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Historical and Legal Perspectives of the Right of Asylum and Extradition until the 19th Century

The presence of asylum and refugee rights is often considered as an achievement of the modern international law. Indeed, it has gained more importance since the beginning of the 20th century and has become a core issue nowadays in modern democracies. In this paper I will attempt to give a comprehensive outlook of the evolution of asylum and refugee rights. This part of international legal history seems to be marginalized, though it is a legal institution with long and abundant history. One can clearly separate the stages of its evolution from the very beginning.

From the beginning, the major obligation of a State was to establish and maintain firm legal order within its borders. This obligation had to be accomplished by its executive power and criminal jurisdiction. A person having infringed upon the country's legal order could flee the jurisdiction of that country. In that case, the obligation to restore that order became difficult and might have clashed with other countries' sovereignty. So the country, whose order was infringed upon, became relievable.

Since the second half of the 20th century international refugee law, asylum rights and the system of extradition has made great strides steadily. Through bilateral and multilateral agreements, which were conducted under the guidance of the UN, an efficient and complex system was built. The recent development was strongly connected with the evolution of human rights, which gained importance after the Second World War. The history of the institution is derived from the past and has showed various forms through its evolution. The underlying purpose of it was to provide appropriate help to those who escaped from unjust legal or political orders, where the common sense of humanity and human rights were infringed upon.

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One can clearly distinguish between its national and international characteristics. The national character was typical until the 17th century, when national legal orders and criminal procedures were dubious and could not provide efficient guaranties and remedies in case of failure. The main purpose behind this right was to provide help to the accused against encroachment until the criminal procedure started with its legal guaranties for a fair and just trial. On the other hand, asylum rights with international characteristics, operating between states, had mainly political or humanitarian reasons.

This legal institution had been considered as a common field for both criminal and international law until the 19th century, when refugees - due to the European revolutions and fights for independence and the improving transportation facilities - fled to other countries. By that time the question of competency finally seemed settled and the international law approach was accepted. Also scholars, at that time, continued heated debate over positive and customary law applicable to asylum rights and extradition.

Though, one can argue that asylum law is the new phenomenon of the 19th and 20th centuries, in my view, the history of international asylum right can be divided into two parts. The first part begins with the establishment of the Roman Empire and lasts until its consolidation. During that period, territorial asylum served for both local and foreign refugees due to the current state of the criminal jurisdiction and inhuman punishments. The principle of talion made it necessary to set up places where the perpetrators, alleged or real, could find temporary or permanent shelter from their persecutors. The second stage commenced in the 16-17th century when extradition agreements had already been signed between European monarchies in order to punish political asylum seekers. This period has lasted since then and reached its peak in the 20th century when people left their original countries in large numbers.

Reasons can also be classified and they have not changed during the past 3000 years. These are criminal, political and economic reasons, which urge people to flee from a certain area.

In ancient times asylum first appeared in the Middle East. The first signs of the existence of asylum rights can be found in the ancient Egyptian and Assyrian history. Obviously, the first places providing protection were statues erected by ancient kings.[2] Helfrecht[3] points out that in

[2] Several writers, such as Fulgentius, Bernhardus, Sixtus Senensis and Alphonsus Fostanius argued that King Assyrophernes could be considered as the founder of asylum rights. Because at the statue - set up in memory of his son by him - a fleeing criminal could get asylum. Later other places are mentioned which provided shelter for

Assyrian history the same kind of mythology existed, though the Assyrian religious customs mostly deny its possibility. Also there is little evidence that Persians would grant asylum right to certain places. [4]

Contrary to other middle-eastern nations, Jewish tribes established a firm judicial system based on their religious norms. They inserted this institution into their system and used it to control the flow of vendetta. First of all, Moses' legislation had one very strong aim and it was to establish a firm social and legal order in the Jewish state. As the first step they had to limit the use of talion when it could cause injustice. It was essential in cases where the crime was committed without any intention. Above all, the altar of God became the most fundamental and sacred place which provided help for those in need. From there nobody could be taken away without the permission of God.[5] This tradition lived on in the ecclesiastical asylum. Later Moses ordered the Jewish tribes to choose cities for asylum. These cities were possessed by the Levites.

In that age, international asylum existed without any international agreements. By that time, nations did not recognize their shared interest to extradite criminals; apart from a few exceptions; one can hardly talk about international legal order. If an offender chose voluntary exile it was considered to be equal to the death penalty in some cases. That is why the perpetrating country very rarely asked for extradition and even more exceptional, it was only under the pressure of an exceeding military power, when a refugee protected by the right of visitors was extradited. However, this kind of asylum was not recognized by Jewish tribes.

In the case of Greek tribes it is even more difficult to trace the source of this right. Firstly, they had no unified legislation that could have had a control over every Greek tribe. They had no monolithic religion either, contrary to the Jewish. It is also undemonstratable[6] that the Greeks received asylum through reception, as the nations they had contact with (e.g. Egyptians, Persians and Phoenicians), did not use the same legal institution. Neither could they have adopted it from the Jewish as there were great differences between the Greek and Jewish rights of asylum. So this

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refugees.
[3] Helfrecht, Histor.: Abhandlung von den Asylen, Hof 1801. p 9.
[4] Montesquieu wrote (De l'espirit de lois XXV.3.), by Chardin ("Voyage en Perse"), that in Persia the right of asylum was ascribed neither to mosques nor to other sacred places. Refugees could find shelter only at the graves of great saints, the gates, stables and kitchens of the King's residence. So only Greek cities under Roman conquest, which referred to Persian kings as a granter of their rights, could keep their rights to give asylum to fleeing people.
[5] 2 Moses 21,14
[6] Messinger, Simon: A menedékjog történeti fejlődése és ez idő szerinti jelentősége, Magyar Igazságügy, 1883.XX.3. p. 249

right could be regarded as an embodiment of humanity, since it emerged from the craving for defence of the weak against the power of the stronger. As it was only the gods who could afford asylum, every side of the asylum was sacred to gods. The first ones were established in Thebe and Athenea and were called altars of mercy, which were open for anyone. Later temples, altars, and sacred rivers and groves possessed the right of asylum and their peculiarity was that they provided equal and unlimited asylum. Consequently, foreigners could also take advantage of them.

As it was mentioned before, the purpose of these places was to limit despotism and cruelties in Greece. For instance, those who massacred the innocents sheltered in the temple, during wartime, were regarded as blasphemers. Also slaves could find shelter from their cruel masters in those places. Later those who committed certain kind of crimes were deprived of the right to make use of the place. Just like those as who were deprived of their civil rights and sentenced to infamy by court or law. These shelters were strongly protected by laws and religious norms so people infringing upon these rules could face profanation; death penalty; exile or they could also be cursed.

Although, in the beginning, religion was only an instrument of the Greek right of asylum, its aim was to provide protection for the defenceless. Later it was absorbed to their religion and became a religious institution which expanded its scope further than right and unlawful criminals, such as murderers or assassins who stayed there remained unpunished. It was, in fact, the approval of injustice by divine laws.[7]

Another institution also provided legal help for those in need. It was the right of the visitors, which was highly respected in Greece and was applied to the Greeks and foreigners as well. Territorial asylum was first based on this right. The foreigners, who committed a crime in their country of origin, found shelter in the whole territory of the other country. By the mere fact that one entered that territory, he gained entire protection. Territorial asylum was maintained by the fact that there was no real connection between nations and the religious sentiment in Greece.

Roman asylum rights were strongly connected to the establishment of Rome. The first asylum was established by Romulus and played an important role in the foundation of Rome. The aim was to establish a strong bellicose state and for that reason the city was opened for all of the

[7] In order to finish this practice in 22 AD Tiberius ordered the Greek cites to prove their legal title before the Senate. (Tacitus, Annales III.60.)

fleeing people. So it can be stated that Roman asylum was based on the principle of practicality. Presumably it was the first asylum in Italy, except for the Greek colonies in Graecia Magna. This view is supported by the fact that if the same kind of asylum had existed in other Italian cities, Rome would not have been that popular to attract so many people from other places, who, later, formed the class of 'aliens'.
Also we can assume that this institution was originally adopted from the Greeks because in Latin the Greek word 'asylum' was used and the havens were similar, for instance they considered the same gods as refugees' protectors.[8]

Roman social and legal order was established relatively fast. Legislation and jurisdiction gradually developed all the necessary legal guaranties to provide a fair trial and punishment for the accused. During the prosperity of the Republic there was not a real need to enforce these rules. Legislation was flexible and became only a tool in the hands of the powerful potentates. Judges increasingly used *extraordinaria cognitito*, which widened the possibility of judicial subjectivism. The praefectus urbis' and governors' jurisdiction covered more areas than before. Some authorities gained the right to punish certain crimes that sometimes meant a danger to the public for being judged without previous accusation.[9] Criminal laws became more severe. For instance, *Lex Cornelia de sicariis* destined that even *dolus* was punishable and its external appearance in the act in question was not the prerequisite for culpability. So the person who carried a weapon with the intention of killing or robbing somebody could be punished as a murderer. Moreover, according to *Lex Julia de majestate* not only the animus, but also the plan could be considered by criminal jurisdiction. This kind of extension of state authority set the path to further development of asylum rights.

In Rome, as in ancient Greece, certain places were counted to have the right of asylum. These were scared temples, altars, emblems and scared persons, such as vestal virgins and *Flamen Dialis*. Later emperors - as the Pontifex Maximus - meant protection by themselves.[10] Some of these places were open to everyone and others were not. Open asylums were Romulus' asylum and Caesar's grave.

The violation of the asylum was strictly punished; nevertheless it occurred in several cases. Besides divine vengeance, some other punishments were aque et ignis interdictio, deportatio, damnatio ad bestias and furca. This clearly indicates that these places were the last hope of

[8] Bulmerincq: Das Asylrecht und die Auslieferung flucht. Verbrecher. Dorpat. 1853 p 12
[9] Rein: Das Criminalrecht der Romer, Leipzig, 1844 p. 36
[10] supra note 6 at p 260

humanity and justice in Rome and, consequently, they were strictly defended. Emperors developed it further by their legislation.

Referring to its international perspectives, we note that Roman asylum is also considered as territorial asylum, though it was limited by mutual legal aid, and bound by Romans and their allies. This connection was regulated by *jus fetiale* and execution was the duty of an additional act. As a principle, Rome did not protect foreign criminals, at least not inevitably and not without stints. We should take a look at certain cases related to this field.

If a Roman citizen committed a crime against another Roman then it was not the forum *delicti commissi* acting as the competent authority, but they submitted the case to Roman judicature.[11]

Also Roman laws did not exclude from this remedy the peregrines. During the era of the Kings and the Republic, Romans signed foedus with other nations so that if a Roman citizen violates one of those citizens, he could be extradited to that nation for punishment.[12] However, parallel to the termination of foedus agreements, this practice was abandoned. On the other hand, the imperial Rome insisted on extraditing its citizens in order to punish them.

The institution called deditito regulated crimes committed against other states. In this case, the extradition was executed for the sake of punishment, not of trial. Since Roman citizens could be extradited by this law, extradition was preceded by strict and deep examination of the case.[13]

Finally, we can state that the Roman asylum institution was an important stage during the evolution of the right of asylum. Territorial asylum was limited by the consequent and regular application of extradition and the perpetrating country's criminal jurisdiction was supported by international agreements.

The middle age asylum laws were incorporated by ecclesiastical norms. However, these cannot be considered as belongings to the domain of international law because they were connected with crimes committed on the territory of the Church. Ecclesiastical asylum right represented the Catholic Church's mercy and forgiveness to the secular world. In 323 AD, Constantine the Great authorized temples to exercise the right of asylum. With that power the Church got

[11] for instance, when a Roman citizen's sons were killed by Roman legionaries, the case was judged by the Roman Senate because national pride would have been pulled down if it had invoked the help of a foreign authority.
[12] Weiss: Le droit Fetial, 1880 p 51-53. ll
[13] supra note 6 at p 263

involved into the criminal jurisdiction of the secular state, which often caused conflicts between them as the Church gained more and more power.

From the 16th century the power of the Church declined and the secular states won back the authority of their jurisdiction. France was the first who repealed the ecclesiastical asylum laws in 1539, followed by other European states: England in 1624, Prussia by the Allegemeines Landrecht, Saxon-Weimar in 1827,[14] Hungary in 1855 and Spain kept it until the 1860's.

In the secular world the first extradition agreements were signed between the English King, Henry II and the Scottish King, William, in 1174. They agreed to punish or extradite criminals of high treason. The treaty signed by the French King Charles V and the Count of Savoy on 4th of March 1376 is considered to be the first extradition treaty. During the 16-17th centuries several treaties were signed between European monarchs. Their main aim was to extradite the political asylum seekers. Despite these treaties, rulers often disregarded them if it fit their political interests. In other words they were not consistently applied.[15]

The international practice of non-extradition of political refugees started at the time of the Great French Revolution. Although there were examples of breaking this principle later, one might argue that since those times the basic principle of protecting political refugees has strengthened. According to the 1833 Belgian Extradition Act: 'extradition treaties shall stipulate that the person extradited cannot be passed a sentence upon either for having political offences committed before the extradition, for acts connected with political offences, or for crimes or offences not named in the actual act, otherwise the extradition will be refused.' [16] Undoubtedly, it was a progressive regulatory policy in this field which established the fundamental principles of modern present asylum rights.

During centuries the view of the superiority of one state's legal system had absorbed. Since the 17th century the number of people moving from one country to another has increased, owing to the development of transportation. Also, the new international interests of the developed countries have emerged. Jurisprudence had to follow this tendency. Its progress started with the extradition treaty signed by France and the Netherlands. During the 18th century extradition treaties were signed only by neighbouring states. Their main principles were the following: The

[14] supra note 8 at p 105
[15] Ballagi, Béla: Menedékjog és kiszolgáltatás, Magyar Igazságügy 1885. XXIII p 23

[16] Ibid. at p 23

extradition based on the principle of reciprocity. Extradition took place only in case of serious crimes. Subjects could not be extradited, and there was no exception for political asylum seekers.

The right of extradition reached a new phase in its evolution in 1830, when distant countries – after neighbouring ones - signed extradition treaties. At that time these treaties provided the undisturbed flow of jurisdictions. The treaties contained the principles and list of crimes when they had to be applied.

International legal theorists in the 19th century continued the debate over relationship between the nature of international law and issues of the right of asylum. The question was whether the state – which was asked for extradition by the violated country - should extradite the criminals who escaped to its territory or punish them by its own national criminal laws. Another question was, whether the countries have jurisdiction over crimes committed in other countries, and if so, on what basis?

One group of writers builds upon international law on universal legal order and the other on the sovereignty of states. Similarly to the issue raised by the application of asylum right, scholars argued both for punishment and extradition. These days international law is a customary law because a legislative authority does not exist that could legislate universal measures.

Supporters of sovereignty theory argued that each state possesses the sovereignty to set the rules of its own legal system with the duty to maintain and protect it. Only in case there is no conflict with its legal system, can it assume obligation by agreements with other countries. But in lack of agreements or internal legislation its obligation is only moral and it depends only on her good will and interests.[17] It is a really formal possibility to the states to decide whether to act or not. There were not any positive rules regulating the state's behaviour. The term 'moral obligation' was really flexible; supporters of this theory took different position on material questions. In the absence of positive regulations another tool applicable for that was the *comitas nationum*.

On the other hand, universal legal theorists put emphasis on the principle which argued that every state had the obligation to cooperate in the world legal order. In other words, each state had to support other nations' jurisdiction if necessary. The basic idea was that subjects had the moral duty to contribute to the establishment of an ideal legal order. On the one hand it is a rational need, but on the other, it is an essential prerequisite of the intellectual and material

[17] Falk, Miksa: A menedékjog a nemzetközi jog alapelveiből származtatva. Akadémiai székfoglaló Pesten, 1864 p 23

wealth. Consequently a state is the embodiment of her subjects' will to reach their higher goals. And it means that the state has to protect the universal legal order not only in her territory but also over her borders, when it is necessary and no one has a closer right to act.[18]

It was sovereignty representatives' counterargument that universal legal order existed only theoretically. They accepted the moral obligation to restore the legal order infringed upon but in the absence of a positive law, this kind of obligation could not be based on moral speculations. Practically speaking, in the absence of agreements or laws, a state cannot be obliged to extradite refugees. Also, if a crime having been committed in a country and which is not qualified as crime in the other country, the latter is not obliged to punish the criminal. Anglo-American legal scholars who support this aspect argued that fairness, moral principles and the humanity's common jurisprudential interest obliged states to provide legal help, though it became a positive obligation in the case of existing law or agreement.[19]

The most well-known representatives of universal legal theory were Grotius, Zacharia, Mohl, Bulmerincq and Villefort. Grotius argued that in case the criminal harmed the universal legal order so it was not only the state that was involved, all the states had to restore the order.[20] As it can clearly be seen, each had the positive obligation to either punish, or extradite the fleeing criminal. Mohl and his followers went further when they argued that extradition and legal aid were the preferable means and the use of these had to be based on the principle of a mutual legal aid.

Conclusion

The short history of asylum drawn here points out the values attached to these legal means distinctly. Refugee issues are still relevant nowadays. However the emphasis has shifted from criminals to political and economical refugees but the question is still not agreed whether to protect or extradite them.

Also, theories examined here above, represent a huge undertaking that international legal scholars had to carry out so that the rights of asylum and extradition be recognized as an international legal institution and this debate motivated its further development. However, the

[18] Mohl, Revision der volkerrechtlichen Lehre vom Asyl. (Tubinger Zeitschr. fur die ges. Staatswiss. 1853.)
[19] supra note 15 at p 28
[20] Grotius, Hugo: De Jure belli ac pacis L.II. 20-21 c.

questions they put are not completely answered. In the past 50 years, the application of extradition is still a relevant issue. Political interests still influence certain cases and a consequent, rule-based practice in case of political asylum seekers is still not reality.

Katalin Siska: Perspectives historiques et juridiques du droit d'asile et de l'extradition jusqu'au 19ème siècle

À la fin du 19ème siècle, parallèlement au développement rapide des moyens de transport et l'accroissement corrélatif des possibilités de mouvements transfrontaliers des demandeurs d'asile, l'établissement du droit d'asile est devenu un important sujet de débats juridiques. Mais le droit d'asile ne date pas de cette époque, et ses prémisses sont apparus très tôt. Le droit d'asile a en effet connu de nombreuses évolutions au cours des siècles, mais il a conservé ses objectifs premiers. Dès le début, le droit d'asile a fait l'objet d'une attention toute particulière tant des institutions civiles que religieuses, ce qui a d'autant renforcé le pouvoir de celles-ci. Les tribus juives peuvent être considérées comme les fondatrices des premières normes légales régissant le droit d'asile. Par la suite, les grecs et les romains ont développé l'institution du droit d'asile tant pour des raisons liées à des nécessités historiques et légales provoquées par les circonstances troublées, que pour des raisons liées à l'extension des rapports commerciaux et politiques avec le reste du monde. Au Moyen Age, l'exercice du droit d'asile fut très disputé entre les juridictions ecclésiastiques et séculaires et limité seulement aux asiles locaux. Les premiers traités d'extradition apparurent cependant à la même époque. Il résulte de cette évolution la création d'un système complexe régissant les extraditions internationales dans les années 1850. C'est à cette époque que d'intenses débats entre théoriciens de la légalité et les théoriciens de la souveraineté débattirent du droit d'asile et de l'extradition. Hugo Grotius fut le précurseur sur ces thèmes et Robert von Mohl est devenu le meilleur représentant de ces idées. Tous deux ont ferment défendu l'idée d'une obligation morale contraignant les Etats à punir ou à extrader tout demandeur d'asile ayant commis un crime. Ils ont de ce fait posé les bases de nos principes juridiques internationaux régissant l'extradition et le droit d'asile.