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FORMATION OF THE INSTITUTE OF EXTRADITION IN INTERNATIONAL LAW: HISTORICAL AND DOCTRINAL ANALYSIS

ФОРМУВАННЯ ІНСТИТУТУ ЕКСТРАДИЦІЇ В МІЖНАРОДНОМУ ПРАВІ: ІСТОРИЧНИЙ І ДОКТРИНАЛЬНИЙ АНАЛІЗ

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The article is devoted to the study of the peculiarities of the historical formation and development of the institution of extradition in the context of contemporary international law. The study demonstrates the transformation of the institution of extradition from its initial manifestations in the form of intertribal and interstate customs in ancient times to its formation as an independent legal institution in the system of international legal relations.

Particular attention is paid to the analysis of the periodisation of the formation and development of the institution of extradition based on doctrinal approaches covering both pre-revolutionary theories and modern scientific concepts. The analysis of doctrinal approaches to the periodisation of the institution of extradition demonstrates the existence of several scientific concepts that reflect different stages in the development of this phenomenon of legal reality, depending on political, legal, social and international factors. It has been determined that the most well-argued approaches are those that highlight the key stages of development from primitive customary practices to the modern system of international treaty regulation.

It is noted that although the origins of extradition date back to ancient times, it was after the bourgeois revolutions of the 18th and 19th centuries that the institution acquired the features characteristic of the modern understanding: legal certainty, systematicity and international universality. It is emphasised that it was during this period that the active conclusion of both bilateral and multilateral extradition treaties began, which made it possible to systematise approaches to its legal regulation.

It is concluded that the institution of extradition, despite its long history, continues to evolve in the context of globalisation and changes in international relations. Promising areas for the development of the institution of extradition include the unification of extradition rules between states, the strengthening of cooperation between law enforcement agencies of states, the development of multilateral international agreements, integration with international organisations, and the use of advanced information technologies in this process.

Key words: extradition, surrender of persons, international law, international cooperation, periodisation, fighting crime.

Стаття присвячена дослідженню особливостей історичного становлення та розвитку інституту екстрадиції в контексті сучасного міжнародного права. У дослідженні продемонстровано трансформацію інституту екстрадиції від її первісних проявів у вигляді міжплемінних та міждержавних звичаїв у давнину до оформлення як самостійного правового інституту в системі міжнародно-правових відносин.

Особливу увагу приділено аналізу періодизації формування та розвитку інституту екстрадиції на основі доктринальних підходів, що охоплюють як дореволюційні теорії, так і сучасні наукові концепції. Аналіз доктринальних підходів до періодизації інституту екстрадиції демонструє наявність кількох наукових концепцій, які відображають різні етапи розвитку даного явища правової дійсності залежно від політико-правових, соціальних і міжнародних факторів. Визначено, що найбільш аргументованими є підходи, які виокремлюють ключові етапи розвитку від первісних звичаєвих практик до сучасної системи міжнародного договірного регулювання.

Зазначається, що хоча витоки екстрадиції сягають давніх часів, саме після буржуазних революцій XVIII-XIX століть інститут набув рис, притаманних сучасному розумінню: юридичної визначеності, системності та міжнародної універсальності. Підкреслюється, що саме в цей період розпочалося активне укладання як двосторонніх, так і багатосторонніх договорів про екстрадицію, що дало змогу систематизувати підходи до її правового регулювання.

Робиться висновок, що інститут екстрадиції, незважаючи на свою давню історію, продовжує розвиватися в умовах глобалізації та змін у міжнародних відносинах. Перспективними напрями розвитку інституту екстрадиції є уніфікація правил екстрадиції між державами, зміцнення співпраці між правоохоронними органами держав, розвиток багатосторонніх міжнародних угод, інтеграція з міжнародними організаціями, використання передових інформаційних технологій в зазначеному процесі.

Ключові слова: екстрадиція, видача осіб, міжнародне право, міжнародне співробітництво, періодизація, боротьбі зі злочинністю.

The institution of extradition is considered one of the oldest in international criminal law, which began to take shape in ancient times and gradually "refined" to the new realities and demands of the time. Foreign literature argues that "despite the fact that the early stages of human history were characterised by undeveloped international relations, which mainly covered small regions, it is impossible not to recognise that international ties did exist, including on issues of extradition". The coverage of issues related to the history of the formation and development of the institution of extradition in international law is due to the fact that, outside of the historical context, it is almost impossible to evaluate the accumulated knowledge from the point of view of studying the prospects for the development of the institution of extradition, to comprehend the essence of this phenomenon of legal reality and to predict its further development. As the prominent Ukrainian legal historian and criminologist O. Kystiakivskyi rightly noted, "Only history can explain the reasons for both the current state of ... law and its state in previous periods" [cited in 11, p. 92].

The theoretical basis for researching the history of the formation and development of the institution of extradition is provided by the scientific work of domestic and foreign scholars, such as: S. Andreychenko, M. Bassiouni, H. Bekhruz, K. Windjert, I. Zavydniak, N. Zelinska, M. Kostenko, O. Krykunov, I. Nurullaiev, M. Pashkovsky, S. Sasko, M. Smirnov, A. Shyrer, and others.

The purpose of the study is to analyse the theoretical aspects of the formation and evolution of the institution of extradition in international law, taking into account the key stages of its development, as well as to identify doctrinal approaches to the periodisation of the institution of extradition.

Explanation of the main provisions. In contemporary scientific literature, the issue of periodisation of extradition as a multi-systemic institution of international law is the subject of active discussion, which gives rise to numerous debates. The fact is that in the course of research, difficulties may arise in determining the criteria for constructing the most reasonable periodisation of the formation and development of extradition.

When analysing the genesis of the institution of extradition, it is important to focus on its historical stages, since the development of extradition has not always been linear. The most intense transformation of the institution of extradition began in the late 18th and early 19th centuries and was associated with the bourgeois revolutions. In this regard, the scientific community has proposed several options for periodisation, among which two are the most common and conceptually sound.

It is logical to begin the study of scientific approaches to the periodisation of the institution of extradition with the concept proposed by the eminent diplomat and author of a number of innovations in the field of international law, F. Martens, whose approach became the foundation for further doctrinal approaches. At the end of the 19th century, the scholar proposed the following periodisation of the institution of extradition:

1) from ancient times until the end of the 17th century, when extradition was a rare occurrence, mainly involving political opponents, heretics and defectors;

2) from the beginning of the 18th century to the end of the 1840s, during which the number of treaties concluded not only in relation to rebels and defectors (in relation to deserters and fugitive soldiers) but also to persons guilty of ordinary crimes increased, although the former still predominated, while the latter were still the exception due to their small numbers;

3) a new era that began in 1840, when states launched a coordinated campaign against fugitive criminals who had committed acts that were not politically motivated and were punishable under general criminal law [cited in 7, p. 38].

The position of American scholar M. Bassiouni seems very close to the above. Thus, the scholar distinguishes the following periods of extradition:

1) from ancient times to the end of the 17th century, when only political opponents, heretics and defectors were extradited;

2) from the beginning of the 18th century to the middle of the 19th century, when there was a significant increase in the number of agreements concluded not only in relation to rebels, deserters and military personnel who had fled, but also persons guilty of ordinary crimes;

3) from 1833 to 1948, when states launched a coordinated campaign against fugitive criminals who had committed acts that were not politically motivated and were punishable under general criminal law;

4) the period from 1948 to the present day, when the priority is to build a system of international security and prevent crimes against peace and the security of humanity, and the deepening of human rights protection in the extradition process has become decisive [12, p. 4].

A similar periodisation is proposed by S. Nesterenko, who identifies the following stages in the development of the institution of extradition: 1) from ancient times to the 18th century. Despite the fact that some provisions on the protection of the interests of extradited persons can be found in the most ancient extradition treaties, during this period, human rights functions were mainly performed by the institution of asylum, which competed with the institution of extradition. In the Middle Ages, there was an increase in the number of extradition treaties specifying the circle of persons subject to extradition and defining the grounds for extradition. Political opponents were extradited first and foremost; 2) from the 18th century to the mid-20th century. A significant turning point in the development of the institution of extradition was marked by the bourgeois-democratic revolution of the 18th century in France. With the legal formalisation of the right to asylum in France, extradition took on the character of mutual legal assistance between states in the fight against general criminality. In the 19th century, a new characteristic feature of the institution of extradition emerged: it not only served the state's goals in the fight against crime, but also guaranteed certain rights to extradited persons. In the 1940s, political, military-strategic and ideological confrontation between countries with different social systems began, and the institution of extradition, and in particular the principle of non-extradition for political offences, was a manifestation of political confrontation in international relations; 3) from the mid-20th century to the present day. In the 20th century, the development of the institution of extradition was significantly influenced by World War II and its aftermath. Since 1948, a universal and comprehensive understanding of human rights has been formed, which has been reflected in particular in the protection of the rights of persons involved in extradition proceedings. The institution of extradition has been developing in the direction of extradition to the present day [7, p. 39].

I. Zavydniak, developing the idea of the emergence of the institution of extradition since ancient times, identifies the starting periods from which the history of the formation and development of extradition begins, in particular:

1) from ancient times to the end of the 18th century, characterised by the fact that bilateral treaties made the first attempts to establish conditions for the extradition of persons who committed crimes in the political and religious spheres; "the first scientific commentaries and principles of international cooperation in the fight against crime appeared";

2) from 1833 to the end of the First World War. "This stage is characterised by the active expansion of the international legal framework through the conclusion of bilateral treaties and the adoption of relevant provisions in national legislation";

3) from 1919 to 1945, characterised by "... the spread of bilateral agreements, mainly in the field of extradition. ... most of the provisions of these agreements regulated the extradition and implementation of certain types of mutual legal assistance. The issue of criminal prosecution at the request of the parties was not considered";

4) from 1945 to the early 1990s, during which "the development of cooperation between states in the fight against transnational crime began. ... It was during this period that, in addition to traditional approaches aimed at concluding both multilateral and bilateral international treaties on extradition and mutual assistance, international treaties aimed at stopping certain types of international crimes appeared";

5) since the 1990s and continuing to this day, characterised by such trends as: "improvement of legal regulation of certain categories of crimes; regulation of each area of international cooperation in the investigation and detection of transnational crimes; expansion and deepening of legal regulation of the criminal sphere of international cooperation at the domestic, bilateral and regional levels" [6, pp. 82–85].

Noteworthy is the thorough periodisation of the development of the institution of extradition proposed by O. Karimov, who distinguishes the following periods: the first period begins in ancient times and ends at the end of the 17th century. During this period, the extradition of criminals was not a frequent occurrence and mainly took place in relation to political crimes, as well as heretics and defectors. The second period begins in the 18th century and ends in the first half of the 19th century. This period is characterised by the existence of agreements between states not only in relation to rebels and defectors, but also to persons guilty of criminal offences. The third period begins in 1840. During this period, states began a coordinated campaign against fugitive criminals. The fourth period begins after 1948 and ends in 1998 with the adoption of the Rome Statute of the International Criminal Court. It was after World War II that international relations began to develop intensively. During this period, the need to build international security and prevent future crimes against peace and security of humanity came to the fore. The fifth period began in 2002 with the entry into force of the Rome Statute of the International Criminal Court, after its ratification ... This period is characterised by the conceptual differentiation

of extradition, surrender, expulsion and transfer of criminals, as mentioned in the Rome Statute of the International Criminal Court [13, p. 133].

V. Bortnytska suggests dividing the development of the institution of extradition into the following periods:

1) from ancient times to the 17th century – the extradition of individuals was the prerogative of those in power and was political in nature.

2) 17th to early 19th centuries – the transition of extradition from political crimes to general criminal offences in the legal sphere. During this period, extradition laws were disseminated, regulating the internal rules of states regarding the extradition of persons on the basis of reciprocity, and the codification of such laws at the international level began, as well as the formation of bilateral and multilateral treaties on the extradition of persons;

3) from the 19th century to the present day – a new era in the development of the institution of extradition. It is due to the development of the rights of persons involved in extradition proceedings, as well as the humanisation of criminal procedural law. The simplified procedure for extradition as a form of international assistance underwent significant development in the third period after the adoption of the European Convention on Extradition and its additional protocols [3, p. 29].

An analysis of existing approaches to the periodisation of the institution of extradition allows us to conclude that, for the most part, they are based on the periodisation proposed by F. Martens, somewhat supplemented to take into account the latest realities and developments in extradition over the past century and a half.

It should be noted that not all international scholars share the view that the institution of extradition has its roots in ancient times. A certain opinion has gained popularity, according to which the actual formation of extradition as a legal category in international law began with the bourgeois revolutions of the late 18th and early 19th centuries (O. Wolewodz).

This position is based on the denial of the existence of international law in ancient times and, as a result, the institution of extradition.

However, as I. Nurullaiev rightly points out, "some preference is given to the first of these points of view – the formation of the foundations of international cooperation in the fight against crime must be traced back to ancient times, when the first international treaties on the mutual surrender of criminals (extradition) were concluded" [9, p. 156].

The institution of extradition has undergone a significant evolutionary development, dating back to ancient times. Most researchers agree that the first references to extradition date back to 1296 BC, when Pharaoh Ramesses II and Hittite King Hattusilis III signed a "peace treaty" containing the following provisions: "if Ramesses becomes angry with his slaves when they revolt and goes to pacify them, the Hittite king must act in agreement with him... If one person, or two, or three, flee from the land of Egypt to go to the great prince of the Hittite country, the great prince of the Hittite country must seize them and order them to be sent back to Ramesses II, the great ruler of Egypt" [10, p. 86].

Historiographical literature provides numerous examples of extradition agreements concluded in the context of ancient legal systems in China, Rome and Greece. However, extradition was actively used in relation to fugitive slaves who had no right to asylum. In the Middle Ages and the Modern Era, the extradition of criminals was used to a limited extent, which indicates that the institution of extradition was in its early stages of development. The factor that actually hindered the spread of extradition practice was the feudal custom prevailing in Western European countries, according to which all foreigners who arrived in the country without proper permission or remained there for more than one year were considered attached to the land. As I. Zavydniak notes, "the facts show that from ancient times and approximately until the end of the seventeenth century, extradition was not an institution of international law... The vast majority of extradition cases were caused by political circumstances, but not by the needs of mutual assistance in criminal proceedings. This period is characterised by the exceptional concern of states with crimes in the political and religious spheres, but not in the economic or other spheres. Therefore, most of the known treaties of that period provided for the extradition of exclusively political and religious criminals or defectors" [6, p. 82].

A turning point in the history of the development of extradition as an instrument of international cooperation was the events associated with the Great French Revolution of 1789, which legally formalised the right to asylum. In the 19th century, the right to asylum gained universal recognition, and extradition took on the character of mutual assistance between states in the fight against crime. Gradually, international treaties and legislative acts on extradition began to be concluded. The first law on extradition was the Belgian law of 1833, which served as a model for other European countries to adopt special laws on extradition, in particular England (1870), the United States (1848) and the Netherlands (1875). "Simultaneously with the formation of national legislation, there was a process of expanding the international legal basis for cooperation through the conclusion of both bilateral and multilateral treaties (mainly on extradition). When concluding treaties, the national interests of states, their geopolitical position and needs for such cooperation were taken into account first and foremost. Given these trends, the late 19th century and the first half of the 20th century marked the beginning of a transition from bilateral international treaties to multilateral conventions in the field of criminal procedure" [6, p. 84]. During this period, the number of extradition treaties increased and legal coordination in the fight against crime affecting the interests of several states improved.

The first multilateral treaty regulating extradition issues was the Treaty of Amiens of 1802, concluded between Great Britain, the Netherlands, Spain and France. The provisions of this treaty provided for the extradition of persons accused of murder, fraudulent bankruptcy and counterfeiting of currency. In general, the institution of extradition developed in accordance with historical trends in the development of international law. In international practice, political crimes began to be excluded from the scope of extradition, extraditable offences were defined, and the principle of non-extradition of own citizens was established.

After World War II, a new stage in the development of international cooperation in the fight against transnational crime began. In this context, the institution of extradition is an important tool for effective inter-state cooperation in the fight against crime. During this period, international legal treaties were concluded, the first conventions on the extradition of offenders were adopted, and international organisations dealing with international crime, search and extradition were established. The regulation of the institution of extradition during this period was detailed, with the grounds for extradition being established and the types of crimes for which extradition was applicable and those for which it was not being defined.

A significant event in the regulation of extradition was the adoption in 1957 by the Council of Europe of the Convention on the Extradition of Offenders [4] and additional protocols thereto in 1975 and 1978. In 1962, the Scandinavian Treaty on Extradition between individual states was also concluded. In addition to the documents submitted, the European Convention on Mutual Assistance in Criminal Matters of 1959 [5] and the Berne Convention on the Transfer of Sentenced Persons to Serve Their Sentences in Their Country of Nationality of 1978 [1] and others were adopted on the European continent. Other regions also adopted their own international treaties on various issues of extradition. [1], and others. Other regions are also adopting their own

international treaties on various issues of extradition. For example, within the framework of the League of Arab States, the Convention on the Extradition of Criminals of 14 September 1952 was adopted, and on the American continent, the Inter-American Convention on Extradition of 1981 was adopted.

The current stage of development of the institution of extradition in the 21st century is characterised by its gradual transformation and adaptation to new challenges. According to H. Bekhruz, "the prospects for the development of the institution of extradition lie in finding ways to ensure greater efficiency, fairness and international cooperation in the fight against crime. These goals can be achieved, in particular, through the unification of extradition rules between different states, which will avoid legal conflicts; strengthening cooperation between law enforcement agencies of different states for more effective detection and investigation of crimes; ensuring human rights at all stages of the extradition process; using advanced technologies in the extradition process; training qualified personnel in the field of international law" [2, p. 201].

Conclusions. Summarising the genesis of the establishment and development of the institution of extradition, it is important to emphasise that "at the beginning of the 21st century, the institution of extradition continues to develop. States are adopting new laws on extradition, concluding international treaties, and increasing judicial practice" [8, p. 353]. Research into the history of the formation and development of the institution of extradition shows a gradual transformation from elementary inter-state practices to a complex, systematised legal construct of modern international law. In the course of its historical development, the institution of extradition has evolved from the extradition of slaves and political opponents in ancient civilisations to a standardised procedure for international cooperation in the fight against crime. The institution of extradition is not only an important legal category, but also an indicator of the level of international cooperation, legal culture and the dynamics of legal thinking that is developing in response to the challenges of the times.

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