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EXTRADITION AND LAW

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ABSTRACT

The hi-tech criminals are more harmful to the society than the traditional offenders. Municipal laws are forceful in matter of catching hold of an offender who, after committing an offence, remains within the state. But it is much challenging on the part of the legal system for giving punishment to an offender who, after committing an offence in a country, escapes to an alien state. The extra-territorial state at such a juncture is required to prosecute and punish the offender even though the crime complained of was not committed therein. Otherwise the offender is requested to be handed over to the state where such an offence was in fact committed. The act of handing over an offender by one state to another state is practically not possible unless there is an "extradition treaty" between the territorial state and the requesting state. But idiosyncrasy is that not all the member states of the United Nations are the parties to the Extradition Treaties.

KEYWORDS

extradition, territorial, requesting state, prosecute, surrender, Political Offender, commitment, fugitive.

INTRODUCTION

In law, the principle of *aut dedere aut judicare* stands, in short, for either extradite or prosecute. It refers to the legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition. The obligation arises regardless of the extraterritorial nature of the crime and regardless of the fact that the perpetrator and victim are of alien nationality. The very purpose of such a legal instrumentality is to deprive the criminals of any safe haven. This obligation is classically understood as requiring the custodial state to prosecute the suspect in case of non-extradition. The very genesis of the obligation to extradite or prosecute can be traced back to Baldu's Works in the 14th century, and it was first qualified as the *aut dedere aut judicare* principle by Grotius in the 16th century.

Purpose of Extradition: the purpose of extradition is manifold which may be summed up as follows:-

1. Extradition is a process of crime control. Ordinarily a person cannot be prosecuted and punished in a state from where he has fled away because of legal technicalities in criminal law including jurisdiction. Criminals are required to be extradited so that they may be punished.
2. Extradition acts as a warning to the criminals that they will be within the grip of law even though they flee to another state. It has thus a deterrent effect.
3. Criminals are surrendered as it safeguards the interest of every state. Otherwise if a particular state adopted a policy anti-extradition of criminals, they would like to flee to that state and it would become a paradise international criminals.
4. Extradition is based on mutuality. A state which is required to surrender the criminal today may have to request for the same of a criminal on some other day.
5. Extradition is done as of necessity for it tends achieve international problem of a social nature as provided under para 3 of Article 1 of the UN Charter.
6. The state where the crime is committed is the most suitable place for the trial of the offender so far evidence is concerned.

Extradition: Nature of Duty of a State;

The principle extradition or prosecution has been expressed by the maxim "*aut dedere aut punire*" which means-

Extradition as a duty is both moral as well as legal on the part of the states. However, a legal duty to surrender a criminal arises only where treaties are concluded by the states including extradition as a stipulation therein. In some other cases, a state may extradite a person on the basis of reciprocity or mutuality. In such cases duty to extradite can be said more to be moral than legal in nature.

Extradition and Deportation:

Extradition and deportation differ in the following counts:

- i. Extradition is done in the interest of the requesting state but deportation is performed in the interest of the expelling state.
- ii. Extradition requires the consensual co-operation of at least two states, but deportation is a unilateral action apart from the duty of the receiving state to accept its own national.
- iii. Extradition applies to criminal prosecution to suppress criminality. On the other hand, an expulsion order may be issued to any foreign national on various grounds.
- iv. Extradition is possible only on the request of another state but expulsion is an order of a state which prohibits a person to remain inside its territory.

Law of Extradition

The rules relating to extradition are not outlined in International law. Law of extradition has dual operation- national as well as international. The question on extradition of a person is determined by the municipal courts of a state and simultaneously it also forms part of International law for it governs the relations between two or more states over the question. Such an issue is determined by the municipal courts but the basis of that determination is the commitments and the rules of international law. In the absence of any multilateral treaty or convention, extradition, presently, is done by states on the basis of bilateral treaties. Consequently, States do have municipal legislations to that effect. In that sense, the judicial decisions of municipal courts have strengthened the general rules of international law which may be summed up as under:

1. Extradition treaties:- the most important condition precedent to extradition is an extradition treaty itself between the territorial state and the requesting state. Adherence to such a treaty, at times, stands as an obvious obstacle to international co-operation in crime control in absence of extradition treaties. In absence of an extradition treaty, when an offender is returned to another state, it is called not extradition but deportation.

2. Extradition of Political Offenders: -It is more a customary than a legal rule of international law that political offenders are not extradited. They are rather granted asylum by the territorial state. In olden days i.e. during the days of monarchs, extradition of political offenders was in vogue. The objective of extradition during that period was to avoid intervention in the affairs of another state. But the French Revolution brought a change in such practice and for the first time the French Constitution in 1793 provided for granting asylum to those foreign nationals who exiled from their home country for the cause of liberty. Gradually, other states followed the principles of non extradition of the political offenders. Indian Extradition Act, 1962 also lays down a similar provision u/s 31(a). It has now become an exception to the general rule of extradition based on humanity as the political offenders are not dangerous for the territorial state as it may be in case of ordinary criminals. It is the duty of the territorial state to ensure safeguards to the surrendered fugitives or else the requesting state might attempt to take actions of extra legal character against them.

LIMITATIONS TO THE POLITICAL OFFENCE EXCEPTIONS

Under the colour of Political Offence, on some occasions, fugitives take undue advantage of the principle of non extradition of political offenders. In order to check the abuse, an attempt was made to restrict the principle in certain cases as under:-

- i. It is expressly excluded by some multilateral treaties notably the Genocide Convention on Apartheid of 1973.
- ii. The protection is not available in the case of customary International law crimes including war crimes and crimes against humanity.

- iii. This exception does not extend to multilateral treaties relating to hijacking, torture or hostage taking, injury to diplomats and grave breaches of the Geneva Conventions on the laws of war and armed conflict.
- iv. States exclude the political offence exception in the case of certain localized criminal offences by means of bilateral or multilateral treaties.
- Notwithstanding the prevalence of the practice of non-extradition of political offenders, there is, in fact, no rule of customary International law preventing their extradition. If a state so wishes to impose any restriction on the rule of non-extradition of the political offenders, it may do in its extradition treaties by which the principle itself is regulated.

MEANING OF POLITICAL OFFENCE

Even though theoretically there is the mention of political offenders, it is practically difficult enough to answer the question what is, in fact, meant by 'political offence' or 'political offender'. Intricacy of it lies in the fact that such a question is usually answered by the municipal courts which may result in divergent views taken by different judges. More ambiguity is thereby created rather than its being cleared. No exhaustive definition of the term political offence is found in the realm of international law. Similar problem is found in case of International publicists who make an attempt to define it precisely.

In the case of *Re Castioni*, it was laid down that for an offence to be political, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act, in the course of acting in a political matter, a political rising, or a dispute between two parties in the state as to which is to have the Government in its hand.... The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political character with a political object, and as a part of the political movement and rising in which he was taking part...His extradition was refused on the finding that his motive for the act was political.

In *Re Meunier*, having upheld an extradition, it was held that

"in order to constitute an offence of a political character, there must be two or more parties in the state each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the instant case, there are not two parties in the state, each seeking to impose the Government of their own choice on the other, for the party with whom the accused is identified....namely, the party of anarchy, is the enemy of all Governments, their efforts were directed primarily against the general body of citizens.

According to these decisions, an offence is considered to be political if it is directed against the state or the constitutional order, or be otherwise inextricably involved in conditions disturbing the constitutional life of the country. It should be committed by an organized movement to secure power in the state against the established regime.

3. DOCTRINE OF DOUBLE CRIMINALITY: The doctrine of double criminality denotes that a crime must be an offence both in the territorial state and in the requesting state as well. This very principle is founded on the logic that it would offend the conscience of the territorial state if it has to extradite a person when its own law doesn't regard him an offender. The requesting state, on the other hand, would also not ask for surrender of a person for those crimes which are not recognized as such in its state. The doctrine thus satisfies double purpose. It helps the requesting state to enforce its criminal law, and to the territorial state to the effect that the rule protects it from fugitive criminals. For the said purpose, a list of extraditable offences is found place in the extradition laws of some states. But in general parlance, such a list is stipulated in the treaties for which extradition is done. Double criminality as a doctrine, at times, creates an ambiguity in ascertaining the true position of an act in question when the same is an offence in one state but not in the other. To get rid of this imbroglio, there may be adopted some standard of generality to be capable of addressing to certain particular acts under that umbrella.

4. According to the principle of double criminality, a fugitive may be tried by the requesting state only for the offence for which he has been extradited and not for any other offence. The rule appears to be based on giving protection to the fugitive against frivolous extradition. It has now become a settled principle of International law; so far the law relating to extradition is concerned.

5. PRIMA FACIE EVIDENCE

It is desirable that there exists a prima facie evidence against the accused in matter of the alleged offence. This is the condition precedent for extradition which the territorial state must be satisfied before a person is extradited. The purpose for laying down the rule of prima facie evidence is again to check the fraudulent extradition.

6. TIME BARRED OFFENCES: As of rule and practice, a fugitive criminal shall not be surrendered, if he has been tried and has undergone the punishment for the offence committed in the territorial state. Thus, extradition is granted if the offence for which extradition has to be made has not become time-barred.

7. EXTRADITION OF OWN NATIONALS: In certain cases, a person having committed a crime in a foreign state flees back to his own country. At this juncture, the question arises as to whether a state should extradite such a person, who is, in fact, its own national to a state where crime has been committed. Such a question is normally answered basing upon the wording of the extradition treaties. If the treaties concerned restrict extradition of its own nationals, it becomes the duty of the territorial state to punish the offenders so that crimes may not go unpunished.

8. MILITARY OFFENDERS: Military offences do not find place in extradition treaties. Therefore, military offences are excluded from extradition. Military offences may be broadly divided in to two categories. Firstly, those which constitute offences under ordinary criminal law and secondly, those which relate specifically to military matters. Only the later category is treated as military offences and extradition as a rule does not apply to it.

9. POSITION IN INDIA: In India the extradition of a fugitive from India to a foreign country and vice-versa is governed by the provisions of The Indian Extradition Act, 1962. Extradition is ordinarily based on a treaty between India and a foreign country. Under sec.3 of this Act, a notification may be issued by the Central Government of India extending the provisions of the Act to the country/countries so notified.

Information regarding the fugitive criminals sought in foreign countries is received either directly from the government of the concerned country or through the General Secretary of the ICPO-Interpol in the form of red notices. The Interpol wing of the Central Bureau of Investigation immediately passes it on to the concerned police organizations. The red notices received from the General Secretariat are circulated to all the state police authorities and immigration authorities.

The question arises as to what action, if any, can be taken by the police on receipt of information regarding fugitive criminal wanted in a foreign country. In this connection the following provisions of law are relevant:

- Action can be taken under Article 34(b) of the Indian Extradition Act.1962. this Act provides procedure for the arrest and extradition of fugitive criminals under certain conditions which include receipt of the request through diplomatic channels only and under the warrant issued by a Magistrate having a competent jurisdiction.
- Action can also be taken under the provisions of Section 41(1) (g) of the Cr.P.C.,1973 which authorizes the police to arrest a fugitive criminal without a warrant, however, they must immediately refer the matter to Interpol Wing for onward transmission to the Government of India for taking a decision on extradition or otherwise.

In case the fugitive criminal is an Indian national, action can also be taken under Section 188 Cr.P.C., 1973 as if the offence has been committed at any place in India where he may be found. The trial of such a fugitive criminal cannot take place without the previous sanction of the Central Government of India.

CONCLUSION

Extradition plays an important role with the widest possible amplitude in the international combat against crime. It owes its existence to the so-called principle of territorial applicability of criminal law, according to which a State is supposed not to apply its penal statutes to acts committed beyond its territory except, of course, where the protection of special national interest is at stake. In view of the solidarity of nations in matter of crime control, however, a state, though refusing to impose its penal laws directly to offences committed outside territory, is made willing to cooperate, otherwise in bringing the perpetrator to justice lest he goes unpunished.

It necessarily follows there from that the objective of the extradition treaty is to fabricate a platform of cooperation among the member states in matter of crime control which will remain will o' the wisp in absence of a sense of whole hearted reciprocity and mutuality among all the member states. Mere institutionalizations without internalization of the urgency with all unanimity in this end cannot do anything. Safe wondering of some notorious anti-social elements including the

terrorists, poses a question out of common sense that the extradition treaty though sounds well thematically has a lot to do, so far its pragmatic aspects are concerned.

SUGGESTIONS

1. Law on extradition is a means to an end and not an end in itself. The end is to be respected by all the states in the larger interest of crime control.
2. An offence being a wrong against public at large in a society, the law on extradition tends to control crimes in the global society. If, by principle, an individual is required to be responsible towards the state, by the same principle, the states are required to be sensible towards the global society.
3. Some harden criminals having committed crimes in other states; manage to find a safe haven in certain countries. The logic behind giving such protection doesn't appeal to the common sense and it may simply be said that it is their failure of commitment towards world peace. Participation of such states in different world peace summit and putting forth their views on world peace makes it a travesty of International law.
4. The number of states in matter of being parties to extradition treaties need to be to the maximum possible extend so that it would leave little room for the criminals to flee elsewhere if at all they know that their attempt to evade prosecution will go in vain.
5. The goal of the law on extradition could never be achieved unless all the states take proactive measures in giving respect to the spirit of it with a sense of cooperation and utmost deliberation on priority basis.
6. It is the demand of the day that certain harden criminals, who are wandering freely in certain countries, be either extradited or prosecuted so that they would be punished adequately without further delay

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