressure the asylum seekers in a Church asylum by, for example, sealing off the Church premises, starving (withholding food, water), confiscating property of the

[1]) See LOJEK, A., *České azylové právo 16. až 18. století, Kořeny pozdější úpravy nebo možná inspirace pro současnost [Czech Right of Asylum in 16th through 18th Centuries, Roots of Later Amends or Possible Inspiration for Today]*, Prameny a nové proudy právní vědy, Praha 2011.

[2]) BABO, M., *Kirchenasyl – Kirchenhikesie: Zur Relevanz eines historischen Modells im Hinblick auf das Asylrecht der Bundesrepublik Deutschland*, Eichstätt 2003, pg. 111 and following.

asylum seekers, or to use force to get hold of the asylum seekers. The Church reacted to such actions in the early stages of state formation by excommunicating the offenders because it was perceived to be a violation of a "sacred" place.[3])

This conflict was intensified by the fact that the Church had its own judicial system, which was claiming the right to decide whether an asylum seeker is to be handed in or punished. It must be said that initially the Church would not differentiate between those who committed serious crimes and those who were prosecuted for minor offences, such as tax debtors. Thus the asylum protection offered by the Church had in fact a very broad basis.

Because in those times not just innocent fugitives, but also criminals, who had committed crimes, could use asylum protection, the state had the tendency to reduce Church judicial power and replace it with state criminal jurisdiction – not just to avoid misuse of the right of asylum by criminals, but also to increase the security and prevent public nuisance.

For the above reasons the newly formed modern states started advancing their sovereignty and state's monopoly on power by limiting not only the Church form of asylum, but also other competing forms.

In the area of asylum protection the states worked towards creating unlimited state monopoly, which basically replaced individual forms of asylum and limited international right of asylum to political refugees.

II. The viewpoints on the historical differences in the asylum protection

Specialists focusing on modern asylum protection will certainly find interesting its historical particularities. These particularities can be perceived from several viewpoints.

Viewpoint of understanding asylum

It has been proven historically that the initial meaning of the word "asylum" is spatially defined. This original spatial sense is characteristic also for the early modern period. Asylum was a place or a building, in which a fugitive could find protection from violence or revenge of his pursuer.[4])

Today asylum is not understood as a place, but rather as the protection given to the receiving person, although English language still recognizes both meanings of the word. It is worth mentioning that this question was intensely discussed during a meeting of the International Law Association in the second half of the 20th Century and most members of a special committee, created for this purpose, concluded that asylum can be in legal terminology used to define location. Only during plenary session the opposite thesis prevailed.[5])

Today we understand asylum not as a place, but as protection, which is granted in certain places or areas.

Viewpoint of continuity and discontinuity

The development of asylum protection in this period can be characterized as discontinuous, but with continuity links to the previous period. However, in general,

[3]) FLOR, G., *Asylrecht von den Anfängen bis heute*, Berlin 1988, pg. 137.
[4]) LÖHR, M., *Das Asylwessen im alten Testament*, Halle 1930, pg. 177.
[5]) KIMMINICH, O., *Grundprobleme des Asylrechts*, Darmstadt 1983, pg. 2.

of discontinuity within asylum granted to individual categories of persons caused by limiting and abolishing possible reasons for granting asylum by legal regulations prevailed.

Certain continuity is maintained in the form of the secular asylum, which is based on privilegies of the ruler. These privileges had to be confirmed by every new ruler, but only if such confirmation was requested, otherwise these rights were considered to be "extinct", i.e. expired.

Viewpoint of asylum reasons

In the formation period of modern states various reasons for granting asylum were acceptable. In asylum practice of early modern period we find asylum reasons such as murder, homicide, fraud, theft, desertion, debt, vagrancy, pauperism, bankruptcy, adultery, incendiary etc. However, over the course of the time the states, as well as the Church, gradually removed certain categories of persons from asylum. For example, criminal codes of law criminalized certain outcast social groups for pauperism and vagrancy.[6])

Viewpoint of granting asylum

During this period granting of asylum depended on ambivalent humanitarian, religious, economic and political motives of different places of asylum. The right of asylum was modified within Church legal standards, such as papal constitutions, bulls, resolutions of council assemblies, but also in the sphere of secular legal standards, such as legal codes, patents, rescripts and privileges.[7])

In this period we also differentiate asylum, which is granted by the place – local asylum, asylum granted by a person – personal asylum, but also asylum granted based on certain time limit – time asylum, especially in the form of a protective document. We can therefore say that the individual forms of asylum right have certain common attributes; place, person and time.

The Church right of asylum recognized churches and adjacent buildings, monasteries and monastery precincts, vicarages, homes of bishops and higher Church officials, graveyards, clerical colleges as places of asylum.[8]) In Switzerland asylum places were also crosses with inscription "Freiheit". Whoever was touching such cross, or was within the protection radius, could not be forcibly taken away from this area.[9]) Personal asylum is represented by a Church official – in particular bishop or abbot.

As for time asylum or time protection by a general Church institute it was Peace and Truce of God (*Pax Dei*), which protected certain categories of persons, such as clergymen, pilgrims, merchants, women, children etc. *Pax Dei* forbade violence against these persons under the threat of Church curse. Over time *Pax Dei* was

[6]) HÄRTER, K., *Vom Kirchenasyl zum politischen Asyl: Asylrecht und Asylpolitik im frühneuzeitlichen Alten Reich*, In: Das Antike Asyl, Köln 2003, pg. 303.

[7]) Ibid., pg. 304.

[8]) See BINDSCHEDLER, R.G., *Kirchliches Asylrecht (Imunitas ecclesiarum localis) und Freistätten in der Schweiz*, Zurych 1906, pg. 36; HÄRTER, op. cit., pg. 305; FLOR, op. cit., pg. 129.

[9]) FEHR, H., *Das Recht im Bilde*, Erlenbach-Zurich 1923, pg. 92.

replaced by "earth peace" (transfer from Church to secular authority). These types of peace protected individual persons on certain days, holidays and time periods.[10])

For example, in case of diplomatic asylum right, the place of asylum was the building of the ambassador and other adjacent buildings, his coach or even entire diplomatic quarters (as was the case in Paris, Madrid and Rome). Personal asylum is granted to the ambassador, who was representing a ruler of a sovereign state.[11])

And we could go on introducing individual characteristics of other forms of asylum right.

Viewpoint of the form

During this period several completely different forms of the right of asylum existed side by side. It was the Church right of asylum and the secular right of asylum, as the two basic forms, but there were also other specific forms such as diplomatic right of asylum and right of asylum for national and religious minorities, right of asylum for deserters, considered to be a branch of political right of asylum, which was being formed at that time. These forms of asylum were different in their relative importance and dynamics of their development.

Let us look more closely on the importance of the right of asylum; for example Church asylum was a significant compensation of the cruel criminal justice system; it prevented capital punishments, potentially unjust imprisonment, torture and it was useful for implementing and respecting certain ethical principles by secular state authorities, such as pardoning, reducing punishment and introducing new legal institutes, such as bail. [12])

On the other hand diplomatic asylum, for example, was important because it represented first-level exterritoriality-based jurisdiction of another state. According to this legal fiction a fugitive was subject to the jurisdiction of the delegating state rather than the accepting state, because embassy was considered to be a part of territory of the delegating state.[13])

And this could be the origins and basis for the understanding of the concept of the territorial political asylum, where criminal essence of a crime was understood differently; in other words, what seemed to be a political crime in one state might not have been understood and condemned in another state as a political crime. Let us briefly mention at this point that the political asylum, as a specific form of asylum, focuses on political offences rather than on crimes in general, and thus it lead to worsening of the situation of culprits who committed general crimes.[14])

The dynamics of the development can be demonstrated on the specific case of diplomatic right of asylum, which was originally intended to protect the ambassador and his personal and material necessities, i.e. for a group of persons accompanying the ambassador – his cohort and carriages, as well as itinerary. However, at this time

[10]) Compare BALÍK, S., *Právní dějiny evropských zemí a USA* [Legal History of the European Countries and the USA], Plzeň 1999, pg. 138.

[11]) HEIKO, C., *Das diplomatische Asyl im gegenwärtigen Völkerrecht*, Baden-Baden 1994, pg. 31.

[12]) LOJEK, A., op. cit., pg. 65.

[13]) BULMERINCQ, A., *Das Asylrecht in seiner geschitlichen Entwickelung*, Wiesbaden 1970, pg. 126-127.

[14]) REITER, H., *Politisches Asyl im 19. Jahrhundert*, Berlin 1992, pg. 19 and following.

the asylum was extended to include also the embassy and other buildings of the ambassador, sometimes even the entire diplomatic quarters.

The dynamics can also be seen in the fact that until the Peace of Westphalia in 1548 ambassadors were appointed on *ad hoc* basis. In the following period this changed and gradually we see permanent embassies established in foreign states.[15]) As we already mentioned, this lead to a considerable expansion of the diplomatic asylum, which later lead to conflicts not only in secular area – ruler vs. ruler, but also to conflicts between the Church and secular rulers.[16])

On the other hand, at the end of this period, and we are talking about a brief period of 3 centuries, this form of asylum was drastically limited to the point of disappearing, because it was no longer tolerated and the function of exterritoriality was rejected and replaced by functional affiliation.[17])

III. Conclusion

Some historical forms of the right of asylum re-appeared in the 20th and 21st centuries, for example the previously mentioned form of diplomatic asylum. Diplomatic asylum was used in the 20th century by the USA during revolutionary events in Hungary. We can mention the case of Cardinal Josef Mindszenty, who in 1959 sought refuge in US embassy in Budapest, where he was granted diplomatic asylum for 15 years, until he was granted safe passage to Vatican.[18])

Also in connection with the mass movement of citizens of GDR in 1989 to the embassy of FRG in Prague we can talk about diplomatic asylum.

Diplomatic asylum survives until the present day to certain extent; it is tolerated in South-American states, even though it has no support in the international law.

Currently, we sometimes hear about people, who live in churches or in basements of vicarages in Church asylum and state authorities are often reluctant to use police force to capture them, even though it would be in most cases legal.[19])

This "church asylum" refers today also to a situation when foreigners without valid permit hide in church premises to avoid deportation. This form of church asylum is often used to voice protest against current alien law or to prevent refugees from becoming homeless.[20])

Significant spreading of this historical form dates back to 1980, when we saw certain renaissance of church asylum, with the church granting protection in many cases. This spurred a discussion about the legitimacy of modern church asylum in a number of European states.[21])

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[15]) ADAMOVÁ, K., *Dějiny veřejného práva ve střední Evropě* [History of the Public Law in Central Europe], C.H.Beck, Praha 2000, 1st ed., pg 84.

[16]) KLEPPER, I., *Diplomatisches Asyl, Zulässigkeit und Grenzen*, Franfurkt am Mein, 2009, pg.1.

[17]) Compare KIMMINICH, O., HOBE, S., *Einführung in das Völkerrecht*, Tübigen 2000, pg. 316; JÍLEK, D., *Odpověď mezinárodního práva na hromadné uprchlictví* [Response of the International Law to Mass Refuge-seeking], Brno 1996, 1st ed., pg. 45.

[18]) HAILBRONNER, K., *Asylrecht und Völkerrecht*, Baden-Baden 1980, Vol. I., pg. 75.

[19]) MORGENSTERN, M., *Kirchenasyl in der Bundesrepublik Deutschland*, Wiesbaden 2003.

[20]) Ibid.

[21]) Ibid.