
INTERNATIONAL CRIMINAL ACTIVITIES

ROLE OF THE STATE AND THE JUDICIARY

**NATIONAL CONFERENCE OF HIGH COURT JUDGES ON
CRIMINAL LAW AND HUMAN RIGHTS**

18TH APRIL 2015, NATIONAL JUDICIAL ACADEMY, BHOPAL

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OUTLINE OF THE PRESENTATION

- **SECTION I: EXTRADITION: ROLE OF COURTS**
- **SECTION II: MUTUAL LEGAL ASSISTANCE IN INVESTIGATIONS**

ROLE OF COURTS: EXTRADITION

“In a world of increased mobility, interactive technology and new forms of criminality, extradition represents an essential response to the characteristics of contemporary crime.”

Justice Kirby, Dissent in *Foster v. Minister of Customs and Justice* (2000) 200 CLR 442 at 474, High Court of Australia

EXTRADITION LAW PRINCIPLES

PRINCIPLE OF DOUBLE CRIMINALITY

- *Bartle-Ex Parte Pinochet* 1998 UKHL 41=1998 4 ALL ER 897
- The *Carlos Cabal Extradition* 2000 (186) ALR
- Section 2(c) Indian Extradition Act; Article 2 UN Model Treaty; Section 3 UN Model Law

PRINCIPLE OF SPECIALITY

- *Daya Singh Lahoria* (2001) 4 SCC 516
 - *Abu Salem (I)* (2011) 11 SCC 214 modified by *Abu Salem (II)* (2013) 12 SCC 1 – Lesser offences excluded by the Ministerial order
 - *Om Prakash Srivastava* (2004) 112 DLT 123
 - Section 21 Indian Extradition Act; Article 14 UN Model Treaty; Section 34 UN Model Law
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INDIAN EXTRADITION ACT, 1962

- **SECTION 2(c)** Double Criminality
- **SECTION 21** Specialty
- **SECTION 31** Political Exception
- **SECTION 34C** Death Penalty
- **SECTION 7** Powers of the Magistrate
- **SECTION 8** Powers of the Central Government

UK EXTRADITION ACT, 2003

- **Section 11** Bars to Extradition
- **Section 21** Human Rights (Requiring ECHR compliance)
- **Section 25** Physical or mental condition of the detainee
- **Sections 26-34** Appellate procedure
- **Sections 166-171** Treatment following arrest including fingerprints, samples and photographs
- **Part 4** Police powers

UN MODEL CODES

- **The UN Model Treaty on Extradition, 1990**
 - Provides for human rights safeguards such as protection against torture, prejudices arising out of religion, sex, race or political opinion or status (Articles 2 and 3)

- **The UN Model Law on Extradition, 2004**
 - Grounds for refusal: offences of political nature, discrimination, torture, fair trial standards, ne bis in idem, death penalty (Sections 4-13)

 - *Aut dedere, aut judicare* (Section 15 of the UN Model Law)

Approaches on Abuse of Process

- *McKinnon v. The Government of the United States of America* [2008]UKHL 59
- *USA v Cobb* [2001] 1 SCR 587
- *Nadeem Akthar Saifi v. The Governor of Brixton Prison and The Union of India* 2000 EWHC ADMN 437
- *Ravi Shankaran v. The Government of India* [2014] EWHC 957 (Admin)
- *Maninder Pal Singh Kohli v. Union Of India* (2007) 97 DRJ 178

Acceptance of India's Position on Abuse of Process and Torture

- ***Hanif Mohammed Umerji Patel @ Tiger Hanif v. The Government of India* 2013 EWHC 819 (Admin)**
 - The test applied by Courts in the United Kingdom is that of a “case to answer”; which lays down that the prosecution must establish a strong *prima facie* case to show that there is a sustainable case against the defendant whose extradition is being sought. **What must be shown is that there is sufficient evidence to build a case and prosecute the defendant. If it cannot be shown that there is a sustainable case the same would amount to an abuse of process.**
 - Relying upon the statements made by the co-accused, the English Court in the case of Tiger Hanif was of the opinion that a “case to answer” had been put forth by the prosecution.

The Principle of Political Exception

- ***T v Immigration Officer (1996) UKHL 8*** - “international terrorism must be fought and the vague outlines of political exception are of no help” (per Lord Mustill)
- ***Cabal 2000(186) ALR 188***, holds that it requires strict proof to show that the extradition was sought to prosecute the fugitive solely on account of his political opinion. There must be material to show that the decision to seek extradition was because of the applicants political opinion.
- The view of the House of Lords in ***RB (Algeria) 2009 UKHL 10*** sounds the death knell of this defence – “*it should be recognised too, and counterveilingly, that there may be compelling reasons in favour of extradition rather than that the suspect should enjoy an undeserved safe heaven from prosecution*” - per Lord Brown.
- **Section 31(1)(a) – Offence of a political character**

UNSC Resolutions Concerning Terrorism Exclude the Defence of Political Exception

Resolution 1373 dated 28.09.2001

Political motivation is not a ground to refuse extradition requests.

“claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”

Resolution 1566 dated 08.12.2004

Imposes obligations such as,

- (a) Deny safe haven,
- (b) Bring justice on the basis of the principle of “*extradite or prosecute*”

Secy. of State v. Rehman [2001] UKHL 47

- National security includes international cooperation against terrorism
- **Lord Slynn:** “.... the reciprocal cooperation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom’s national security...”
- **Lord Hoffmans’ postscript:** “I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.”

INTERNATIONAL MUTUAL LEGAL ASSISTANCE IN INVESTIGATIONS

MUTUAL ASSISTANCE AND STATUTORY PROVISIONS

- Reciprocal arrangements regarding processes (Section 105(1)(ii) and 105(2) Cr.P.C.)
- Reciprocal arrangements for assistance in securing transfer of persons, attachment/forfeiture of property, identification/seizure of unlawfully acquired property (Sections 105-B to 105E Cr.P.C.)
- Letters Rogatory (Sections 166A & 166B Cr.P.C.)

Statutory Provisions relating to MLATs

Cr.P.C. Compliance

- Using the LR under Section 166A does not give the investigating agency any greater legal advantage. The deeming provision under 166A(3) is only to the effect that statements recorded etc. shall be deemed to be evidence collected during the course of investigation. All that this means is that this will be a part of the charge sheet.
- Evidence received by an MLAT or an LR will still have to be proved by leading evidence. The MLAT is much faster, efficient and less cumbersome.
- There has also been extensive use of the MLAT procedure in the Headley Trial.
- The examination of doctors from Singapore, in the Delhi Gang Rape case, by video conferencing using the MLAT process is an example in point.

Mutual Assistance in Criminal Matters Statutes

- To aid and regulate international co-operation, requests for mutual assistance in criminal matters including extradition.

 - Examples:
 - i. Switzerland: The Federal Act on International Mutual Assistance in Criminal Matters, 1981 (IMAC)
 - ii. New Zealand: The Mutual Assistance in Criminal Matters Act, 1992 (MACMA)
 - iii. Singapore: The Mutual Assistance in Criminal Matters Act, 2000 (MACMA)
 - iv. Malaysia: Mutual Assistance in Criminal Matters Act, 2002
 - v. UK: The Crime (International Cooperation) Act, 2003

 - No such statute in India
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RED CORNER NOTICES AND EXTRADITION

- ***Bhavesh Jayanti Lakhani v. State of Maharashtra (2009) 9 SCC 551***
 - A red corner notice, by itself, cannot be the basis of arrest or transfer of an Indian citizen.
 - Extradition is subject to the Indian Extradition Act, 1962 as well as other municipal laws of the country.
 - Arrest and/or extradition severely affects civil liberties, and is therefore, subject to judicial review on the ground of violation of fundamental rights.
 - This matter, in any event, related to a matrimonial dispute, where a Red Corner Notice ought not to have been issued in terms of Article 83 of the INTERPOL's Rules on the Processing of Data.
- ***Assange v. Swedish Prosecution Authority 2012 UKSC 22***
 - Extradition for investigation

THANK YOU

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