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EVALUTATION OF THE NATURE AND SCOPE OF EXTRADITION LAWS AND POLICIES BY SHIVANI MISRA*

Introduction- Meaning and Scope of Extradition

One of the most distinct features of a crime is that it is committed not only against a person, but also against the society as a whole. It is an act that is against the established institutions and ideals upon which the foundation of the society rests and therefore, the prosecuting authority in criminal cases is generally the State. Hence, the State is under an obligation to ensure that justice is done. When the persons who have committed a crime or are accused of committing a crime are located within the territory of a State, the State law enforcing authorities have complete jurisdiction to search, apprehend or try the person according to the prevailing laws. However, when a person escapes to another State pursuant to committing a crime, the jurisdiction of the State, where the crime was committed, gets extinguished. In order to ensure proper dispensation of justice, such a person must be brought back to the land where he committed the offence. This forms the foundation of the principles governing the laws of extradition.

Extradition is the act of surrendering of a criminal by a foreign State, to which he has fled for refuge from prosecution, to the State within whose jurisdiction the crime was committed; upon the demand of the latter State, in order that he may be dealt with according to its laws[1]. The term extradition has been defined to mean differently in different times and it is most commonly understood as the process whereby under a treaty or upon basis of reciprocity one State surrenders to another State a person accused or convicted of a criminal offence against the laws of the requesting State[2]. According to the United Nations, "Extradition" means the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offence[3].

Contemporary relevance of Extradition

In the current global era, the increase in movement of people and goods across borders has also ushered in a new dimension of crime. Criminal jurisprudence now faces the increased impact of trans-national crimes[4]. The present century has been characterized by a wonderful improvement in facilities of travel leading to rapid movements in population. As flight from justice has become easier and more frequent, the necessity to check it has become more

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[1] Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.
[2] JG Strake, Introduction to International Law, Tenth Edition(1989) p. 352
[3] UN Model of Extradition, 2004
[4] Article 3, The United Nations Convention against Transnational Organized Crime, an offence is transnational if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State

apparent.[5] With the growth in science and technology, communication channels have opened between nations and this in turn has made it easier for criminals to flee from States after committing an unlawful act. Thus, the global impact of these results is the need for mutual assistance and cooperation amongst States to maintain peace and secure justice. This concept of mutual assistance to meet the ends of justice has received acknowledgement from the international community which has been instrumental in creating new institutions and expanding the network of bilateral and multilateral treaties designed to outlaw transnational crimes, promote extradition, and authorize mutual assistance.[6] Effective mutual legal assistance through uniform extradition policies are thus the need for the contemporary world.

Origins of Extradition

Maintenance and promotion of global peace has been the sole aim of international relations that states undertake. With the increase in trade and the opening up of barriers between states, crime acquired a transnational character. It is in this scenario that the need of extradition increased, and thus enabled a holistic development of the laws of extradition. From the mid 1980s until after the Second World War, the global focus seemed to shift towards the apprehension and retention of common criminals.[7]

Ultimately, extradition is a process by which a sovereign state softens its sovereignty over the persons residing in its territory in order to serve a greater purpose of ensuring global peace. Thus, the conflicting interests of the extraditing state and the demanding state have to be carefully balanced. It is for this reason that extradition is most commonly based on the principles or reciprocity or through a bilateral treaty. Extraditions may also be made without a treaty if it appears to be in the interest of law and security of the conserved countries.

Extradition and the United Nations

Multilateral and bilateral treaties have immerged to shape laws of extradition. In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged Member States to increase their activity at the international level to combat organised crime.[8] The efforts of countries through deliberations at the United Nations ultimately lead to a global convention recognizing the importance to illuminate transnational criminal activities. In 2000, the United Nations Convention against Transnational Organized Crime, with 147 signatories was adopted.[9] The convention popularly referred to as the Organized Crime Convention, attempts to introduce strategies to combat organised criminal activities including money laundering, corruption and other activities of organised criminal groups. These measures closely deal with State's obligations in extradition proceedings across borders in relation to organized crime and corruption offences.[10] If the State Parties do not have an extradition treaty in force between them, the Convention may be taken to operate as the legal

[5] Moore, J. B. (1896). "Extradition." The American Law Register and Review 44(12).
[6] John Dugard and Christine van den Wyngaert, "Reconciling Extradition with Human Rights", *AJIL*, (1998), p.185.
[7] Bassouni, International Extradition
[8] GA Res 39/112, UN GAOR, 39th sess, 101st mtg, UN Doc A/RES/39/112 (14 December 1984).
[9] GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Annex I, UN Doc A/RES/55/25 (15 November 2000) ('Organized Crime Convention').
[10] Article 16, United Nations Convention against Transnational Organized Crime

basis for extradition.[11] Therefore, the world order on extradition policies has been greatly influenced by the efforts of the United Nations.

Aut Dedere Aut Judicare

The fundamental principle behind the extradition of criminals across jurisdictions has been, in one way or the other, been a part of most judicial systems. International Customary Law recognizes it in the form of *aut dedere aut judicare*. The principle denotes an alternative obligation to extradite or prosecute an offender. This phrase which was coined by Grotius has lead to the development of extradition treaties in the modern world. An offender is deemed to be punished for a crime he committed in another jurisdiction, if he is not extradited to the jurisdiction wherein he committed the offence.[12] International conventions that concentrate on sectoral eradication of terrorism have attracted the principle to the greatest extent. For example, Article 7 of the Convention for the Suppression of Unlawful Seizure of Aircrafts states, "The Contracting State in the territory of which the alleged offender is found, shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution[13]."

The positive impact of the adoption of this principle is that it results in the offender facing prosecution for the offence he is alleged to have committed. The offender cannot avoid criminal responsibility by fleeing into the jurisdiction of another State. The question of alternate prosecution or extradition was addressed by the International Court of Justice in the case of Belgium vs. Senegal.[14] The court held that a State which received a request for extradition can relieve itself of its obligation to prosecute the offender by acceding to the demand of extradition.

Extradition and the Universal Principles of Human Rights

While extraditing an alleged offender from one state to another, the states concerned are bound by the conditions in the treaties that impose such obligations. However, the states cannot evade the rights of the offender. The offender or suspected offender is to be protected against any breach of human rights. Human rights violations have acquired an increasing important space in international law. Thus, while extraditing criminals the states cannot violate the human rights of the persons so apprehended. Thus, extradition policies need to be certain and must ensure fair trial proceedings that do not unnecessarily encroach upon human rights from discrimination in order to ensure that they meet their obligations under international human rights law[15]. Human rights form an intrinsic part of the existence of any person. To keep a check on the states' encroaching upon the human rights of the alleged criminal, the role played by the Universal Declaration of Human Rights cannot be undermined. Even though the UDHR is not binding in nature, it forms a rule of customary

[11] Article 16, United Nations Convention against Transnational Organized Crime
[12] The Law of War and Peace (Classics of International Law, F.W. Kelsey transl.) 1925, pp. 526-529
[13] United Nations Treaty Series, vol. 860, No. 12325
[14] I.C.J. Reports 2012, p. 422
[15] Background Paper on Extradition and Human Rights in the context of Counter Terrorism, Workshop on Legal Cooperation in Criminal matters related to Terrorism, ODIHR (Office for Democratic Institutions and Human Rights) Vienna, 22-23March 2007 available at http://www.osce.org/odihr/24392essed on 10th April 2012

international law and the state parties are persuaded to abide by the principles enshrined in the declaration. It considered being implicit in the UN membership and thus, the principles of the UDHR enable one to understand the global opinion on extradition and its scope in reference to the breach of the principles that govern human rights.

Arbitrary arrest, detention or exile of individuals by nations is not permitted under the UDHR[16]. This, by necessary implication refers to both the extraditing state and the demanding state. The grounds for detention by the extraditing state must adhere to principles of natural justice and customary principles of international law. The must also be communicated effectively to the alleged criminal. By virtue of the UDHR individuals may also seek asylum from persecution[17]. This is slightly more complex. It forms ground for the interplay between international refugee protection and laws relating to extradition and effective balance of both under a sustainable framework. The right to seek asylum has evolved to enable an individual to flee his own country in pursuit of asylum. There appears to be a dichotomy in the scope of the right to seek asylum and the right to extradite. However, the language used in Art 14 of the UDHR is a clear indication of the intention of the drafters of the code and suggests that the provision entitles a person to seek asylum and not a right to receive it[18]. Thus, the interests of the world community and the individual's autonomy to seek asylum need to be balanced to maintain global order, peace and security.

Extradition Principles in India

Extradition principles in India are by and large regulated by the Extradition Act of 1962. The Act underwent major amendments in 1993 and has been in consonance with all international practices that have assumed the nature of customary international law. The statute restricts extradition to those offences that have been mentioned in the extraditing treaty between India and another state or those which are punishable beyond a period of one year in India or the other country concerned. Section 2 of the Act, 1962 gives meaning to various terms used in its following chapters. A "composite offence" is defined to mean an act or conduct of a person occurred, wholly or in part, in a foreign State or in India but its effects or intended effects, taken as a whole, constitute an extradition offence in India or in a foreign State, as the case may be.[19] A composite offence thus includes those acts and omissions that though have not have taken place entirely in India have effects which constitute an offence in India or foreign state. The term only finds reference in Section 2(c) that deals with the definition of "extradition offence". An "extradition offence" has been defined in two prongs: 1. Offences that find specific mention in the extradition treaties, and 2. In relation to non-treaty States, offences that are punishable for not less than one year of punishment under Indian law or laws of the foreign state.

[16] Article 9, *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)
[17] Article 14, *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). Art.1 reads, *1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*
[18] Stephen B. Young, Between Sovereigns: A Re-examination of the Refugee's Status, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 339
[19] The Extradition Act, 1962, S. 2(a)

As stated before, the law of extradition is chiefly governed by the terms of the extradition treaty with a foreign state on the principles of equality and reciprocity.[20] To this end, the Act, 1962 defines an extradition treaty to include any treaty, agreement or arrangement of India with a foreign state relating to extradition of fugitive criminals.[21] Further, by virtue of S. 3, the Central Government may, by notified order, direct application of the provisions of the Act to any foreign state.[22] The Act, 1962 defines a "fugitive criminal" in elaborate terms too.[23] The definition encompasses not only those persons who are convicted of extradition offences in foreign states but also those who are accused of such offences. Those who conspire, attempt or act as accomplices are also included. At the core of the law of extradition lies the importance of due extradition of fugitive criminals. A fugitive criminal may not necessarily be present in India as an accomplice at the time of commission. It has now long been established that his presence is not a *sine qua non* for the Court's jurisdiction.[24]

Procedure of Extradition of Fugitive Criminals to Foreign States with No Extradition Treaty

Chapter 2 and Chapter 3 of the Act, 1962 comprise the procedure for extradition of fugitive criminals. Chapter 3 deals with extradition to foreign states with which India has an extradition treaty while Chapter 2 deals with foreign states with which India does not have an arrangement. The procedure aims at ensuring speedy delivery of justice and seeks to ensure that no country provides a safe haven to fugitives.

Chapter 2 extends from S. 4 to S. 11 of the Act, 1962. Section 4 specifies that, to set the process of extradition in motion, a requisition from the foreign state is mandatory. Such a requisition may be made to the Central Government by a diplomatic representative of a foreign state or by the Government of a foreign State through its diplomatic representative. S. 5 stipulates that the Central Government, on receiving such requisition, if it thinks fit, may issue an order to any magistrate to inquire into the case assuming the offence had been committed with the local limits of his jurisdiction. The magistrate is a magistrate of the first class.[25] Pursuant to such an order, the magistrate is required to issue a warrant for the arrest of the fugitive criminal.[26]

Section 7 prescribes the procedure of inquiry before the magistrate. On appearance before him, the magistrate is empowered to inquire into the case were one triable by a Court of Session or High Court with the same powers and jurisdiction. The magistrate is required to receive evidence on behalf of the foreign State and the accused and come to an independent conclusion regarding establishment of a *prima face* case. If a *prima facie* case has been made out in support of the requisition, the fugitive criminal is committed to prison to await the

[20] Factor v. Laubenheimer, United States Marshal, et al., 290 U.S. 276 (54 S.Ct. 191, 78 L.Ed. 315). *See* dissenting opinion of Justice Butler
[21] The Extradition Act.,1962, S. 2 (d)
[22] India has extradition treaties with 28 countries and arrangements with 10 countries.
[23] *Ibid.*, S. 2(f). It states: "fugitive criminal" means a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or incites or participates as an accomplice in the commission of an extradition offence in a foreign State.
[24] Rex v. Godfrey, (1923)1 K.B. 24; Mobarak Ali Ahmad v. State of Bombay, AIR 1857 S.C. 857, p. 868
[25] The Extradition Act, 1962, S. 2(g)
[26] *Ibid.*, S. 6

orders of the Central Government. The result of his inquiry along with the written statements of the accused is also submitted for consideration of the Central Government. The Central Government, on receiving such a report, may issue a warrant for the custody and removal of the fugitive criminal and for his delivery.[27] However, if a *prima facie* case is not made out, the magistrate discharges the fugitive criminal.

The objective of the inquiry is to ascertain if the requisition is sound and justifies extradition of the fugitive criminal.[28] The role of the magistrate is limited to this end. He cannot beyond his role and inquire into the legality of the extradition treaty.[29] Needless to say, the inquiry by the magistrate is not a trial. The inquiry does not concern itself with the innocence or guilt of the accused or with the merits of the case. The main purpose of the inquiry is to determine whether there are reasonable grounds which warrant the fugitive criminal being sent to the demanding State.[30]

Procedure of Extradition of Fugitive Criminals to Foreign States with Extradition Treaty

Chapter 4 of the Act, 1962 deals exhaustively with extradition to foreign States with which India has a foreign treaty. The chapter applies in cases where the fugitive criminal is found in India and the Central Government finds its expedient to return him to the foreign State by reason of the extradition agreement with that State.[31] To execute his arrest, Section 14 states that such a person can be apprehended under an endorsed or a provisional warrant.
The Central Government may endorse a warrant of apprehension against a fugitive criminal issued in a foreign State if it is satisfied that it was issued under lawful authority. Such an endorsement would be sufficient authority to apprehend the person named and have him brought before the magistrate.[32] 16 empowers the magistrate to issue a provisional warrant of apprehension *suo moto* if he has reason to believe that a fugitive criminal of a commonwealth country is suspected to be, in or on his way to India.[33]

On the accused being brought before him, the magistrate is required to inquire and satisfy himself that the endorsed warrant is duly authenticated and the offence for which the fugitive is apprehended is an extradition offence. Pursuant to such a satisfaction, the magistrate may commit him to prison or discharge him.[34] If committed, the Central Government issues a warrant for his custody and removal to the country concerned.[35]

Juxtaposing the nature of judicial inquiry under Chapter 2 and Chapter 3, the Court in Ram K Madhubani v Union of India[36] held that the powers of the magistrate under Chapter 2 range from collection of evidence to establishment of a *prima facie* case. In contrast, the power of

[27] *Ibid.*, S. 8
[28] Maninder Pal Singh Kohli v. The State and Another, (2006)129 DLT
[29] Charles Gurmukh Sobhraj v. Union of India, CDJ 1985 DHC 493, para 14
[30] Nina Rajan Pillai & Ors. vs Union Of India And Ors., (1997) DLT 487, para 11.
[31] *See* the Extradition Act, 1962, S. 12 & S. 13
[32] *Ibid.*, S. 15
[33] *Ibid.*, S. 16
[34] *Ibid.*, S. 17
[35] *Ibid.*, S. 18
[36] CDJ 2008 DHC 1838

the magistrate under Chapter 3 is limited to ascertainment of authentication of the endorsed warrant and satisfaction over the offence being extraditable.

Procedure of Surrender or Return of Accused or Convicted Persons From Foreign States

The procedures for surrender or return of alleged criminals finds place in chapter 4 of the Act. The chapter applies to persons who are accused or convicted of extradition offences committed in India and who are suspected to be in a foreign State. To bring him to justice, the Central Government may make a requisition for his surrender to the diplomatic representative of that State at Delhi or to the Government of that State through the diplomatic representative of India in that State.[37] On his return to India, the accused or convicted person must be dealt with according to law.[38] Section 21 embodies the rule of speciality: prosecution by the demanding country of a person returned may only be sought for the offence for which he was extradited.[39] The accused/convict can only be tried in India for an offence: for which he was surrendered; or returned; or for any lesser offence disclosed by the facts; or for which the foreign state has given its consent.

Conclusion

Extradition laws and principles governing the extradition have become increasingly relevant in today's world. These policies form the basis of a global legal order as the influx of globalization has opened up channels of communication between sovereign States.

A majority of problems with reference to extradition revolve around the fact that there is no uniform treaty based law. Though, a variety of principles have been recognized as a part of customary international law, none has been given shape of a multilateral treaty that binds a substantial number of states. This results in ambiguity in policy matters with respect to extradition with states that do not have treaty relations. With the enactment of the Extradition Act, 1962 India aimed to being clarity to the policies adopted for non treaty nations. It must be noted that States cannot be obliged to surrender alleged criminals when they are not consensually bound by a treaty. This often leads to the diplomatic associations hinder the path of justice. Questioning the sovereignty of a nation is not seen as an acceptable principal of global jurisprudence, and is therefore done with caution. It is because of these shortcomings that non treaty extradition policies have retained the nature of soft law.

[37] The Extradition Act, 1962, S. 19.
[38] *Ibid.*, S. 20
[39] *See* U.S. v. Rauscher, (1886) 119 US. 407