

Extradition of A Person for Criminal Prosecution: International Law and National Aspects

Extradición de una persona para su enjuiciamiento penal: derecho internacional y aspectos nacionales

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Abstract

The article analyses the scientific and practical problems of the institution of extradition of a person for a criminal prosecution substantiates the importance of this institution and its role in the law enforcement activity of the state. The authors carried out a comparative analysis of the provisions of the fundamental international acts in force and Russian legislation governing extradition issues. At the same time, attention is paid to establishing the significance of international treaties and agreements on extradition for cooperation between states in law enforcement. The article focuses on an important circumstance that not only persons who have committed conventional (with increased risk), but also ordinary crimes are subject to extradition. The analysis of aspects of extradition of a person for criminal prosecution on the basis of international treaties and agreements or in accordance with the principle of reciprocity is presented. Particular attention is paid to the issue of ensuring the rights and legitimate interests of the person subject to extradition, including his/her right to ensure the security of the extradition process. The problem of inadmissibility of extradition in the event of the possible use of torture, ill-treatment, as well as persecution for religious and political reasons, as well as in a situation of unfounded accusations of terrorist activity, is considered separately.

Keywords: extradition, criminal prosecution, extradition, convention, request.

Resumen

El artículo analiza los problemas científicos y prácticos de la institución de extradición de una persona para un enjuiciamiento penal fundamenta la importancia de esta institución y su papel en la actividad policial del Estado. Los autores llevaron a cabo un análisis comparativo de las disposiciones de los actos internacionales fundamentales en vigor y la legislación rusa que regula las cuestiones de extradición. Al mismo tiempo, se presta atención a establecer la importancia de los tratados y acuerdos internacionales sobre extradición para la cooperación entre Estados en la aplicación de la ley. El artículo se centra en una circunstancia importante de que



no solo las personas que han cometido delitos convencionales (con mayor riesgo), sino también los comunes están sujetos a extradición. Se presenta el análisis de aspectos de la extradición de una persona para su enjuiciamiento penal sobre la base de tratados y acuerdos internacionales o de acuerdo con el principio de reciprocidad. Se presta especial atención a la cuestión de garantizar los derechos e intereses legítimos de la persona sujeta a extradición, incluido su derecho a garantizar la seguridad del proceso de extradición. El problema de la inadmisibilidad de la extradición en caso de posible uso de tortura, malos tratos, así como persecución por motivos religiosos y políticos, así como en una situación de acusaciones infundadas de actividad terrorista, se considera por separado.

Palabras clave: extradición, procesamiento penal, extradición, convención, solicitud.

Introduction

The foreign cooperation of the Russian Federation in the battle against corruption is one of the objectives of state policy in the field of anti-corruption and is intended to meet Russia's obligations under foreign courts' treaties. International cooperation in the criminal prosecution of perpetrators of crimes is an impetus for the modernization of law enforcement, regardless of existing contradictions (Cherniavskiy et al., 2019; Karsai, 2019). The most important area of this cooperation is the interdisciplinary institution of extradition of persons for criminal prosecution (extradition), the main procedures of which are established by the norms of international law (Schabas & Schabas, 2000; Stahn, 2019; Wise et al., 2009). The execution of extradition is a manifestation of the goodwill of the issuing state and a confirmation of its adherence to global standards for the protection of values that are significant for humanity from unlawful encroachments. In this regard, the extradition of persons who have committed not only conventional but also conventional crimes is carried out (Giffin, 1982; Hartmann, 2008; Kruessmann & Soltanowich, 2019; Nemets & Zagaris, 2019; Sodikov, 2020; Zagaris & Plachta, 2019).

Objective

A comparative study was carried out by the authors of the terms of the fundamental foreign acts in effect and of Russian legislation regulating extradition issues. Attention is paid to determining the value of international extradition treaties and arrangements for cooperation between states in law enforcement. The paper focuses on a significant situation in which not only individuals who have committed traditional crimes (with increased risk) but also ordinary crimes are subject to extradition.

Material and Methods

To write the article, the authors applied dialectical, comparative, formally logical, legal modelling, inductive and deductive methods.

Results and Discussion

The authors have 1) identified the factors that determine the significance of international normative acts for the development of the institution of extradition; 2) analyzed the theoretical provisions and legal foundations of extradition in the Russian legal system; 3) formulated the definition of extradition of a person for criminal prosecution; and 4) substantiated the directions of improving the criminal procedure legislation of Russia, regulating the extradition of a person for criminal prosecution (Oprişan, 2019; Roecks, 1994).

The most important area of cooperation between states in combating crime is the procedure and the inter-sectoral institution of the same name for extradition, which are based on the norms of international treaties, agreements and national legislation.

The program provisions for the extradition of persons for criminal prosecution are provided for by the European Convention on Extradition No. 24 ETS, (1957, hereinafter - the European Convention on Extradition). According to the Convention, extradition is carried out in relation to offences punishable under the laws of the two parties (requesting and requested) by imprisonment for a period of at least one year or more. In cases where conviction and imprisonment take place in the territory of the requesting party, the established term of punishment must be at least four months (part 1, Article 2) (Schabas, 2015; Van den Wyngaert, 1990).

This document limits the powers of the state in relation to the requirement to extradite a person who has committed a crime, the severity of which does not allow the imposition of a sentence of imprisonment. An important criterion for combating crime should be the minimization of losses on the part of the individual, even if he/she is prosecuted.



The European Convention on Mutual Assistance in Criminal Matters (1959) provides for the possibility of the temporary extradition of a person in custody for interrogation as a witness or for confrontation (Art. 11) (Council, 1959; Figge, 1980). This procedure reflects one of the directions of cooperation between states, allowing to overcome various approaches to the criminalization of acts. If the act is recognized as a crime by the legislation of one country but is not criminalized or decriminalized in the legislation of another, the person is extradited for a certain time specified in the official document and confirmed by the requesting party, not for a criminal prosecution, but for interrogation as a witness, including a face-to-face confrontation. Another approach does not allow for extradition due to the direct requirement of the European Convention on Extradition.

Certain issues of extradition are regulated by international conventions focused on combating the most dangerous crimes. The UN Convention against Transnational Organized Crime (2000) regulates extradition in Article 16 "Extradition", recognizing the consistency of the norms of the criminal legislation of states that treat an act as a crime as a fundamental condition. The Convention lists other conditions for extradition: "serious" nature of the offences; the alleged involvement of the crimes in the extradition treaty; in the absence of an agreement between states, the basis for extradition is the Convention itself (Art. 16) (Annex, 2000; Clark, 2004).

International documents also establish restrictions on requests for the extradition of certain persons. In particular, the European Convention on the Suppression of Terrorism (1977) contains a requirement on the inadmissibility of extradition of a person who faces criminal prosecution or punishment for reasons other than the commission of a crime (on the basis of his race, religion, nationality or political views). An additional argument for refusal to extradite may be the assumption that the person's situation may be worsened for any of the reasons listed above (Art. 5) (Andrews, 1977).

The Supreme Court of the Russian Federation expressed its position on the legal status of a person extradited for a criminal prosecution, consistent with international regulations, in the Resolution No. 11 of June 14, 2012, "On the legal proceeding of issues related to the extradition of persons for criminal prosecution or the execution of a sentence, as well as the transfer of persons to serve a sentence". It stated that extradition might be refused under certain circumstances, including age and physical condition, if evidence indicates that it

would pose a danger to a person's life or health (p.13) (Shaibakova & Talan, 2018).

The requirement of the European Convention on the Suppression of Terrorism is consistent with the provisions of the Universal Declaration of Human Rights (1948): every person, wherever he or she may be, has the right to recognition of his/her legal personality (Art. 6); all people are equal before the law and have the right without distinction to equal protection of the law (Art. 7).

An analysis of the rules of international treaties and agreements helps understand the extradition of persons for criminal prosecution: this is one of the forms of international cooperation in criminal and criminal-procedure law; a complex of legal relations between states, other subjects of international law; these bodies are empowered to carry out law enforcement and judicial activities; extradition is expressed in the procedure for the extradition of a person who committed a crime for criminal prosecution or execution of a conviction against him; extradition is based on international treaties, agreements, national legislation and/or the principle of reciprocity.

Extradition is one of the institutions of criminal prosecution based on the rules of international and implementing national law. The European Convention on the Transfer of Criminal Proceedings (1972), ratified by the Russian Federation, establishes the possibility of *transferring a person for criminal prosecution*. The only condition for such a transfer is the "classic" requirement for all extradition conventions on the consistency of the norms of the national legislation of the requesting and requested states.

As a result, the extradition of persons for reasons of humanity is manifested in the establishment of a number of restrictions and, in some cases, prohibitions on the performance of actions to extradite persons in respect of whom an extradition request has been made (Andrews, 1977).

An analysis of international documents on extradition of persons for criminal prosecution allows us to formulate conclusions that they: 1) determine the limits of the powers of states in making decisions on extradition; 2) proceed from a reasonable combination of public and private interests in the legal regulation of the extradition of a person for criminal prosecution or execution of a sentence; 3) establish the requirement of "mutual criminalization" of acts; 4) approve a single requirement for the admissibility of the extradition of a person for criminal prosecution - the commission of crimes punishable in accordance with the legislation of the requesting and requested



parties; 6) establish the requirement for the minimum term of punishment in the form of imprisonment (four months), which is supposed for the extradited person; 7) establish the procedure for filing a request for extradition and a list of documents; 8) impose restrictions on the execution of extradition requests filed for other reasons (except for the commission of a conventional or common criminal offense); 9) certify the right of persons subject to extradition to the protection of the law and recognition of their legal personality in the application of any procedures based on the norms of international or domestic law; 10) allow the transfer on the basis of a bilateral agreement, the transfer of the criminal prosecution as a whole; 11) indicate the possibility of extradition in the absence of a bilateral treaty between states (in this case, the ratification of the corresponding convention is equated with the treaty).

The literature notes that the fulfilment of such obligations is carried out by Russia on the basis of international treaties “concluded with about a third of the world’s states. With all other countries, issues of extradition are resolved on the basis of diplomatic politeness” (Annex, 2000). In fact, by executing extradition requests, states show not only respect for the rules of international law, goodwill in the implementation of its prescriptions, but also recognition of the sovereign rights of another state in the field of criminal proceedings.

Chapter 54 of the Criminal Procedure Code of the Russian Federation (CPC RF) is devoted to the extradition of a person for criminal prosecution or execution of a sentence.

Chapter 54 of the Criminal Procedure Code of the Russian Federation establishes two aspects of extradition: criminal prosecution, and execution of the sentence. It seems difficult to give a detailed analysis of both situations of extradition in the format of a scientific article. Therefore the authors limited themselves to considering the issue of extradition of a person for criminal prosecution.

The initiation of the procedure for the extradition of a person for a criminal prosecution, in accordance with Article 460 of the Criminal Procedure Code of the Russian Federation, is carried out as follows: the Russian Federation sends a request to a foreign state to extradite a person for criminal prosecution on the basis of an international treaty with this state; sending a request on the basis of a written obligation of the Prosecutor General of the Russian Federation to extradite persons in the future on the basis of the principle of reciprocity to this state.

The restriction on the extradition of persons for criminal prosecution is established in part 1, Article 61 by the Constitution of the Russian Federation: a

citizen of the Russian Federation cannot be expelled or extradited to another state. Part 1, Article 13 of the Criminal Code of the Russian Federation establishes that citizens of the Russian Federation who have committed a crime on the territory of a foreign state are not subject to extradition to this state. At the interstate level, the above provisions are confirmed in par. "a", Part 1, Article 57 of the Convention of the CIS member states (1993) "On legal assistance and legal relations in civil, family, and criminal matters" (Minsk Convention).

The Code of Criminal Procedure of the Russian Federation establishes the limits of the criminal liability of a person extradited to the Russian Federation. According to Part 1, Article 461 of the Criminal Procedure Code of the Russian Federation, a person extradited by a foreign state cannot be detained, prosecuted, or convicted without the consent of the extraditing state, or transferred to a third state for a crime not specified in the extradition request.

On the basis of Part 1, Article 462 of the Code of Criminal Procedure of the Russian Federation, the Russian Federation can extradite a foreign citizen or stateless person to a foreign state for criminal prosecution. The grounds for the extradition of a person to a foreign state by Russia, in accordance with Part 1, Article 462 of the Criminal Procedure Code of the Russian Federation, are an international treaty of the Russian Federation; the principle of reciprocity; the person being issued does not have Russian citizenship; finding a person on the territory of the Russian Federation; the commission by this person of an act that is punishable under the criminal law of the Russian Federation and the law of a foreign state that sent a request for the extradition of a person.

To ensure the possible extradition of a person, a preventive measure in the form of detention or house arrest is chosen (Article 466 of the Code of Criminal Procedure of the Russian Federation). A preventive measure is chosen subject to the severity of the crime committed by a person to be extradited, the age of this person, his state of health, and other circumstances (marital status, registration at the place of stay or residence, permanent place of work, etc.).

The Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) would guarantee the right of everyone to an effective remedy before a public authority, even if the violation was committed by persons acting in an official capacity (Art. 13). In fact, this provision means not only protection of a person from unlawful law enforcement, but also from abuse of law.



In order to comply with the requirements of the European Convention, it is necessary to objectively evaluate the information provided by the person under discussion (or his/her defence counsel). If there are doubts about the legality of the request for extradition and the reliability of the materials received, it should be recognized that it is permissible to carry out measures to a) obtain information from other persons (for example, family members living with this person, his/her colleagues at work); b) conducting a medical examination, prescribing a forensic medical examination to establish traces of beatings and torture on his body (if the person claims that they were applied to him/her in the state whose law enforcement agencies have requested his extradition); c) conducting an examination of the circumstances specified in the application by the person, requesting to recognize him/her as a refugee or to grant him/her political asylum in any state, not only in the Russian Federation.

Conclusion

A complicated network of rules, treaties, and agreements is foreign extradition. For the most part, a treaty regulates the extradition to another country of an individual residing in (or visiting) one country (the Resident Country) who has charged that person with one or more crimes (the Extraditing Country). Many democratic countries have arrangements with each other to extradite citizens convicted in another country of crimes, as long as "dual criminality" is shared between the two countries. In regulating the process of extradition of a person for a criminal prosecution, Russian legislation needs to be adjusted on the basis of the rules of fundamental international acts aimed at guaranteed protection of human rights and fundamental freedoms, expanding the prospects for cooperation between states in the fight against crime.

Russian legislation in extradition of a person for criminal prosecution can be improved in the following areas:

- 1) revision of the rules of the Code of Criminal Procedure of the Russian Federation to bring them into line with the conventional norms, as well as other treaties and agreements of the Russian Federation devoted to the fulfilment by the state of its obligations to observe and protect fundamental human rights and freedoms;
- 2) clarification of the grounds for choosing a preventive measure in the form of detention in respect of the extradited person (in particular, justifying the impossibility of choosing a preventive measure in the form of house arrest);
- 3) the introduction of an urgent procedure for considering complaints about the selection of a

preventive measure in the form of detention of persons in respect of whom the issue of extradition for criminal prosecution is being decided (considering that this requirement is established in par. 4 of Part 5 of the European Convention);

4) elimination of a formal approach to verification of the circumstances confirming the threat of cruel treatment, torture, which may occur in the event of a person being extradited to a foreign state for criminal prosecution.

In our opinion, the process of extradition of a person for criminal prosecution should be accompanied by ensuring his/her personal safety. We should note that this problem attracts sufficient attention from both Russian and foreign scientists. In practice, however, the extradited person can be exposed to threats from interested parties. In this regard, it is necessary to develop an interstate mechanism for the application of norms in national criminal procedural laws on procedural means of ensuring the safety of the extradited person.

The extradition of a person for criminal prosecution is an important institution of international law, as well as constitutional, criminal and criminal procedural law of Russia, a form of international cooperation between states in the field of law enforcement, which allows them to overcome disagreements of a political, national, religious, economic and other nature.

We have to admit that the rules of Russian criminal procedural law on extradition need to be adjusted based on the fundamental international documents, as well as on the positive foreign experience in the implementation of such activities.

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