INTERNATIONAL EXTRADITION, THE RULE OF NON-ENQUIRY AND THE PROBLEM OF SOVEREIGNTY

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Abstract

Extradition is defined as the act whereby one particular jurisdiction delivers a person who is accused or convicted of particular crime in different jurisdiction, so as to take them and proceed further in a trial as their law enforcement. Basically, this process is a co-operation of enforcing law procedures between two different jurisdictions depending upon the arrangement made between them. Keeping aside the legal aspects of extradition, it also includes the transfer of custody, of a person who is being extradited to the legal authority upon request of the concerned authority. If we look into the extradition process, one of the sovereign jurisdictions has to make a formal request to another sovereign jurisdiction. If the accused is found within the boundaries of the requested sovereign, then the requested sovereign may arrest the accused and is further subjected to the extradition process. Here the extradition procedures will be subjected to the laws of the requesting sovereign. But for the countries, the process of extradition is regulated by the treaties. Whereas when extradition is compelled by laws, such as among sub-national territories, the concept is known as surrendering or rendition.

Overview

The research is divided into following chapters:

- International Extradition
- Bars to Extradition
- Rule of Non-Enquiry
- Problem of Sovereignty.

The concord in international law is that any state does not have any responsibility to surrender any suspects, or a criminal, to any foreign state, where the reason behind this is that according to the

principle of sovereignty each and every state has a legal authority over the people within its jurisdiction. Thus, such absence of international understandings and wants of the right to demand such suspects criminals from other countries, have led to the evolution of Extradition treaties. If there is no extradition treaties existing among the countries, a country may still request the dismissal or lawful return of an individual in accordance, with the existing laws of requested country's domestic laws. Whereas, the legislation of the penal provisions in many countries contain provisions which allows for extradition to take place when the extradition treaty is absent. But once again, the countries may request for the dismissal and lawful return of a accused from the boundaries of the requested state in absence of the extradition agreement. It is quite obvious that none of the countries in the world has an extradition agreement with all other countries, for instance United States of America does not have an extradition treaty with China.

Bars to Extradition

There are circumstances under which the countries may accept or reject the extradition requests. Basic rights of human beings bring an essential ground for such denial. These bars are instances of lawsuits, execution and pronouncements of the deserter in the requesting countries. These bars also extend to consider the impact on the family of the refugee during the extradition process. Henceforth, civil rights identified by zonal and global harmony may be a ground for refusal of extradition requests. Nevertheless, such rejection must be treated individually and must occur only in special cases. Common bars to extradition include the following:

- Failure to fulfill dual criminality- The extradition process is mainly instigated for offences with minimal punishments in both requesting and requested sovereign. This criteria has been scrapped for wide class of crimes in some dominion, especially within European Union.
- Political nature of the alleged crime- Many countries reject to initiate extradition process for accused of "political crimes".
- Possibility of certain forms of punishments – Some countries deny extradition on the basis that if the escapee succeeds in being extradited, he may be subjected to death punishment or inhuman torment.
- Jurisdiction- The desertee in question being a nation's own citizen, comes under that country's boundaries. Thus, jurisdiction upon a crime can be included to reject extradition.

The Rule of Non-Enquiry

The rule of non-inquiry began with the Supreme Court's 1901 decision in *Neely v. Henkel*[1], speaking through Justice Harlan, the Court declared,

"When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided by treaty stipulation between that country and the United States".

A more complex and controversial holding may also be implicit in this analysis, the government does not violate a citizen's due process rights when it sends him to face a criminal proceeding that differs materially from criminal proceedings conducted in U.S. federal courts[2]. A holding of this kind would not turn precisely on the issue of extraterritoriality, but its resolution almost certainly would respond to extraterritoriality analysis.

The fact that jury trial triggered the rule of non-inquiry is significant, because it indicates what was – and what was not – at stake. The right to trial by jury in a criminal case is a federal constitutional right and was an issue in the first U.S. extradition case.[3] Yet the Court did not consider the right to a jury to be particularly important at the time Neely was decided. Several of the Insular Cases[4] held that the jury trial right was not "fundamental" enough to apply to criminal proceedings held in "unincorporated" territories of the United States. Thirty years later, the Supreme Court held that the Constitution did not compel juries in state criminal proceedings,[5]and it did not incorporate the jury trial right against the states until 1968.[6]

In short, many courts simultaneously invoke the rule of non-inquiry while also considering the merits or otherwise taking steps to ensure that the extradite is not at risk. The frequency of this practice indicates both that courts may not be entirely comfortable with the rule in its most rigorous formulations, and that the rule itself is not as strong as those formulations maintain. One

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[1] (No. 1), 180 U.S. 109, 123 (1901).
[2] Munaf v. Geren, 553 U.S. 674, 695-97 (2008)
[3] *See* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 296-97, 321 (1990).
[4] *See* Balzac v. Porto Rico, 258 U.S. 298, 305 (1922).
[5] Palko v. Connecticut, 302 U.S. 319, 324 (1937).
[6] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

might even conclude that in cases involving physical mistreatment, the rule of non-inquiry is less a bar to judicial review than it first appears.

The Problem of Sovereignty

This part returns to the concept and rhetoric of sovereignty that sits at the heart of contemporary justifications for the rule of non-inquiry. I examine the implications of sovereignty theory as the Supreme Court seems to understand it today, and I seek to clarify the ideas of sovereignty that support the rule of non-inquiry. I also hope that this part will spur readers who are not persuaded by my doctrinal proposal to consider more closely the consequences of continued adherence to the rule. Importantly, however, I do not intend this section to be a critique of sovereignty or sovereignty theory in general. My target is the deployment of an arguably ahistorical and sometimes facile notion of sovereignty for the apparent purpose of preserving state and executive power at the expense of other values or interests.

According to many federal courts and executive branch lawyers, inquiring into a nation's criminal processes goes to the core of national sovereignty, particularly the sovereign's ability to coerce its population through its "monopoly of the legitimate use of physical force within a given territory."205 This way of conceptualizing sovereignty – particularly when it appears in the context of the rule of non-inquiry and the treatment of prisoners and detainees encompasses two related yet distinct topics: the sovereignty of the territorial nation state as an entity, and the allocation of sovereign power within a government. Part of my effort in this concluding part is to highlight the rise of executive authority – that is, of sovereign power both in the sense of consolidated power and in the sense of the power to make decisions about critical issues and thereby to complicate the common assertion that national sovereignty has weakened or fragmented.

Conclusion

Thus, on the one hand, changes in international law and the processes of globalization erode territory-based sovereignty, which, among other things, makes the rule of non-inquiry increasingly anachronistic. On the other hand, these same processes increase the power of one branch of government to set policy and make decisions, and to do so in ways that are inconsistent with

traditional conceptions of the rule of law. This aspect of internationalization supports the rule of non-inquiry as another tool for aiding efficient cooperation among national executives. But in so doing, it allows the rule of non-inquiry, and the extradition processes built around it, to reinforce territory-based models of national sovereignty as well. At the risk of over- generalizing, one might conclude that internationalization and the rise of cosmopolitan law and global legal pluralism do not necessarily erode traditional, territorial conceptions of sovereignty. They certainly do not erode the executive discretion that sits at the core of contemporary versions of those traditional conceptions.