CHAPTER - VII

CONCLUSION AND SUGGESTIONS

Extradition is the name given to the formal legal process by which persons accused or convicted of crime are surrendered from one State to another for trial or punishment. It is a form of international cooperation in criminal matters, intended to promote justice. Extradition proceedings are criminal proceedings of a very special kind. They do not involve the determination of any criminal charge. It is designed to provide assistance to criminal proceedings which have taken place or are yet to take place in the territorial jurisdiction of another State.

Extradition is based on the principle that it is in the interest of all civilized communities that offenders should not be allowed to escape justice by crossing national borders and that States should facilitate the punishment of criminal conduct. It is in the public interest that extradition should work promptly and efficiently. This is because modern transport, the increasing freedom of movement of persons and communication facilities have contributed to the growth of international crime and made the criminal law more difficult to enforce. Without effective extradition arrangements criminals would commit crimes without fear of prosecution, and movement abroad by criminals in search of safe havens would be indirectly encouraged.

Generally speaking extradition takes place in accordance with bilateral treaties or multilateral conventions entered into by Sovereign States. These treaties and conventions ordinarily impose an obligation on the requested country to surrender to a requesting country a person charged with or convicted of an offence of a certain specified gravity in that country, subject to conditions and exceptions. In exceptional cases a state may extradite using its sovereign freedom even without treaty obligations as a matter of country or reciprocity.
There are several principles and factors that influence the decision on extradition, even in cases where the two countries have an existing treaty. These can include:

Political Crimes — In general a nation will not grant extradition for a crime of a political nature, though it is up to the state holding the alleged criminal to decide what constitutes a political crime.

Double Jeopardy — extradition will usually not be granted if the person has already been convicted and served punishment for the same offense.

Nationality — many countries refuse to extradite their own citizens to other nations. Since 1990 the United States has allowed the extradition of its citizens to other countries if there is a treaty and other conditions are met.

Possible Forms of Punishment — from human rights perspective, some extraditions are refused if the person to be extradited faces severe forms of punishment such as the death penalty or torture. Many counties refuse extradition to the U.S. due to its use of capital punishment.

Dual Criminality — some extraditions are fought on the grounds that the country holding the individual would not punish the person for committing the alleged crime within its own borders.

An important development that significantly contributed to the changing dynamics of extradition is, the influx of human rights ideology. To everyone’s knowledge, human rights ideology has gained a very forceful presence at least theoretically, in many areas of law, extradition being one of them. Interests of individual are at high stake in matters of criminal justice. Therefore, international jurisprudence has been paying significant focus on the issues of human rights of persons facing criminal process. Since extradition exposes the fugitive criminal to the criminal justice process which has a great potential for abusing the most important human right to life and liberty.
of the concerned individual, it is not a surprise that human rights ideology extended to the institution of extradition.

Even the traditional principles of extradition like principle of double jeopardy, rule of specialty, double criminality, political offence etc have a human right dimension about them. But, the earlier law of extradition has not focused on the issues of form of punishment and the extra legal processes involved in the administration of criminal justice as much as has the contemporary extradition law has done. The growth and expansion of the human rights concept have inevitably led it to cover the vast area of international cooperation in criminal matters whose most renowned form, extradition, has been for centuries dominated by considerations and concerns deeply rooted in state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc. Human rights have been granted protection only in so far as that would correspond with these stated priorities. The human rights movement with its unequivocal emphasis on their protection as such, has changed that perspective. ¹ Now, it is also recognized that the law should contain appropriate safeguards for individuals where they would in the event of extradition suffer manifest injustice or oppression. Achieving a balance between these competing considerations is by no means as easy task.

Reaching a compromise between the interests of state in gaining extradition and protecting the human rights of the fugitive criminal is a difficult task, for it requires recognizing, taking into due consideration, assessing and weighting many various factors and components. The process of balancing all the interests involved should be carried out at two levels: first, human rights versus needs of law enforcement and international cooperation; second, human rights of the requested person (fugitive) versus human rights of others (and society). In addressing and evaluating the relevancy of human rights in the context of extradition, two criteria could be employed. One would emphasize the nature of a specific right as vital or necessary. This approach requires sorting out all human rights in order to “designate” the appropriate ones. It is here that the concept of

“fundamental human rights” has emerged and is gaining a widespread acceptance. This concept is based on the understanding that out of all human rights as group has been recognized as non derogable in all universal and regional instruments and, therefore, has to be granted protection the specificity of extradition notwithstanding.

Currently freedom from capital punishment, freedom from torture and right to fair trial are widely recognized as the core fundamental rights. An examination of the impact of human rights ideology on extradition reveals that the likelihood of imposition of capital punishment, the infliction of torture to the fugitive criminal or denial fair trial is operating as a barrier to concede the extradition request.

An examination of Indian extradition law containing both Indian Extradition Act, 1962 as amended in 1993 hereafter referred as Indian Extradition Act, and also the related judicial pronouncements demonstrates that it accommodates all significant legal features as evolved in general or customary international legal developments relating to extradition.

So far as general principles evolved in extradition law, Indian law accommodates all the basic principles applied in the consideration of extradition Indian requests. Extradition Act, 1962 as amended in 1993 provides specific restrictions relating to extradition which includes political offence\(^2\) as well as the rule of specialty\(^3\). With regard to the exception of political offence, guidance is provided by the Act as to which offences would not be considered as political offences.\(^4\) Double criminality is one of the determining factors of extraditability in the form of requirement of minimum punishment criterion.\(^5\) Nationality is not a bar for considering the request for the extradition of an Indian fugitive criminal. Double Jeopardy is anyway general principle followed in the municipal law. So far as forms of punishment is concerned, India is a retentionist country so far as capital punishment is concerned. Nevertheless, keeping in view the trend in

\(^2\) Section 31 (a)
\(^3\) Section 21 and also S.31 (c)
\(^4\) The Schedule appended to the Act enlists offences not of political character like hijacking, culpable homicide crimes against diplomats etc
\(^5\) Section 3 (c)
extradition law with reference to prospects of extradition to country which retains capital punishment as a mode of punishment, India in a bid to harmonize its law with international developments provided a compromising stand in the Indian Extradition Act since 1993. Accordingly, it undertook to impose only life imprisonment to the fugitive criminal whose extradition is allowed on the request of India to a foreign country whose laws do not allow death penalty as a mode of punishment. In the recent case of extradition of Kohli, India allowed his extradition in July 2011 to UK stipulating that he be imposed no death penalty.

India provides a well framed procedural due process in considering the requests of extradition. To put in nut shell, extradition request from the foreign state will not be completely submitted to pure administrative discretionary process. Judicial examination of the request also is secured though to a limited extent going by the nature of the special character of extradition proceeding.

Basically the Indian Extradition Act, 1962 as amended in 1993, is divided into Five Chapters. While one chapter, namely, Chapter IV, deals with situation of India seeking extradition from foreign countries, two Chapters, Chapter II and III dealt with situations of extradition to be made by India to foreign countries. While Chapter III applies to situations of extradition to foreign countries with which India made extradition arrangements, Chapter II deals with the situations where extradition has to be considered to foreign states with which there are no extradition arrangements. Due to the distinct situations between Chapter II and Chapter III, Magistrate dealing with requests under Chapter II enjoys greater judicial powers than with regard to the situation under Chapter III. In the former though the magistrate has no power to examine the merits of the case, has the power similar to that of the judge of High Court in forwarding the request of extradition for the consideration by the Central Government. Of course, the judicial process involved therein (Chapter II) is not akin to trial but still it affords a due procedural justice and ensures the availability of neutral judicial mechanism.

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In the case of Chapter III, the Magistrate is empowered only to carry out a simple examination of whether the warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence in question is extradition offence or not.

In the case of Chapter II however, the appointed Magistrate will inquire into the case in the same manner and with the same power as that of High Court. Based on evidence produced by the requesting state as well as that of fugitive criminal and seeking any further evidence if considered essential if the Magistrate forms the opinion that a ‘prima facie’ case is made out in support of the requisition, extradition request will be further considered by the Central Government. If no prima facie case, the Magistrate has the power even to discharge the fugitive criminal.

Due importance is given to the notion that there not be unreasonable restrictions imposed on individual liberty even if he be a fugitive criminal. Thus when the fugitive criminal who is committed to prison in pursuance of the Act is not conveyed out of India within two months after such committal, the High Court may order the discharge of such person after due notice to the Central Government.\(^6\) Bail eligibility also is ensured to the arrested fugitive criminal.\(^7\)

Thus the Indian law contains enough procedural safeguards to ensure due process as much as it can be facilitated in extradition proceedings. Here it may be contrasted with the position being developed under European Framework Decision by virtue which the state parties like United Kingdom are dispensing with the minimal requirement that there must be a prima facie case before the fugitive can be extradited.

There is substantial case law which demonstrates that the Indian judiciary has contributed to substantially in lending clarity to the scope and significance of Indian law of extradition as contained in the Indian Extradition Act. It also demonstrates.

\(^6\) Section 24
\(^7\) Section 25
The Act also accommodates the principle of ‘*aut dedere aut judicare*’. Thus where the Central Government is of the opinion that a fugitive criminal cannot be surrendered or returned pursuant to a request for extradition from a foreign state, it may as it thinks fit, can take steps to prosecute the fugitive criminal in India itself.\(^8\) Thus there is scope under Indian law to cater to the ends of criminal justice by not letting the criminal go scot free even if his extradition is denied to the requesting state.

While extradition treaty with the requesting state usually provides a legal basis to facilitate extradition of the fugitive criminal, nothing prevents the Central Government to use its sovereign discretionary power for extraditing the requested fugitive criminal even if there is no treaty to meet the interests of criminal justice. The Supreme Court has long back maintained\(^9\) that the surrender of a person present within a state to another state, whether a person is a national or alien, is a political act on the part of the requested state. The political act may be done in pursuance of a treaty or an ad hoc agreement. The whole process according to the Apex Court is founded on the prime principle that crimes should not go unpunished and on that score it is recognized as a part of comity of nations that one state should ordinarily afford assistance towards bringing offenders to justice. So, as a matter of sovereign discretion the Central Government has the basic power to permit or refuse extradition ultimately and the Act secures a guided power in this regard. At any stage, the Central Government can stay or cancel extradition proceedings and discharge the fugitive criminal on such grounds as trivial nature of offence, deficit of good faith in extradition request, interests of justice, political reasons or otherwise and as a matter of justness and expediency. These factors, particularly the consideration of ‘interests of justice’ provide considerable scope for the Central Government also to take into cognizance the human right concerns of the fugitive criminal whose extradition is sought.

In view of the importance of extradition in the administration of criminal justice in which all members of international community are greatly interested and at the same time taking into consideration the fact that extradition law will primarily be domestic

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\(^8\) Section 34A

\(^9\) State of West Bengal vs. J.K. More, (1976) 1 SCJ, 39
law and as a result there is bound to be divergence or in case where the extradition is exclusively governed by treaty, extradition would be subjected to many variations due to different stipulations, United Nations has taken the initiatives to come out with Model Law of Extradition 2004 as well as Model Treaty of Extradition 1990 in order to strike a chord of harmonization. On an analysis of the Indian Extradition Act, and by making a comparative examination of Indian Extradition Act with the UN Model Law, it can be concluded that the Indian Extradition Act, 1962 as amended in 1993, is largely in tune with the Model Law of Extradition.

In the current techno era, the pace and incidence of criminal activity has scaled up creating challenges to both international and national well being. The unfortunate mix of political, economic and criminal activities involved in such crimes as terrorism, drug and human trafficking etc. is causing great hardship and blocking the prospects of development and well being of individual countries. India since long is a victim of terrorism and other organized crimes. So, India has many stakes in obtaining the extradition of wanted criminals. Of late, however the changing dynamics of extradition law has brought forth few human right considerations that can justify the rejection of extradition requests. They are, deprivation of right to life through capital punishment, freedom from torture and other cruel, inhuman and degrading punishment and right to fair trial.

Capital punishment and torture are in major focus so far as human right approach to extradition law is concerned. The broad principle propagated by the contemporary human rights ideology is, not to extradite the fugitive criminal to a country in which he is likely to undergo torture or capital punishment. At international level, there is significant development of jurisprudence that considers that capital punishment as well as torture constitute barriers to extradition. On these two counts, India has much to be apprehensive about the possible negative outcome of its requests for extradition.

So far as capital punishment as a mode of punishment is concerned, India is one of those few countries which retained capital punishment in the penal system. Therefore,
the possibility lies that its requests could meet negative response. However, as already mentioned this challenge is met by virtue of the 1993 amendment to the Indian Extradition Act. Section 34 C, provides a statutory guarantee is introduced whereby the fugitive criminal surrendered or returned to India on the request of Central Government will be imposed only the life imprisonment provided the requested country is a country which abolished the death penalty in its country.

With regard to torture as a barrier, India has much to be concerned about. In the face of growing jurisprudential support to prohibit torture which is widely employed in the administration of criminal justice, India has every reason to be increasingly concerned about the fate of its extradition requests. Countries willing to accept torture as a barrier to extradition will normally be guided by the country profile of the requesting countries with regard to the torture situations prevailing in their territories. That India maintains a consistently bad record is a fact openly known and freely acknowledged within the public domain. That torture situation in India can prevent a positive response from the requested states to extradition requests from India is a not just a possibility. It is already an experience. Example, Purilia Arms Drop case.

Apart from the reported profile of torture situation in India, another glaring fact that casts a negative shade on the prospects of extradition to India is, the fact that India so far has abstained itself from becoming a party to the exclusive UN Convention against Torture, (CAT).

A positive development in India is on its way. A beginning is already made to develop domestic law on prevention of torture. Prevention of Torture Bill, 2010 is designed with an avowed objective of making suitable domestic law to enable it to become party to CAT. However, quite a number of deficiencies in the Bill have been pointed out. For example, the very definition of torture is not in tune with the definition as provided in CAT, omission of mental torture, no mention about other cruel, inhuman and degrading punishment to treatment, continued possibility of impunity to concerned public official, unreasonable time limitation within which only complaint can be lodged
etc. The new version of the Bill made in 2011 to meet the criticism of the 2010 Bill has bettered the earlier version. Yet, it also is not without shortcomings, eg, due diligence escape clause, non consideration of evidence obtained through torture.

On an overall analysis the following suggestions are made.

**Suggestions**

1. Keeping in view the tension inherent in the mutual relation between the needs of law enforcement, and the protection of human rights, efforts should be made by Human Rights Committee to draw useful guidelines in the form of general comments regarding critical points beyond which human right consideration court not be employed in extradition.

   Even with regard to operation most fundamental and nonderogable rights like torture as barriers to extraction, thrust must be on the severity of violation. The test of real risk on the basis of substantial grounds should be considered as threshold rejecting extradition request.

2. More concrete efforts must be made to reconcile the dilemmas between the need to control serious offences, particularly, terrorism and human right concerns. One of such efforts could be inclusion of terrorism as a subject matter of trial by ICC. Since the essential character of ICC is neutrality, surrendering the criminal to ICC would help overcome many concerns about the human right implications of extradition to the concerned individual like imposition of capital punishment or infliction of torture and at the same time the terrorism does not go unpunished under the pretext of political offence or human right protection that could be employed by some states. However, simultaneously efforts also should be made to circumvent the role of Security Council to defer the proceedings. This suggestion of course, carries many political considerations. Hence, there is a long way to go in this regard. Yet, efforts at least must take off in this direction.
3. To avoid inconsistencies in extradition practices states should be encouraged to adopt UN Model Law.

4. With regard to those serious crimes that are subject matter of ICC Jurisdiction, efforts should be made to encourage countries to surrender of concerned offenders to ICC as a matter of first priority.

5. India should become a party to ICC Statute. This certainly gives a positive image that it supports impunity of state officials guilty of serious international crimes. Similarly, it should also become a party to UN Convention against Torture to at least lessen the negative image it carries regarding the torture situation in its administration of criminal justice. Such negative image can effectively hinder positive responses to its extradition requests.

6. India as one of the target countries of terrorism and other organized crimes of serious nature has special stakes in availing barrier free extradition regime. Therefore, it is essential that India should explore the possible technical reasons that could block extradition to it and make necessary arrangements to prevent the same. In the light of its experience that torture situation operates as a weighty consideration to reject extradition it is necessary that India should try its best to build a country profile that provides positive image about itself. In this regard it is necessary to draft satisfactory version of the Bill on Prevention of torture by incorporating the following changes.

7. Acts of cruel, inhuman or degrading treatment or punishment also must be distinctly made an offence.

8. Victims must be provided redress, and particularly ensure non repetition of torture.

9. Persons suspected and guilty of torture must be either prosecuted or extradited.

10. Police personnel must be educated about the rights in respect of torture.
11. Requirement of sanction or permission for prosecution of public should be charged with changes of torture must be removed.

12. As per the proposed Bill if no sanction granted to the public official, it amounts to deemed sanction. That should be removed. In fact, prosecution must not subject to sanction.

13. There must be prohibition of detaining persons in secret places. India should ratify the international convention for the protection of all persons from enforced disappearances.

14. Information suspected to obtain due to torture must be excluded law being considered for purpose of evidence.

15. India should at the earliest become party to CAT.

16. Principle of non-refoulment is essential ingredient of torture. But the Bill contains no provision. The same must be included.

17. Two year limitation on the investigation and prosecution of torture. Barring the victims from access to privilege for not making complaint which two years is wrong. The same must be removed.

18. Heavy compensation must be provided to the victims of torture and ensure them non repetition of torture.