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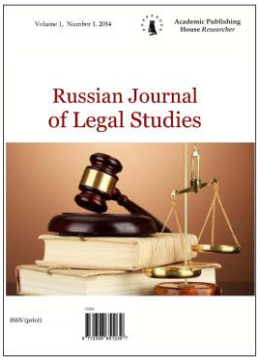

Articles

Regulation of Extradition and Its History – an Austrian Example

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Abstract

The institution of extradition has existed in international law since the earliest times. Moreover, it is becoming increasingly important in a globalizing world. This article aims to present it in a legal, historical and comparative context, through the analysis of a specific example – the Austrian regulation. Starting with a historical outline and a comparison with the asylum institution, the author goes on to discuss contemporary Austrian legislation (esp. Extradition and Mutual Assistance Law of 1979, ARHG), showing its origins and historical roots, dating back to the 19th century. The key role that the EU law plays for contemporary Austrian law especially in the matters of penal law (incl. the instruments given by European arrest warrant) is emphasized. Also the international aspect immanent to the regulation of extradition (international conventions and treaties) is shown. The discussion of the construction of ARHG and its norms allows both to show the dilemmas that every contemporary legislator must resolve and the success of the Austrian regulation, which can inspire lawmakers in other countries.

The application of legal sciences research methods in the article will include multiple instruments, among them the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, critical-legal dogmatics.

Keywords: Austria, Austrian law, extradition, penal law, legal history.

1. Introduction

The institution of extradition occupies a special place among the issues of international law and the criminal process. This is not surprising, since the specificity of criminal liability is, on the one hand, its territorial limitation to the area where a given legal system is in force, and on the other hand – the pursuit of a public prosecution of actions considered reprehensible and unacceptable universally, not only in a certain country.

From the earliest times, the above contradiction encourages people to avoid criminal liability in a relatively simple and very effective way – by moving to another jurisdiction. I use the term "jurisdiction" on purpose, and not "state" – it is worth remembering that until recently in the European legal area, these were not synonymous due to numerous legal particularisms. This enabled e.g. the creation of the right of asylum in sacred areas, common in medieval Europe (Cisoń, 2003). So far, its remnants are the possibility of obtaining asylum in diplomatic posts (diplomatic asylum) or on the territory of other countries (territorial asylum) (Wierzbicki, 1976: 91-95).

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However, the right of asylum has always been an exception, intended to protect the weak or persecuted – this is also how it is understood in contemporary legislation. Apart from it, there is no doubt that the phenomenon of avoiding criminal responsibility by fleeing or hiding in other jurisdictions is mutually unfavourable – both for the state where the crime was committed and for the state that involuntarily becomes the "promised land" for the criminals from a neighbouring country.

Thus, extradition can be defined as a way to overcome the above-mentioned problem, having both a purely pragmatic dimension (fighting crime *en général*) and ethical (combating impunity of criminals). Mutual extradition was already provided for in the Treaty of Kadesh – the oldest surviving peace treaty, concluded between pharaoh Ramesses II and Hittite king Hattusilis III in the thirteenth century B.C. This undoubtedly proves the timelessness and importance of the problem of (to employ modern language) the international prosecution of perpetrators of crimes.

As can be seen from the above, the regulation of extradition remains primarily the domain of public international law – namely international treaties. At the same time, however, it is inevitable to regulate extradition at the level of national law. In this context, Austria is a particularly good example to be analyzed – as a country belonging to the European Union, but at the same time having an uninterrupted legal continuity since the 19th century and, what is also not common, having a separate law regulating extradition matters.

2. Materials and methods

This article is based on the analysis of various sources – primarily contemporary and historical legal acts (including international agreements and conventions). In order to deepen the theoretical basis of the article and to describe the essence and purpose of extradition, the author refers to diverse legal literature. In order to illustrate the public perception of the extradition issue, press releases were also analysed.

The application of legal sciences research methods will include: the historical method (also in its systematic version), comparative legal research, critical and systematic analysis, formal-legal dogmatics. Historical analysis will be utilised to depict a broader historical course of processes that led to the developments researched in the text. Critical legal analysis serves as an instrument aiding the authors in presenting and commenting on the results of their research. Formal dogmatic method will be employed to analyse the relevant law – statutory material and treaties.

3. Discussion

3.1 The genesis and sources of extradition regulation in Austria

Gradually, along with the "shrinking world" of the nineteenth century, the necessity of extradition (and, at the same time, for the practical possibility of its execution) became more and more frequent, giving an impulse to conclude multiple extradition international treaties. For example, the first extradition clause to which the United States was a party was included already in their treaty with Great Britain of 1794, regulating the relations of both countries after the end of the American Revolution (the so-called Jay's Treaty), and concerned the extradition of murderers and counterfeiters (Jay's Treaty).

From the mid-nineteenth century, the Austrian Empire (then transformed into Austria-Hungary), still a significant European power at that time, concluded numerous extradition agreements. In 1852, an agreement was ratified with the Netherlands, and in subsequent years – successively with Belgium, France, the Duchy of Modena, the United States, the Papal States and Spain. At the turn of the 20th century, Austria-Hungary was a party to extradition treaties with almost all European countries, and even with states as exotic as Uruguay (Staatsvertrag, 1896) or Brazil (Staatsvertrag, 1884).

Some of these agreements were long-lived and also tied the legal successors of the dualist Habsburg state that failed in 1918, namely the Republic of Austria and the Kingdom of Hungary (later the Hungarian People's Republic). For example, the agreement of the Austro-Hungarian Empire with Switzerland of 1896 (Staatsvertrag, 1897) remained in force (with regard to Austria) until the ratification of the European Convention on Extradition in 1957, and to this day partially remains in force with regard to relations between Switzerland and Hungary (Fedlex, 1896).

The subject of the analysis in this paper, however, will primarily be the current regulation of the institution of extradition in Austrian state law. As it was already mentioned, the Republic of Austria is a

member of the European Union and has also ratified the European Convention on Extradition of 1957. Already in the 1990s, however, it was assessed as "inefficient" and "inadequate to reality" (Płachta, 1999: 77-94). In connection with the above, a new convention on extradition between EU member states was adopted in 1996, which, however, did not finally enter into force due to its non-ratification by some EU countries (*Convention Relating to Extradition between the Member States of the European Union* [Dublin, 27 September 1996]; Austria has ratified the convention).

In Austria the possibility of extradition was finally replaced – In relations with other EU countries – by the new institution of the European Arrest Warrant (EAW), established by the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*; its Art. 31 ordered to replace the national provisions on extradition in relations between the Member States with the provisions of this decision from 01/01/2004 on. Its regulation is well-described and well known in the literature and doctrine (e.g. Malinowska-Krutul, 2007; Starzyk-Sulejewska, 2007). Therefore, the subject of further analysis will be the regulation of extradition in Austrian state law.

The legal act regulating extradition in Austrian law today is the Federal Law of December 4, 1979 on extradition and mutual assistance in criminal matters, abbreviated as "Extradition and Mutual Assistance Law" (hereinafter – ARHG). When it entered into force on 1 July 1980, it repealed several articles of the Austrian Code of Criminal Procedure *(*hereinafter – StPO), which so far (albeit in a rudimentary way) regulated the way and conditions of extradition. The enactment of the ARHG was part of a broader legislative action carried out in Austria in the 1970s and aimed at a thorough reform and modernization of criminal law regulations. The ARHG also repealed a much earlier act regulating this issue, which was the ordinance of the Ministry of Justice of September 2, 1891, concerning the transit of criminals through Austria (Verordnung, 1891).

The ARHG consists of 78 paragraphs, divided into 8 chapters, titled consecutively (all):

1. "General provisions" (§ 1-9);
2. "Extradition from Austria" (§ 10 et seq.);
3. "Transit Deportation" (§ 42 et seq.) – previously governed by the Ordinance of 1891; in principle, the provisions on extradition apply accordingly to transit;
4. " Mutual assistance for Foreign Countries " (§ 50 et seq.);
5. " Assumption of criminal prosecution and observation; Enforcement of foreign criminal convictions"(§ 60 et seq.);
6. "Obtainment of extradition, transit, transfer, law enforcement assistance, as well as the assumption of criminal prosecution, custody and execution of sentence" (§ 68 et seq.) – thus regulating the situation in which the Austrian authorities request the actions referred to in chapters 2-6 to be performed abroad;
7. "Joint Investigative Groups" (§ 76a-76b) – a chapter added at a later stage related to European cooperation in criminal matters;
8. "Final Provisions" (§ 77-78).

As can be seen from the above, the provisions on extradition from Austrian territory account for nearly half of the ARHG, and further analysis will focus on these too; hence in the remaining chapters, the legislator makes extensive use of the technique of referring to the regulation of chapter 2.

As it is stated in § 1 of the ARHG, the act applies only if not provided otherwise in international agreements. This regulation, opening the law since its creation, is an expression of the inseparability of the extradition from international law; the existence of international or transnational agreements is a *sine qua non* for the feasibility of its implementation. Hence, this kind of, undoubtedly, rare clause, determining at the outset the subsidiarity of the entire act. In this context, first taken into account should be the aforementioned actual replacement of extradition, within the territories of the European Union, by the institution of the European arrest warrant. In Austria it is regulated by a separate, comprehensive law (Bundesgesetz, 2004). It should therefore be remembered that the ARHG regulation currently applies to extradition requests from countries outside the European Union, and only from those with which Austria has concluded an extradition agreement.

An important general clause was included in § 2 of the ARHG by the Austrian legislator, stating that the application of a foreign party may be granted only if it does not violate public order or other essential interests of the Republic of Austria. Such a standard is a "safety valve" for

emergency situations, should all other (numerous and described below) restrictions on extradition and other requests prove to be insufficient. § 3 establishes the general principle of reciprocity, undoubtedly crucial for the entire regulation. According to it, a foreign request for the extraditon may be complied only if it is guaranteed that the requesting state would treat the application of the Austrian party analogously. In case of doubt on this point, the Austrian court must consult the Minister of Justice.

3.2 Extradition in Austria under the ARHG

The first provision of the ARHG directly relating to extradition is § 10, which provides a general definition of it; hence extradition is recognized as a surrender of a person to the authorities of another state "for the purpose of prosecution for offences punishable by court penalty or for enforcement of imprisonment or a preventive measure imposed for such an offense". A characteristic feature of the Austrian regulation is the prohibition of the extradition of own citizens, resulting directly from § 12 of the ARHG; it should be emphasized, however, that – obviously – It does not apply to situations in which an EAW is applicable (Oberösterreichische Nachrichten, 2008).

Section 12 of the ARHG is supplemented by § 44, according to which the transit of an Austrian national through the territory of the Republic is also unacceptable. Both these provisions have a constitutional rank *(Verfassungsbestimmung)*. It should be mentioned that in Austria there is an original system of dispersed sources of constitutional law – the land's constitution consists of numerous laws of constitutional rank *(Verfassungsgesetze)*, as well as individual provisions of other laws – an example of the latter are the above-mentioned provisions of the ARHG (Allgemeines Glossar).

In principle, it is also impossible to extradite perpetrators remaining under Austrian jurisdiction, irrespective of their nationality (§ 16). Section 15 also introduces the principle according to which it is not permitted to extradite persons who have committed prohibited acts, considered under Austrian law only as military or fiscal crimes. It seems that such a limitation results from the close connection of these types of crime with the legal systems of various states and with significant differences that may arise in this context. Moreover, these types of crimes are harmful only to the interests of a given state, and not to generally protected goods.

Further restrictions are contained in § 14, stipulating that extradition of persons prosecuted for political offences may not occur either. This clause reflects well the complementary nature of the institutions of extradition and asylum – while the former is aimed at general, international protection of the legal order, the latter may be regarded as an exception aimed at the protection of fundamental rights. This exception is protected by the § 14 of the ARHG. Such a reservation is a standard feature of extradition legislation and a long-standing tradition. A famous example of asylum due to the political grounds of prosecution was the refusal of the Italian court to hand over the assasins of the Yugoslav king Alexander I and the French prime minister Barthou in the attack in Marseilles in 1934. This event, widely recognized as an abuse, gave the League of Nations an impulse to create a draft international convention on combating terrorism (Prakash Sinha, 1971: 186).

The regulation of § 14 of the ARHG is extended in § 19, which prohibits extradition to states where criminal proceedings or impending penalties may be contrary to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR, of 4 November 1950; Austria ratified it in 1958 – BGBl. No. 210/1958), as well as if the reason for the prosecution is the origin, race, religion, nationality, ethnicity or political views of the accused. An elaboration of the above regulation is § 20, which absolutely prohibits extradition for the purpose of enforcement of the death penalty; and if the person surrendered could, under the law of the state requesting extradition, face the death penalty, surrender shall be possible only under the guarantee that it will not be carried out. The same applies to other penalties, the imposition of which would be contrary to Art. 3 of the ECHR (cf. Art. 604 § 1 section 1 of the CCP). Further prerequisites, meeting the need to provide the accused with basic procedural guarantees, are contained in § 19a, imposing additional requirements in the event of extradition for the execution of freedom sentences imposed *in absentia*.

Noteworthy is § 17 of the ARHG, pursuant to which extradition of a person who is subject to the jurisdiction of a third state but has already been validly sentenced or served a sentence is unacceptable – the legislator is undoubtedly aiming at global protection of the fundamental procedural principle *ne bis in idem*. Section 18, on the other hand, absolutely prohibits extradition

also if the offense to be prosecuted has been statute-barred either under the law of the requesting state or under Austrian law (!). Similarly, extradition of minors at the time of the alleged act is also prohibited (§ 21).

Finally, § 26 et seq. contain procedural and technical provisions relevant already at the stage of implementation of extradition; their analysis is beyond the scope of this work. However, it is worth noting the content of § 29, which regulates the possibility of pre-trial detention of a person subject to an extradition request. A special provision is also § 32, which provides for a simplified extradition procedure in the event of consent of the wanted person; the legislator rightly assumes that in such a case the risk of violating the rights of the perpetrator is significantly reduced.

4. Results

As can be seen from the above considerations, the Austrian legislator has effectively regulated the issue of extradition and its related institutions in one act. From the point of view of legislative technology, this law can be considered a successful work, as evidenced by nearly 40 years of its existence and a relatively small number of amendments (eleven in total, almost all already in the 21st century). There is no doubt that legal stability and certainty is particularly important in matters of international law – the Austrian regulation meets these conditions.

However, as it was already pointed out, it is clear that the ARHG is currently only the backbone of the legal system governing extradition in Austria; at the same time, its importance is severely limited by the existence of the institution of the European arrest warrant. However, this regulatory duality does not seem to be a systemic problem in Austria. The problem of conflict with the EU law – common in this type of situations in European jurisdictions – has been solved by a clear separation of the scopes of regulation. This is undoubtedly due to the inclusion of extradition and related issues in a single law.

5. Conclusion

Analysis of ARHG can be useful for European lawyers and legislators - high quality of the Austrian act shows a possibility of creating a long-living and coherent regulation. In spite of strong bounds to the international law, the Austrian example proves that it is possible for such a regulation to exist also in the age of European integration and ongoing unification of law.

References

ARHG – Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen (ARHG), BGBl. No. 529/1979. ARHG quotations after the English translation. [Electronic resource]. URL: https://www.imolin.org/doc/amlid/Australia/Austria_Federal_Law_on_Extradition_and_Mutual_Assistance_in_Criminal_Matters_1979_As_Amended_2003.pdf

Bundesgesetz, 2004 – Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union (EU-JZG). BGBl. I № 36/2004. [in German]

Staatsvertrag, 1894 – Staatsvertrag zwischen der österreichisch-ungarischen Monarchie und dem Kaiserthume Brasilien wegen gegenseitiger Auslieferung von Verbrechern. RGBl. 142/1884. [in German]

Staatsvertrag, 1896 – Staatsvertrag zwischen der österreichisch-ungarischen Monarchie und der Republik Oriental von Uruguay wegen gegenseitiger Auslieferung von Verbrechern. RGBl. 221/1896. [in German]

Staatsvertrag, 1897 – Staatsvertrag zwischen der österreichisch-ungarischen Monarchie und der Schweiz wegen gegenseitiger Auslieferung von Verbrechern. RGBl. 1/1897 [in German]

StPO – Strafprozeßordnung, 1975. [Electronic resource]. URL: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002326 [in German]

Verordnung, 1891 – Verordnung des Justizministeriums vom 2. September 1891 betreffend die Durchlieferung von Verbrechern durch Österreich, JMVBl. Nr. 34/1891. [in German]

Allgemeines Glossar – Parlament erklärt – Allgemeines Glossar – V. [Electronic resource]. URL: https://www.parlament.gv.at/PERK/GL/ALLG/V.shtml [in German]

Cisoń, 2003 – *Cisoń, B.* (2003). Prawo „do azyli" czy prawo „o azyl"? [The right of "asylum" or the right of "asylum"?]. Instytucja azylu w zarysie. *Studia Redemptorystowskie*. 1: 215-260. [in Polish]

Fedlex, 2003 – Fedlex – Die Publikationsplattform des Bundesrechts – Auslieferungsvertrag zwischen der Schweiz und Österreich-Ungarn [Electronic resource]. URL: https://www.admin.ch/opc/de/classified-compilation/18960002/index.html

Jay's Treaty – Jay's Treaty: Primary Documents in American History. [Electronic resource]. URL: https://guides.loc.gov/jays-treaty

Malinowska-Krutul, 2007 – *Malinowska-Krutul, K.* (2007). Ekstradycja a przekazanie w ramach europejskiego nakazu aresztowania [Extradition and surrender under the European arrest warrant. Prosecutor's Office and Law]. *Prokuratura i Prawo*. 6: 100-114. [in Polish]

Oberösterreichische Nachrichten, 2008 – Im neuen Jahr wird auch Österreich eigene Staatsbürger ausliefern. Oberösterreichische Nachrichten, 3.09.2008. [Electronic resource]. URL: http://www.nachrichten.at/oberoesterreich/Im-neuen-Jahr-wird-auch-OEsterreich-eigene-Staatsbuerger-ausliefern-br;art4,14046. [in German]

Płachta, 1999 – *Płachta, M.* (1999). Konwencja Unii Europejskiej z 1996 r. o ekstradycji [European Union Convention on Extradition 1996]. *Studia Europejskie*. Pp. 77-94.

Prakash Sinha, 1971 – *Prakash Sinha, S.* (1971). Asylum and International Law, The Hague.

Starzyk-Sulejewska, 2007 – *Starzyk-Sulejewska, J.* (2007). Implementacja współpracy sądowej w sprawach karnych [in:] W. M. Góralski (ed.) [Implementation of judicial cooperation in criminal matters [in:] W. M. Góralski (ed.)]. *Unia Europejska. Tom II. Gospodarka – Polityka – Współpraca*. Kraków, pp. 220-234. [in Polish]

Wierzbicki, 1976 – *Wierzbicki, B.* (1976). Ekstradycja, azyl, wydalenie [Extradition, asylum, expulsion]. *Państwo i Prawo*. 31: 4. [in Polish]