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(I.S.S.N 2321- 6417 (Online)
Ph: +918255090897 Website: journal.lawmantra.co.in
E-mail: info@lawmantra.co.in contact@lawmantra.co.in

ANALYSIS OF CONCEPT OF EXTRADITION UNDER INTERNATIONAL LAW *

Abstract

The main purpose of extradition is to stop criminals from seeking haven in a different jurisdiction and avoid justice. Despite being such an important concept of law, there are no clear and settled rules regarding it. To fulfill the legal requirements of law countries often enter into bilateral or multilateral treaties. The paper first discusses the devilment of extradition laws over the centuries. The paper then discusses the effect of war on bilateral and multilateral treaties. Further, the paper also discusses how nations treat their own national when they are subjected to the process of extradition.

The limitations to extradition have also been discussed. Concepts like political offence exceptions, double criminality, and specialty have been highlighted. The exceptions to the exceptions have also been brought forth.

The paper explores the problems in the current extradition laws and proposes some suggestions which can bring about some betterment in the laws.

The researchers has reached to the conclusion that if the extradition laws are properly implemented and enforced, they can act as very powerful tools to bring down criminal activities across borders. The need of the hour is to develop the laws with the changing times. The changes should be free from political downplay and should also show the willingness of the States to fish out criminals and bring them to justice.

Introduction

* Mr. Pramit Bhattacharya, 3rd Year, LLB (Hons.), Damodaram Sanjivayya National Law University, Visakhapatnam & Mr. Abhijit Prabhat, 3rd Year, LLB (Hons.), Damodaram Sanjivayya National Law University, Visakhapatnam.

Extradition, in simple words, means the surrender of an individual by one State to another State, who has committed any offence or is accused of committing an offence or has been convicted of any offence within the territory of the latter and has sought refuge in the former.

The rules regarding extradition under the international law are not very settled as the practices and laws relating to extradition have not evolved much and have not kept the pace with the broadening scope of human rights under the international law. Also, extradition does not fall under the sole domain of the international law and it can be considered as a dual law which is governed by both internal and external factors. Domestically, a State decides on extradition or non-extradition through its domestic legislatures, and the judiciary through the Court system determines the stand. On the other hand, it is also a matter of international politics because extradition is governed by relations between two or more States.[1]

The international law focuses on the role of an individual during the process of rendition, where extradition is carried out through a treaty between the States.[2] In the absence of any multinational treaty regarding extradition between different nations, the process is generally governed by bilateral treaties between different nations on the basis of the relationship they have with each other. This has led to the development of certain principles which are considered to be the general rules of international law. The traditional concepts of the international law have given each nation its own internal and external sovereignty. The internal sovereignty of the State empowers it to exercise its jurisdiction over all the things within its territory. The external sovereignty gives the right to the States to manage international affairs outside its territory through its own discretion. But this independence is not without a few restrictions and a State cannot do whatever it wishes to do without any ramifications whatsoever. When a nation becomes a part of an international community, certain limits are put on its liberty subject to the liberty of the other States. A sovereign State is also entitled to put a limitation or restriction on its liberty by agreeing to be a party to any international treaty or convention. Thus when one State is asking for the extradition of an individual from the jurisdiction of a foreign State, the right is not only based on the liberty and sovereignty of the State but also on broader principles of solidarity, morality, and convenience.

Therefore, when two nations enter into an extradition treaty, they try to balance the need to extradite an individual with the human rights of the person to ensure that the process of extradition does not violate any fundamental principles laid down by the international laws.

[1] H.O. Aggarwal, *International Law and Human Rights*, (Central Law Publication, Allahabad, 13th edn., 2006).
[2] M.Cherif Bassiouni, *International Extradition and World Public Order* (A.W Sijthoff, Chicago, 1974).

Maintaining this balance not only helps in safeguarding the rights of an individual but also helps in maintaining the integrity and legitimacy of the whole extradition process.[3]

There are generally two kinds of extradition treaty namely the List Treaty and Double Criminality Treaty. Under the former kind of treaty, a list of offence is provided for which a person may be extradited. The latter provides that an individual may be extradited if the offence committed by the person has a penalty of more than one year in both the countries. The main purposes of an extradition treaty are similar to that of a criminal code which provides that an individual should not go unpunished for the crimes committed, to obtain jurisdiction over a criminal through a legal process, and to eliminate crime from the society.

The Development of Extradition Laws

The concept of extradition of individuals from one State to the other is not a new one and has evolved over centuries. As the customary laws of nations developed, it placed certain limitations on the pursuit of offenders and thus slowly the extradition laws developed.[4] The basic reason for this was that under customary international law, the sovereignty of other countries was given importance which although encouraged the concept of extradition, but discouraged irregular practices to carry out the extradition process.[5] As stated above, the concept of extradition is an old one and the first instances of extradition treaty can be traced back to the 1200 B.C. in the Middle Eastern kingdoms of Egypt and Hittites which provided for the return of offenders to the homeland in a mutual framework.[6] In Europe, the first extradition treaty can be traced back to 1174 A. D. between England and Scotland.[7] The Chinese also used to extradite criminals and offenders from neighboring countries like Burma, Vietnam, and Korea.[8]

The modern extradition laws can be traced back to the various multilateral and bilateral agreements which were formally drawn up by different States as extradition treaties. This trend of forming formal treaties gained popularity in the late nineteenth century.[9] Several sub-concepts were developed both by the common law and the civil law with some variations

[3]Ilias Bantekas and Susan Nash, *International Criminal Law*(Routledge-Cavendish London, 2edn., 2003)
[4] IVAN A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW, MANCHESTER UNIVERSITY PRESS*(1971).
[5] John G. Kester, *Some Myths of United States Extradition Law*, 76 GEo.LJ.(1988).
[6] Santo F. Russo, *Comment, In Re Extradition of Khaled Mohammed ElJessem: The Demise of the Political Offense Provision in U.S. - Italian Relations*, 16 FORDHAMINT'L L.J. (1993).
[7]JOHN BASSETRMOORE, 1 *TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 1 (1891)
[8]R. Randle Edwards, *Imperial China's Border Control Law*, 1 J. CHINESE L. (1987).
[9]Harvard Research in International Law, *Draft Convention on Extradition*, 29 AM. J. INT'L L. 1, (Supp. 1935)

between the two. Concepts like specialty, political offence exception and dual criminality also came to the fore. Even though there were a few differences between the common law and the civil law, the basic principles and fundamentals of the extradition treaties remained the same.

It is important to note that most extradition treaties which are in existence these days are bilateral. These modern bilateral treaties began developing around the 1800's when countries started entering into formal extradition agreements. Regional agreements between States also started to come into the picture around the same time.[10] Various attempts have been made by various countries to create a uniform and general multilateral extradition treaty, but these efforts have failed due to varying political motives and incompatible legal systems of the countries.

Extradition treaties under both common law and civil law have some general principles like various safeguards given to individuals, some specific crimes for which a person can be extradited and some exceptions to extradition. Under the Common law, most of the extradition treaties are based on the concept of 'reciprocity' under which a nation extradites an individual only in exchange of other extradition or for a future promise of extradition as and when required. Under the Civil law, the process of extradition is a bit less formal and is not necessarily based on some reciprocity arrangement between the nations. The general basis for extradition is harmony and good relations between the nations where one nation formally sends a particular request to the other nation to carry out the extradition process. One of the features of the extradition process under the common law system is that the executive decides whether to go ahead with the extradition or not. The judicial also plays a vital role by certifying the offence that has been committed by the individual. Under the civil law system, the request by a foreign State to extradite individual acts as a sufficient prima facie evidence to carry out the extradition, if all the other requisites of the extradition treaty have been met.

A Model Treaty on Extradition was approved by the United Nation in the 1990 with the aim to provide a useful and general framework on which States could rely upon while framing their own bilateral or multilateral extradition treaties.[11] The Model Treaty on Extradition is an important tool both due to its structural framework and contents. The provisions laid down by the Model Treaty consider the problems faced by different countries in creating an extradition treaty and also contains safeguards which protect the rights of the States as well as the individuals. Therefore, on one hand, where the Model Treaty encourages international

[10] Ibid.
[11] Model Treaty on Extradition,1990,United Nations General Assembly Resolution 45/116 as adopted on December 14, 1990, subsequently amended by General Assembly Resolution 52/88

cooperation and provide aids to the States for proper negotiations, on the other hand, it also seeks to protect the right of individuals who are the part if the extradition process. Furthermore, The Model Law on Extradition was introduced by the United Nations Office on Drugs and Crimes in the year 2004. This Model Law was framed with the primary objective of international cooperation in criminal matters between different nations, including extradition so that countries could make their own extradition laws more effective and efficient.

War between States- The Effect on Extradition Treaties

There can be two views on this issue. The first being total cessation of operation of the extradition treaty during the period of war. The second being the continuation of the treaty between the warring nations. The earlier view was that war between two nations abrogates any and every kind of treaty between them. However, the modern view is somewhat different, which states that the cessation or continuation of a treaty will depend on the extrinsic nature of the treaty. It can be safely assumed that if two nations are at war some treaties are bound to come to an end between them such as treaties of alliance and trade. But treaties such as extradition treaties which deal with rights of the parties are just suspended during the period of war and continue after the war gets over. Subjective intention of the parties and their political conduct with respect to the treaty is also considered when deciding this issue.[12]

Extradition of Nationals

In many cases an individual commits a crime in a foreign territory and then return back to his own country. In this situation, a controversial issue arises that whether the State would extradite its own national to other State or not. The refusal to surrender its own national to the jurisdiction of some other country is a common one. Many arguments have been given against this practice by citing international cooperation between countries; yet the practice is a consistently exercised by many countries. Countries around the world often seemed unmoved by the arguments given against the practice of not extraditing nationals even as conditional surrenders. The practice of not surrendering its own national to the jurisdiction of another country is related more to the individual rather than the crime itself. Countries often put a clause or provision in extradition treaties which excludes the extradition of its own nationals. Such clauses are entered into an extradition treaty in either of the two forms. In one it is stated that a nation will not surrender it's not national. In the second form it is stated that the country will be under no obligation to surrender its own national. So in the former case, the clause acts as an absolute bar to extradition of its own nationals. In the latter case, the nation can exercise

[12]Clark v. Allen, 331 U.S. 503 (1947)

its discretion as to whether they want to surrender their own national to a different jurisdiction or not. Traditionally, absolute bar over extradition of its own nationals is a more favored path which has been adopted by many countries.

Limitations and Exceptions

As with all the things, there are certain limitations to the right of extradition also. Extraterritoriality is a limitation of the right of extradition. One of the modern exceptions to extradition is the concept of political exception. Apart from these the concept of dual criminality and specialty also falls under limitations to extradition. These two principles are not recent principles and were developed during the nineteenth century.

- **Political Offence Exception**

One of the accepted principles of international law which may not give rise to extradition is the concept of political offence exception. Under almost all modern extradition treaties, an extradition will not be granted to a state if they have requested extradition of an individual with regards to a political offence, or any offence which has a nexus with a political offence. The Model Treaty on Extradition also states political offence as one of the exception where there will be a mandatory refusal[13] to extradite an individual and it is governed by Article 3(a) of the Treaty. The concept of political offence exception became a part of customary extradition laws when tolerant states like Britain, Holland and Switzerland started harboring and sheltering political refugees as a matter of their sovereign rights.[14] These States recognized the right of common people to rebel against oppressive and tyrannical authority. One of the main reasons for including political offences in the list of exception is derived from the principles of humanitarianism,[15] because it is almost certain that when a person who is accused of political crimes, the trial given to him will not be fair and will be engulfed by political passion.

Political offences can be divided into two types, namely Pure Political Offence and Relative political offence.[16]

Pure political offence is an offence which is exclusively done against the political interest of the State. Pure political offences do not have the essence and elements of a common crime and

[13] Lt. Zhenhua, "*New Dimensions of Extradition Regime in the fight against Terrorism*", 42 Indian Journal of International Law (IJIL)(2002)
[14] I.A Shearer (ed.), *Starke's International Law*(Butterworth, London, 1994)
[15] E. Martin Gold, "*Non Extradition for Political Offence, The Communist Perspective*", 11 Harvard International Law Journal (HARV. INT'L LJ.)(1970)
[16] Aftab Alam,"*Extradition and Human Rights*", 48 Indian Journal of International Law (IJIL)(2008)

is purely against the Government of the nation. Pure political offence includes crimes like sedition, treason and espionage.[17]

A relative political offence can be viewed as an extension of a pure political offence. It branches out from a pure political offence when an individual commits a common crime also. A relative political offence may also be carried out due to some kind of political ideology of an individual or a group. If an offence is a relative political offence or not depends from case to case and also the proximity of the offence to the pure political offence. There is no fixed yardstick to decide whether an offence is a political offence or not. It depends on the State to which an extradition request have been made that whether they consider the offence a political offence or not according to their own rules, regulations and practices.[18]

Limitations on Political Offences

1. **War Crimes**

Extraditions in the case of war crimes do face certain issues like jurisdiction, and the status of an individual who committed war crimes on international level. Willful killing of people, inhuman practices against people, torturing people and conducting illegal biological experiments on people. Article 8 of the Rome Statute of the International Criminal Court also gives details of war crimes. The French Extradition Law of 1927 clearly stated that if any offences were committed during the course of a civil war, the offender would not be protected under the political offences exception.[19] After the World War II, the United Nations also urged all the States to track down, arrest and send back war criminals to the country in which they committed the crimes so that they could be tried according to the laws of that country. The Genocide Convention of 1948 also exempted offences like genocide and other related offences to fall under political offences exceptions and urged the States to grant an extradition to the country requesting for it.

2. **Anarchist Offences**

Anarchist offences also do not fall within the ambit of the political offence exception and extradition can be granted if the offence is an anarchist offence. There is a difference between political offences and anarchist offences. In the case of political offences, the offenders do not look to topple all the government but only one particular government. But anarchist offenders

[17]Shantonu Sen,"*The American Law on Extradition*", CBI Bulletin 3(February, 1989).
[18]Kalinga Kumar Panda, *A Text Book of International Law* (Anmol Publications, Delhi,1998)
[19]Supra 14

seek to overthrow not only one particular government, but all governments. Therefore, it would not be wise to categorize anarchist offenders as political offenders.[20]

3. Terrorism

Present day extradition treaties clearly and expressly mention that terrorism would not fall under the ambit of political offences and hence an exception wouldn't be granted to terrorists from extradition. To ambit the problem of terrorism, it is of vital importance that countries around the world work in a cooperative environment to fight the evil. Also, due to the increased transitional activities among different nations, it is important to differentiate between genuine refugees and refugees with motives of terrorism.

4. International Crimes

Offences which are committed against laws of a nation, even though politically connected, cannot fall within the exception of political offences as they are considered to be a crime against the world community as a whole. Crimes like high-jacking, piracy, aggression, Crimes against Humanity as defined by the Genocide Convention and Nuremberg Principles, slavery, trafficking of drugs and narcotics, racial discrimination[21] are some examples of international crimes and do not fall within the ambit of political offences exception.

Double Criminality- Or its Absence

Dual criminality is generally founded in reciprocity of extradition treaties. Double criminality means that the offence committed by the individual should be an offence in both the nations and should be punishable by the laws of both nations. A person cannot be extradited unless this condition is satisfied.[22] A State is not under any obligation to extradite a person if the act committed by the individual is an offence under the laws of the requesting State but is not punishable under the laws of the nation where the individual has sought asylum. Earlier, the number of offences for which a person could be extradited was not as it is now. So the nations who were parties to bilateral or multilateral provided a clause in the extradition treaties mentioning specific actions which were recognized as offences in both the nations to maintain the balance and fulfill the condition of dual criminality. With the development and evolution of customary laws of extradition, this method proved to be cumbersome, ineffective and inadequate. Modern extradition treaties use a more comprehensive method of elimination which just defines the minimum and maximum penalty that can be imposed on an individual

[20] Ibid.
[21] Supra 2
[22] Supra 13

with regards to certain offences, but does not lay down any specific offence. Therefore any offence which meets the criteria of double criminality will be considered as extraditable offence. The important point to consider here is that the concept of dual criminality is not interpreted narrowly by the States and the extradition treaty they agree to comply to. States often surrender individuals to the requesting States even if the offence is called by some different name under the laws of the two different nations but has the same elements, same designation and similar penalties. The reason for this liberal interpretation is that extradition is one of the primary tools of state cooperation to suppress and reduce crime on the international level. This kind of interpretation also helps to restore the extraditability of an offence. At the end of the day the basic objective is to bring criminals to the books and promote justice.

The concept can be interpreted in two ways, namely the objective interpretation and the subjective interpretation. In the former case a strict interpretation of legal elements is done and in the latter case, a liberal interpretation is done where the difference in the laws of the two States are harmonized. In the modern times, the subjective interpretation is given more credence. The offences need not be necessarily identical. It is sufficient that they have concurrent elements and are similar (not necessarily same) under the spirit of the law.

Even with the liberal interpretation, some differences do arise due to the difference in legal systems of different countries. To counter this problem the Model Treaty on Extradition under Article 2 Paragraph 2 proposes that States should look into the totality of the conducts or the actions with the basic idea that that the actions or offence should be comparable to a certain degree under the laws of both the States.

Specialty

The doctrine of specialty provided that a person should be tried and prosecuted only for that offence for which the extradition request have been made. A State has full authority to ask a requesting State to place certain conditions before extraditing an individual. The State can also ask the requesting State not to try and prosecute an individual for any other offence other than that for which the request was made. Many modern treaties often contain some provision or clause where a person is extradited only subject to a pledge or guarantee by the requesting State that the individual would not be tried for offences which were not the basis of his or her surrender. This doctrine protects an individual from an unexpected trial or prosecution and protects an individual from the abuse of process by the requesting State.[23]The doctrine of specialty is an old one and can be traced back to the 1870s under the British Extradition Act.

[23]Kuhn v. Staatsanwaltschaft des Katons, *Switzerland Federal Tribunal*, 34 ILR(1961).

The doctrine is included under the Model Extradition Treaty, 1990 also under Article 14 (1).the doctrine has also been adopted by the Rome Statute of International Criminal Court, 1998 under Article101. European Convention on Extradition of 1957 has also provided for similar provisions under Article 14 (1).

In some cases the waiver to the rule of specialty is also provided as a saving clause that allows the requesting State to try and prosecute and individual for crimes other that for which the request for extradition is being made if the individual gives his free consent willingly bysaying that he is ready to be tried for such other offences.[24] But such a clause does not necessarily appear in treaties between countries and States may refuse to extradite if they believe that the person may be tried for some other offence. When the waiver for the doctrine is made certain conditions should be kept in mind, the most important being the protection of the individual who has been extradited. If such limitation is not put on the extradition process it may lead to the miscarriage of justice and abuse of authoritative power. Even though the rule of specialty is an exception to extradition, it is often diluted by some specific saving clause in the bilateral and multilateral treaties. Also, when an individual consents for the waiver of the rule of specialty, it is difficult for the States to know whether such consent was indeed willful and voluntary or not.

Currents Extradition Laws- The Problems?

1. **Narrowing down of political offence exception**

Countries today are narrowing down the political offence exception. One of the main reasons for this is to fight against terrorism and other war crimes. It ensures that offenders who have committed violent and barbaric crimes do not escape the law by using a political agenda. But on the flipside, individuals who do not get access to the internal political system and are forced to resort to violent methods to change the political system of the country do not get any protection under the law.[25]

2. **Irregular Renditions**

Irregular renditions are also used to circumvent the extradition laws. Countries often surrender individuals to the requesting countries through informal processes without following the due process of the law. Nations also use immigration laws of the country to extradite certain individuals. As these methods to not violate the sovereign rights of the States, they are very

[24]Satyadev Bedi, *Extradition : A Treatise on the Laws Relevant to the Fugitive Offenders Within and With the Commonwealth Countries* (William S. Hein and Company; Inc. Buffalo, New York, 2002)
[25] Lorenzo L. Lorenzotti, *Note, In re Extradition of Atta: Tension Between the PoliticalOffense Exception and U.S. Counterterrorism Policy*, 1 PACE Y.B. INT'L L. (1989).

easy to use to circumvent the law. Exclusion of nationals from the process of extradition also gives rise to irregular rendition. They choose to try and prosecute offenders through their domestic laws only. This often causes acquittal or lenient punishment for the offenders.

3. Frustrations over Treaty Reforms

The increase in international law in the late twentieth and early twenty-first century have forced countries to rely upon irregular methods to obtain jurisdiction over international criminals. States which attempted to extradite criminals are often frustrated by the exclusion of certain kinds of offences. Although, countries often try and update the provisions of the treaties, the process is long and cumbersome. In such a situation, either the sought after individual is let off where he can avoid trial and prosecution, or they are brought under the jurisdiction through some illegal and irregular means like abduction and deportation.

4. Outdated Treaties

Extradition treaties which exist today were drawn up considerable time before. These treaties have not been updated and fail to address modern crimes. The treaties have not kept pace with the changing legal and political relationships between the nations. Many a time, criminal codes of the countries also contradict each other which creates a difficulty in enforcing the extradition treaties properly.

Suggestions

1. In the case of double criminality, it can be argued that the main aim should be to prevent the inherent harm caused by the offence and law involved should be substantially analogues. The main focus of the extradition treaty should be on the conduct of the offence rather than the elements. The jurisdictional aspect of the crime should also not be exactly the same between the nations.
2. As far as extradition of nationals is concerned a conditional extradition can be a possible alternative where the requested State can put a condition that the individual might not be given a punishment in excess of a special provision of clause mentioned in the extradition treaty. The extradition treaty should also be drafted in a manner which would provide a minimum and maximum penalty for some specific offences.
3. In the case of the doctrine of specialty, countries entering into an extradition treaties can provide a clause in the treaty which states that the offender may be tried for any offence which the requested State consents to after the extradition process have been

carried out. The United Nations convention against Corruption[26] can also be invoked in certain situations, which although do not directly deals with the doctrine of specialty, states that a person may be extradited in the cases of non-extraditable offences also under some particular conditions.

4. In case the death penalty is imposed on the offender, the requesting State should give due notice to the requesting State and their recommendation should also play a role in the imposition of punishment on the offender.
5. In many cases, extradition is not possible because of various reasons. In such cases, States often employ methods like rendition and luring to get jurisdiction over an individual. While these actions are effective in some ways, they can also have some repercussions and objectionable collateral. There is always a risk of disfavor from other countries. Before carrying out any such operations, a State should get a clearance from a fixed central authority which should be established to look after these matters and the overall effect of such operations should also be ascertained. The same procedure of getting clearance from a central authority should also be done in the case of expulsion or deportation of an individual.
6. A periodic review should be done to categorize offences which have been termed as non-extraditable with the view to downsize the list so that there is better scope for implementation of the law.

Conclusion

The main aim of extradition is to bring an end to crime and prevent criminals from getting a safe haven in some different jurisdiction where he can avoid prosecution. Extradition is a very effective tool which helps in reducing impunity and ensures that criminals, dictators, oppressors, and tyrants cannot run away from the rule of law.

The process of extradition comes into force when an individual is outside the jurisdiction of a specific legal system. Keeping this in mind, and also the fact that there is a need to reduce crime from the society as a whole, the extradition process should be less technical, political and cumbersome. Complications in the extradition procedures and treaties should also be reduced to make it more effective. Conversely, the human rights of the individual who is subjected should also be respected.

[26] United Nations Convention Against Corruption note 10, Article 44(3), General Assembly Resolution 58/4 of 31 October 2003

The principle of specialty and the rule of double criminality should be applied as reasonably as possible because it is important to condemn criminality in all its forms and no criminal should get any exemption from punishment. With the rapid globalization and increasing transnational movement the world has turned into a global village. In such a scenario it is important that a criminal avoids justice by taking refuge in a separate jurisdiction where he will be free from any kind of prosecution. If criminals are caught and surrender, obviously the rate of crime on international level will come down.

One of the most crucial dogmas in extradition is that of sovereignty. The general expectations have changed from that being of one influencing "the will of people" to one which has gradually accepted things on the basis of "erga norms", contemplating things into a much broader ambit of things being of such gravity that they become an offence against the whole of human race.