EXTRADITION IN THE LIGHT OF THE INDIAN CONSTITUTION.

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ABSTRACT OF THESIS

The present thesis is essentially a study of the law of extradition in the light of the Indian Constitution. It is a study of case law and of relevant statutory provisions on the subject not yet judicially considered. Cases on similar provisions decided by English, American, Australian, Canadian and Civil-law countries' courts have been considered.

The early chapters of the thesis set the scene and establish the tone of the subject, which has unique features as a topic of law.

Chapter I gives the details of the Constitutional aspects of the subject in general, including the powers of the legislature, judiciary and the executive. Chapter II gives the definition; general survey of the subject; historical background of the different extradition Acts in force in India; pre- and post-Constitution treaties, and the necessity of giving them the force of municipal law; the distinctions between extradition, deportation, expulsion, kidnapping and the right of asylum; special features of the Indian Extradition Act of 1962, and the improvements made in it compared with the earlier Extradition Acts and international practice and procedure.

Chapter III deals with the procedure provided under Chapter II of the Extradition Act, 1962, with details of the jurisdiction of the magisterial and superior courts, and the Central Government's powers.

Chapter IV deals with political offences and grounds of refusal for extradition.

Chapter V deals with various topics on extradition with special reference to the relevant Articles of the Indian Constitution, with detailed Indian and foreign case law.

Chapter VI deals with remedies available both to the fugitive offender and the requesting State, before the Superior Courts under the Indian Criminal Procedure Code and the Constitution, and before the Central Government.

Chapter VII deals with practice and procedure of rendition within the Commonwealth, giving details of the differences in procedure under Chapters II and III of the Indian Extradition Act, 1962.

Practice and procedure in International Law has also been considered. Suggestions have been made to amend further the present Act wherever necessary, and towards the framing of Rules under Section 36 of the Act.

PREFACE

There is no up-to-date work on the law of extradition in the light of the Indian Constitution and, therefore, I ventured to take up this study for a thesis. It is to be noted that R.C. Hingorani in 'The Indian Extradition Law' (1969, Asia Publishing House, Bombay), and S.K. Agarwala in 'International Law - Indian Courts and Legislature' (1965, Bombay), in Part III,'Extradition' have not covered the Constitutional aspects of Extradition proceedings. This thesis attempts to deal with the Constitutional dimensions in much detail that the other Works on extradition have not attempted. This is the main contribution of this thesis. Cases subsequent to these publications which have proved to be important are also discussed here.

While dealing with the historical aspect of the extradition law in general, and Indian Extradition Law in particular, in the light of the Indian Constitution, up-to-date case law has been given on judicial inquiry, non-extradition of political offenders and lack of definition of political offences, extradition or non-extradition of nationals, the doctrine of double criminality, the rule of 'speciality', the rule against double jeopardy, non-extradition for time barred offences, or offences of a trivial nature, the interpretation of extradition treaties, and related matters.

Since the law of extradition comes within the concurrent dominion of international and national law, I have dealt with the Indian as well as customary rules of International law. On the present Indian Extradition

Act of 1962, the case-law being scanty, numerous judgments of foreign courts on similar provisions on the subject have been included in this study. Cases of the International Court of Justice and other foreign courts have been cited to show practice in International Law, which may be useful in India as persuasive authorities.

Though some discussion of the international aspect of the law of extradition was essential for this study, I have essentially concentrated on the Constitutional aspect on the subject in the light of the Indian Constitution. That is the heart and core and proper theme of this thesis.

Though I registered for the research in 1959, and commenced active work on the thesis soon after March, 1971, it includes case-law up to June, 1973, relevant for the purpose and on the subject of extradition law.

I am highly indebted to Professor J.D.M. Derrett who from time to time suggested material and books on the subject and kept me informed about them, even when I was in India.

I am also highly obliged to Mr.A.Dicks, my Supervisor, who ably guided me in my study and who extended his help in making suggestions for re-writing portions, wherever necessary.

I would like to thank Mr. T.K.K. Iyer for his immense help in getting this thesis revised and in offering suggestions on points of Constitutional Law.

I have consulted the libraries of the School of Oriental and African Studies, the Institute of Advanced Legal Studies, the Senate House Library, the India House

Library, the British Museum Library, the Library of the Supreme Court of India, and the Library of the Rajasthan High Court; and I am much indebted to the staff of these libraries who made available the books I needed.

LIST OF ABBREVIATIONS

A.C.	Appeal Cases, British House of Lords and Judicial Committee of the Privy Council
A.D.	Annual Digest of Public International Cases, 1914-1949
A.I.R.	All India Reporter
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
All. A.L.J.	Allahbad Allahbad Law Journal
All E.R.	All England Reports
An.W.R.	Andhra Weekly Reports
A.P.	Andhra Pradesh
Ap.W.R.	Andhra Pradesh Weekly Reports
Bom.	Bombay
Bom.L.R.	Bombay Law Reports
B.Y.I.L.	The British Yearbook of International Law
B & C	Barnwell & Crosswells Reports (K.B.)
Cal.	Calcutta
Can.Bar.Rev.	Canadian Bar Review
C.C.C.	Canadian Criminal Cases
Cox C.C.	Cox, Edward William - Reports of Criminal Cases - Cox's Criminal Cases.
Cr.L.J.	Criminal Law Journal
C.L.R.	Commonwealth Law Reports (Australia)
C.R.	Criminal Reports (Canada)
Cranch.	Cranch's U.S. Supreme Court Reports, 1801-1815 (United States)
C.W.N.	Calcutta Weekly Notes
E.R.	English Reports
F (Fed, Fed. Rep.)	Federal Reporter (First Series, United States)
F (2d)	Federal Reporter (Second Series, United States)
Fallos Sup.Ct.	Fallos de la Corte Suprema (Argentina)
F.C.R.	Federal Court Reports (India)

F.L.J.	Federal Court Law Journal (India)
F.C.	Federal Court (India)
Grotius Society	Transactions of Grotius Society
H.K.L.R.	Hong Kong Law Reports
I.C.	Indian Cases
I.C.J.	International Court of Justice
I.J.I.L.	Indian Journal of International Law
I.C.L.Q.	International Comparative Law Quarterly
Int. Law Reports	International Law Reports, 1950-
I.L.R.	Indian Law Reports
I.R.	Irish Reports
I.Y.I.A.	Indian Yearbook of International Affairs
J & K	Jammu and Kashmir
J.I.L.I.	Journal of Indian Law Institute
J.P.	Justices of Peace
K.B.(K.B.D.)	King's Bench Division of the English High Court of Justice
Ker.	Kerala
K.L.T.	Kerala Law Times
L.J.	The Law Journal (United Kingdom).
Lah.	Lahore
L.Q.R.	Law Quarterly Review
L.R.Ch.App.	Chancery Appeal Cases (First Series)
L.R.P.C.	Law Reports, Privy Council (United Kingdom)
L.T.	Law Times
L.T.R.	Law Times Reports
M.B.	Madhya Bharat
M.P.	Madhya Pradesh
M.L.R.	Michigan Law Review
Mad.	Madras
M.L.J.	Madras Law Journal

Mys.	Mysore
Mys.L.J.	Mysore Law Journal
Nag.	Nagpur
Nag.L.J.	Nagpur Law Journal
N.L.R.	New Law Reports (Ceylon)
N.B.R.	New Brunswick Reports (Canada)
N.S.W.R.	New South Wales Reports
N.Y.	New York Reports (United States)
N.Z.L.R.	New Zealand Law Reports
O.L.R.	Ontario Law Reports
O.R.	Ontario Reports, 1882-1900 (Canada)
O.W.N.	Ontario Weekly Notes (Canada)
P.L.D.	Pakistan Law Decisions
P.L.R.	University of Pennsylvania Law Reports
P.C.I.J.	Permanent Court of International Justice Reports
Punj.	Punjab
Q.B. (Q.B.D.)	Queen's Bench Division of the English High Court of Justice
Que. K.B.	Quebec Official Reports
Raj.	Rajasthan
S.C.J.	Supreme Court Journal (India)
S.C.R.	Supreme Court Reports (India)
S.C.R.	Canadian Supreme Court Reports
So.Afr.L.R.	South African Law Reports
Sol.Jo.	Solicitors Journal
T.L.R.	Times Law Reports, 1884-1952 (United Kingdom)
Tra-Cochin	Tranvancore Cochin
U.P.	Ultar Pradesh
U.S.	United States Reports (Supreme Court)
W.L.R.	Weekly Law Reports (United Kingdom)
W.W.R.	Western Weekly Reports (Canada)

CHAPTER I

INTRODUCTORY

The Indian law of extradition is operated under a central statute (see below), and the interpretation of this statute is entrusted to the High Courts and the Supreme Court. Although the basic principles of the Indian legal system are very well known, a few words of a purely introductory character are necessary to recapitulate in general the relationship between the statute-making power, the powers of the judiciary, and the legal limits on the discretion of the executive. The latter looms very large in Indian extradition practice, and to it space is devoted in detail in this thesis.

The Indian Constitution has adopted not the Continental system of law, but the British system under which the Rule of Law prevails. Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority,[1] and as will be shown subsequently, the Indian law of extradition is no exception to this rule. The law of extradition is a special branch of criminal law. The present Indian Extradition Act derives from the Constitution of India. The theme of the law of extradition in this work will be discussed and examined in the light of the provisions of the Constitution of India. The law of extradition operates both on the national and the international level, and in this work the provisions and practice of internationnal law in the field of extradition will be discussed, with special reference to

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1. State of Madhya Pradesh v. Thakur Bharatsingh, A.I.R. 1967 S.C. 1170 at p.1173.

the impact of constitutional provisions on the present Indian Extradition Act of 1962. The extradition law of the common law and civil law countries will also be considered in a modest endeavour to give an account of the law of extradition in India in a comparative as well as an international context.

Extradition is a subject specifically provided for as the object of legislation as Entry 18 of List I, Seventh Schedule to the Constitution of India.[1] The Constitution of India is the paramount law and source of all laws in India. It is the mechanism under which laws are made, and not merely legislation which declares what the law on any subject is to be.[2] It is the Supreme Charter which the people have given themselves.[3]

The Indian Constitution is meant to be a complete structure of governance which lays down in detail individual rights as against the rights of the State, and the powers of the legislative, the executive and judicial authorities of the State in their respective fields.[4]

While in England, Parliament is supreme and omnipotent; in America, the judiciary can review the laws for their Constitutionality, which would include an examination of their compliance with 'due process of law' India's Constitution is a compromise between these two extremes, and under it neither the legislature nor the judiciary is supreme. On the whole, our Constitution has preferred the supremacy of the Legislature, and subject to the constitutional limitations (Articles 13, 245 and 246

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1. Anantanarayanan J. in Re Chockalingam, A.I.R. 1960 Madras 548 at p.563.

2. Kania C.J. in A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 at p.42.

3. S.R. Das J. in Gopalan's case, ibid., at p.119.

4. Kania C.J. in Gopalan's case, ibid. at p.38, and Das J. at p.117.

and in Legislative lists), the legislatures are at liberty to pass any laws, and the validity of these laws cannot be questioned by the Supreme Court on any ground other than the transgression of constitutional limitations.[1]

Subject to the provisions of the Constitution, power has been given to Parliament and to the State legislatures to make laws as they please to meet the needs of the people, and power has been given to the Supreme Court to declare any enactment ultra vires or void only if it exceeds the limits of the legislative competence or conflicts with the fundamental rights guaranteed to the citizen. But its power stops there, and the court is not at liberty to judge the validity of a law on any other ground; the court cannot place on the powers of the legislature any limitation which the constitution itself does not place, either expressly or by necessary intendment. In other words, the power of the Supreme Court, under the Constitution, is, in this connection, confined to two things: the interpretation of the Constitution and of any impugned legislation, and the declaration that the legislation is either constitutional or unconstitutional and void, depending upon whether or not it violates any constitutional limitation.[2]

Outside the field of constitutional limitations, the Supreme Court cannot play the high role of the Supreme Court of America. It has no authority to test a law on the anvil of natural justice, and has no power to examine the justice, or the propriety of any law according to its own ideas of what a law on the subject in question ought to be.

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1. S.R. Das J. in Gopalan's case, ibid., at p.107,
2. Kania C.J. in Gopalan's case, ibid., at p.42.

If a law keeps within constitutional limitations, it cannot be touched however harsh, unreasonable or onerous it might be, according to the court's own notions.

As we have seen, Parliament and the State Legislatures are at liberty to pass laws subject to the constitutional limitations in Articles 13, 245 and 246. Article 245 requires that all laws shall be subject to the provisions of the Constitution. Article 13 provides that the State shall not make any law which takes away or abridges a Fundamental Right conferred by Part III of the Constitution, and Article 246 lays down the ambit of the law-making powers of Parliament and the State legislatures. The combined effect of these articles is that a law is good in constitutional terms, unless it transgresses the legislative competence of legislature under Article 246, and the legislative lists in the Seventh Schedule, or takes away or abridges any Fundamental Rights.

It will be appreciated that fugitive offenders are 'persons' and therefore, have certain rights guaranteed to them under Part III; and since India will grant extradition of her nationals (see below), many persons whose extradition is requested will be citizens, to whom yet other rights are guaranteed. It follows that the constitutional limitations upon Parliament and the actions of the Central Government may at any time prove to be of the highest importance, and their definition is an on-going process of considerable concern.

Any person who is directly affected by any law, or by any executive order made under it, can challenge it before the Supreme Court or any of the High Courts, either as <u>ultra vires</u> or as being in conflict with a Fundamental Right.

No doubt the Constitution has given the legislature power to determine what is good for the people, but this power is circumscribed, and the legislature cannot go beyond its bounds. If the court finds that a law has transgressed those limitations, it must declare the law to be bad and the question whether it benefits the people in , e.g. any political sense, does not arise for consideration.[1] All these principles will apply in regard to the challenge of any provisions of the Indian Extradition Act, 1962, and the extradition proceedings themselves.

The court's power is confined only to the determination of the question whether an impugned law transgresses any constitutional limitation, and if it does not, it is the duty of the court to uphold the validity of the law, whatever the view of the court may be as to the effect of its operation.[2]

The present Indian Extradition Act, 1962, has been enacted by the Indian Parliament in exercise of the powers conferred upon it by Articles 246 and 253 of the Constitution, read with Entries 10, 14, and 18 of the Union List as given in the Seventh Schedule. Article 246(1) gives exclusive power to the Parliament to legislate with respect to any matter given in the Union List of the Seventh Schedule. Article 253 empowers Parliament to make any law in order to implement any international agreements such as extradition treaties and the arrangements with foreign countries

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1. Bose J. in State of West Bengal v. Anwar Ali, A.I.R. 1952 S.C. 75 at p.103.

2. S.R. Das J. in State of Punjab v. Ajaib Singh, A.I.R. 1953 S.C. 10 at p.13.

into which the Government of India may have entered. Entry 10 of the Union List makes 'foreign affairs' the monopoly of the Central Government of India. Foreign affairs are interpreted to include "all matters which bring the union of India into relation with any foreign country". Entry 14 empowers the Union Government to enter into treaties with foreign countries and to implement the same.

Entry 18 specifically deals with 'extradition', i.e. the delivery of an accused or convicted individual to the State on whose territory he is alleged to have committed or to have been convicted of, a crime, by the State on whose territory the alleged criminal happens for the time being to be.[1] The entry itself merely reads the single word 'Extradition'. Although the interest of civilized communities requires that such persons should be extradited, states have claimed the right to give asylum to such persons on the ground that it follows from their territorial supremacy.[2] Consequently, extradition has been the subject of treaties between various States. Extradition treaties may be expressly or impliedly subject to extradition laws.[3]

As extradition is a specific subject of legislative power, it follows that the rendition of an offender for an extraditable offence could not be in derogation of Fundamental Rights enshrined in Part III of the Constitution of India,[4]

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1. Oppenheim, International Law, Vol.I, p.696; State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1175.

2. H.M. Seervai, Constitutional Law of India, p.946.

3. Seervai, ibid., p.946.

4. Anantanarayanan J. In Re Chockalingam, A.I.R. 1960 Madras 548 at p.564.

and therefore, the present law of extradition in India has to be tested in the light of the Constitution of India. If any provisions of the Indian Extradition Act, 1962, or any Rules framed (eventually), under section 36 of the said Act, or any action taken by the court or the Central Government under the Act, or any treaty provision are in derogation or in infringement of the provisions of the Constitution, the superior courts in India would not hesitate to strike down the provisions of the Act or Rules or the action of the investigating Magistrate or the Central Government. The testing of the extradition laws in the light of the Constitution has produced a new body of jurisprudence on the approach to these problems in India, and it is this which is the subject matter of this work. Current trends in judicial thinking suggest many complicated questions of constitutional law which did not arise before the coming into force of the Constitution.

After C.G. Menon's case,[1] and before the enactment of the Indian Extradition Act of 1962, there was an interregnum and the extradition was ordered at the request of foreign and commonwealth countries on the basis of the instructions issued by the Government of India, and such instructions were held valid by the Supreme Court in Jugal Kishore More's case.[2] Even now, no Extradition Rules have been framed by the Central Government in exercise of its powers under section 36 of the Indian Extradition Act. No court can issue a mandate

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1. State of Madras v. C.G. Menon, A.I.R. 1954 S.C. 517.

2. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at pp.1179, 1182.

to a legislature to enact a particular law. Similarly, no court can direct a subordinate legislative body to enact or not to enact a law which it may be competent to enact. Conversely, no court can give a direction to a government to refrain from enforcing an existing legal provision, the constitutionality of which has not been impugned.[1]

Under the Indian Extradition Act, 1962, the exclusive power of determination whether to grant extradition or refuse extradition is vested in the executive wing of the Central Government by virtue of sections 29 and 31 of that Act. Assuming that the Act of 1962 has been enacted validly, the power of extradition can, subject to certain conditions (laid down e.g. in sections 29 and 31 of the Indian Extradition Act of 1962) be delegated to some other authority. But the exercise of that power by the legislature's delegatee is still an exercise of a legislative power.[2] The Supreme Court and High Courts can examine if any of the provisions of the Act are in violation of any provision of the constitution, and so beyond the legislative competence of Parliament.

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There is a natural tendency on the part of the State of asylum to facilitate the surrender of fugitives. Bringing a fugitive to justice is one motive, reciprocity

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1. Narinder chand v. Lt.Governor, Administrator, Union Territory, Him. Pra. and Others, A.I.R. 1971 S.C. 2399 at p.2401. (on the principles of this sales tax matter, the Courts can not give directions to the Central Government to frame Rules under Section 36 of the Extradition Act of 1962). (The Parliament has by virtue of Section 36 of the Extradition Act, 1962, empowered the Central Government to frame Rules and on the analogy of the principles in this case the Central Government will have legislative powers to frame Rules, though they are required to be placed before the Parliament as provided under Section 36 of the 1962 Act).
2. Narinder chand, ibid., at p.2401.

is another; keeping cordial relations with the requesting State is another motive. Extradition proceedings involve complicated procedural matters and a balance has to be struck between the life and liberty of a person accused and the vindication of justice on the part of the requesting State, so that the fugitive offender may not escape the consequences of the crime he has committed.

The liberty of an individual being supposedly an important right, nowadays, many States, particularly the United States and the United Kingdom, prescribe that no fugitive will be extradited in the absence of an extradition treaty between the two countries concerned. But the existence of a treaty is not always a prerequisite for securing the return of the fugitive. Some States do not insist on the existence of a treaty as the basis for extradition and India is one such country. Under the Indian Extradition Act of 1962, notification of the application of the Act to a particular country under sections 3 and 12 is enough to enable the foreign State to request the surrender of the wanted fugitive, although the liberties of the individual are, of course, protected by the provisions of the Indian Constitution.

The Russian sailor Tarasov's case [1] is an instance of a non-treaty country demanding the extradition of the fugitive on the basis of notification. Canada, France, Switzerland, Sweden and Turkey do not require an extradition

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1. Hingorani,R.C., The Indian Extradition Law, pp.25, 53, 55; see J.N. Saxena; Extradition of a Soviet Sailor, A.J.I.L. (1963), vol.3, p.883; Agarwala, S.K., International Law,Indian Courts and Legislature, p.219; Bedi, S.D., Extradition in International Law and Practice, p.150.

treaty for the surrender of the fugitive, and thus, India does not lack precedents.

Apart from the basis of requisition for the surrender of the fugitive, the territorial State has a dual responsibility. On the one hand, it is obliged by treaty or its own notification, to extradite the fugitive, if he is held to have committed an extraditable offence; and on the other hand, it has to safeguard the interest of the fugitive who according to the Indian legal system,[1] is supposed to be innocent until a prima facie case has been established against him,[2] and also his constitutional Fundamental Rights are to be safeguarded. The danger of jeopardizing the cordial relations between the requesting and requested State on account of procedural requirements cannot be ruled out,as procedures for extradition vary from State to State and it may sometimes be onerous for a demanding State to be confronted with searching inquiries.

The surrender of a political offender can be a thorny problem, Now, the legislation in Britain [3] also prohibits extradition of 'political offenders'. Extradition and granting political asylum are two intersecting doctrines which conflict with each other, and the Central Government may face difficulties in drawing a line between the two, so that the law is not sacrificed to political considerations. This is why a magistrate's enquiry has been provided in the

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1. Field, J. in Reg v. Rogers (1877), 2 Q.B.D. 28 at p.34.

2. J.N. Saxena: Extradition of a Soviet Sailor, (1963) 57 A.J.I.L. 883 at p.887(ii).

3. The Fugitive Offenders Act, 1967.

Indian Extradition Act of 1962, to avoid the requesting State's displeasure. Thereafter, according to the set standards laid down in the Act, the Central Government has discretion to grant or refuse the extradition.

Due to the many meanings attributed to the phrase, 'political offender', by the various commentators and judges, a discretion is left initially with the magistrate to determine whether in the given circumstances, the fugitive offender is an ordinary criminal liable to be extradited or is a political offender entitled to asylum within the territorial State or elsewhere. The courts may find it difficult to determine whether a given offence is a political one when a political offender commits an ordinary crime to achieve political ends. Sometimes the fugitive is falsely implicated in the commission of a crime which is ostensibly non-political. The Central Government must remain alert against possible abuse of extradition facilities and, as in Zacharia's case,[1] the Central Government, by virtue of section 29, has the discretion to refuse or to grant extradition of a fugitive offender. The grounds for refusal or grant of extradition in the Extradition Act itself were held[2] (see below, p. 55) within the legislative competence of the Indian Parliament: the court could not examine their desirability and undesirability, but would only see if the procedural and substantive law had been followed. Even then, above all, the discretion of the Central Government was supreme.

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1. Zacharia v. Cyprus (1962) 2 All E.R. 438.

2. Hans Muller v. Supdt. Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367, at p.374.

Some States are known to have refused to surrender their own nationals for eventual trial in foreign States, but there are some other States which do not hesitate to surrender the wanted fugitive to the demanding State, irrespective of the fact that the fugitive is a national of the surrendering State. The United Kingdom, United States and India are such States and do not discriminate on the basis of nationality. The Constitution itself has made applicable articles in Chapter III, applicable to citizens and aliens alike, except Article 19 and 31. The Indian Extradition Act, 1962, does not restrict the extradition of Indian fugitives who have taken shelter in India after commission of an offence in a foreign country, and consequently, even Indian citizens can be extradited to a foreign State, if a prima facie charge is established against them, unless of course, there is a treaty between them excluding the extradition of nationals.

In extradition proceedings, some of the fugitives are bound to be mere suspects, and yet others, falsely accused: all of them are not necessarily actual offenders. The fugitive offender feels great difficulty in conducting his own defence, compared to the efforts of the demanding State. The government machinery of the requesting State works to effect his extradition while the fugitive offender, is rarely able to defend himself properly, a difficulty enhanced by foreign exchange restrictions. Cases can go undefended for want of funds, even to call witnesses to rebut the evidence against him. This problem is sometimes solved by the legal aid society, and the courts may request a competent lawyer to defend the fugitive offender. But a handicap remains, of which the courts are aware.

In extradition proceedings, any surrender must be preceded by precautions to the effect that nobody is denied the process of law and that no fugitive offender is made the victim of political vindictiveness. The Indian Extradition Act, read with our constitutional provisions, provides all these safeguards. The extradition or the surrender of a fugitive is essentially a political act done in pursuance of treaty or an arrangement ad hoc. The Central Government has been given powers under sections 29 and 31 of the Indian Extradition Act, 1962, to refuse extradition if the offence is of a political character or is barred by time (see below), or if the law of the requesting State does not contain a rule of speciality (see below), or if the fugitive has been accused of some offence in India, not being the offence for which his extradition is sought. Similarly, if he is undergoing sentence, or the case is a trivial one, or the application for surrender is not made in good faith or in the interest of justice or for a political reason, or otherwise, it is unjust and inexpedient to surrender or return the fugitive criminal. All these conditions will be examined in detail below. The Central Government is authorised, in fact, to exercise these powers after the magistrate has made his report for committing of the accused under sections 9(2) and 17(1) of the Indian Extradition Act, and the Central Government can arrive at conclusions different from those arrived at by the magistrate.

If the executive exceeds its powers, the judiciary will restrain it, but when the conditions laid down by the legislature as a prerequisite to extradition are fulfilled and the judiciary has, therefore, no power to intervene,

the executive is, nevertheless, under no legal compulsion to surrender the prisoner. It retains discretion in the matter, and may, for reasons which appear to it be valid, cancel the warrant which has been issued.[1]

The Central Government is to see whether or not sufficient grounds have been made out for depriving the demanded person of his liberty and sending him out of India to answer a charge in a foreign country. The Central Government will decide the matter in accordance with the principles laid down in sections 29 and 31 of the Indian Extradition Act.

The present Indian Extradition Act does not specifically provide for refusal of a surrender if the request is made for the purpose of prosecuting or punishing the fugitive offender on account of his race, religion, nationality or political opinions, or that it might prejudice his trial, or on the ground that he may be punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions, as provided in the United Kingdom.[2] But when a person is guaranteed Fundamental Rights in Chapter III of the Indian Constitution, there is no need for making separate provisions for these in the Indian Extradition Act, 1962.

Even prior to the enactment of the current Indian Statute, an examination of the scheme of the Indian Extradition Act, 1903, showed that it was not an abritrary or

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1. Shearer, J.: In Hadi Bandhu Prodhan v. Emperor, A.I.R. 1946 Patna, 196 at p.199; see also section 29 of The Extradition Act, 1962.

2. See Fugitive Offenders Act, 1967, sections 4(1)(a)(b)(c): R. v. Governor of Pentonville Prison, Ex parte Fernendez, (1971) 2 All E.R. 24

capricious piece of legislation,but is a careful product of a balance between what was due by way of reciprocal international courtesy to achieve the common objective of suppression of crime,and what was due by way of protection of one's own citizens before being delivered up for trial in a foreign country whose laws they were accused of having broken.[1]

That Act, while maintaining the rights of the individuals as far as possible and adequately safeguarding them, did not overlook the rights which the public and State are entitled to claim. Thus, even that Extradition Act was a harmonious combination of what was agreeable to the constitution and laws, and the voluntary exercise of the power to surrender a fugitive from justice to the country from which he has fled. It has been said: "It is our moral duty to do so."[2]

The English Extradition Acts on the lines of which the Indian Extradition Act of 1962 has been modelled have been praised:[3]

> "The Extradition Act stands, I think, as a monument of successful draftsmanship, it has so established itself that almost one has come to believe it could take rank as a doctrine inherent to scientific law-making. The successful statutes make little fuss, cause little argument in the courts. And judged by the standard (the brevity of the case law arising under it),this statute must be pronounced to be very successful."

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1. Ramaswami J.,In Re Chockalingam, A.I.R. 1960 Madras, 548 at p.553.

2. Ramaswami, J., in Re Chockalingam, A.I.R. 1960 Madras, 548 at p.553.

3. Piggot C.J. (HongKong): The Law of Extradition, preface remarks; Ramaswami, J., in Re Chockalingam, A.I.R. 1960 Madras, 548 at p.553.

The remarks of Ramaswami J. and Piggot C.J. (Hong Kong) would apply to the present Indian Extradition Act of 1962 with full force. Improvements regarding reciprocity and other provisions, such as non-extradition for political offences, have been provided in the present Act. When the Indian Extradition Act, 1903, was framed the Indian Constitution was not in force, but when the new Act was enacted the Constitution was already in force and its framers took into consideration the drawbacks and lacunae of the earlier British and Indian Acts, and re-modelled the new Act in the light of the Constitution.

It is important to note that in cases of extradition for ordinary offences, as distinguished from political offences, no infringement of Fundamental Rights of an Indian citizen is involved.[1] The imprisonment of a criminal, or of a person who is arrested and detained according to law does not offend any Fundamental Right, for to hold otherwise would result in a virtual paralysis of the administration of criminal justice.[2] Extradition is a subject specifically provided for as the object of legislation, as Entry 18 of the Seventh Schedule, List I, in the Constitution. Since extradition is a specific subject for the legislative competence under the Constitution, it follows that the rendition of offenders for extraditable offences cannot be in derogation of Fundamental Rights of freedom of movement or residence and this restriction is in the interest of general public, as provided in Article 19(5), which reads as under:

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1. In Re Chockalingam A.I.R. 1960 Madras 548 at p.559.

2. A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C.27; Anantanarayanan J. in Re Chockalingam, ibid., at p.564.

> "Nothing in sub-clauses (d),(e) and (f) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent this State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses in the interest of the general public or for the protection of the interests of any Scheduled Tribe."

Rendition for trial to another country, in accordance with international law and the municipal law under the Indian Extradition Act, cannot constitute an infringement of fundamental rights guaranteed under Article 19(d) of the Constitution.[1]

As it is a valuable right of a citizen that he should not be sent into a foreign jurisdiction, unless the law is strictly complied with, the decisions are uniform that a court must give a strict interpretation to the provisions of the Extradition Act.[2] The decision on any points raised by the accused is a judicial order,[3] though the proceedings before the magistrate are in exercise of the special jurisdiction conferred by the Act, and though they arise out of a criminal cause or matter.[4] The proceedings are not that of an inferior court under the Criminal Procedure Code, as

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1. Anantanarayanan J. in Re Chockalingam, ibid., at p.564.

2. Ramprags v. Emperor, A.I.R. 1948 All 129 at p.130; Emperor v. Gulli, A.I.R. 1914 Cal.22 at p.24; Santabir Lama v. Emperor, A.I.R. 1935 Cal.122 at p.124.

3. H.K. Lodhi v. Shyamlal, A.I.R. 1950 All 100 at p.104.

4. Re Alice Woodall, (1888) 20 Q.B.D. 832; 59 L.T.549; R. v. Fletcher (1876), 2 Q.B.D. 43; The King v. Governor of Brixton Prison, Ex parte Savarkar (1910) 2 K.B. 1056.

the magistrate is specifically appointed under section 5 or 23 of the Act of 1962. Conversely, the jurisdiction of ordinary criminal courts would seem to be ousted.[1]

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While a state of war exists, there is no place for extradition proceedings between the belligerents and all treaties on the subject are at least suspended during continuance of war. Whether extradition treaties are abrogated during the continuance of hostilities is doubtful. Perhaps the safer view is to regard such treaties as abrogated and to hold that they do not revive on the restoration of peace, save by express agreement. This theory was followed after the Franco-Prussian war in 1871.[2]

These brief remarks are intended to set the scene and introduce the technical chapters which follow. It was thought inappropriate and unnecessary to qualify each and every remark above by reference to particular details of the law as they will emerge below. In view of the failure of the Central Government to provide Rules for the working of the Act, and in view of the absence of the arrangements which would call into force the provisions of a whole Part of that Act, it is both requisite that the statute's purpose and potential should be investigated in great detail, and that this investigation should be angled somewhat in

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1. The Norwich Corporation v. The Norwich Electric Tramways Co. (1906) 2 K.B. 119 (C.A.).

2. Law of Extradition: Muddiman: Preface to first edition.

the direction of enlightening the reader as to the scope for development which extradition law in India still possesses (subject to the factual limitations mentioned above).

CHAPTER II

(1) EXTRADITION IN GENERAL

(a) Definition

The origin of the word "extradition" lies in a combination of two Latin words, viz. "ex" and "traditio " which means deliver from. This word was first used in a French decree of 1791 and later in a Treaty of 1828, after which the word has been uniformly used.[1]

Extradition has been defined as the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the Courts of the other State. Surrender of a person within the State to another State, whether a citizen or an alien, is a political act done in pursuance either of a treaty or of an arrangement ad hoc.[2] It is the surrender by one State of an individual accused or convicted of an offence committed outside of its own territory and within the territorial jurisdiction of the other, to that other which, being competent to try and punish him, demands his surrender. Extradition is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one

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1. Harvard Research Draft, 1935; 29 A.J.I.L. (supp.), p.66.

2. State of West Bengal v. Jugal Kishore, A.I.R. 1969 S.C. 1171 at p.1175; Terliden v. Ames (1902), 184 U.S. 270 at p.289.

State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent states is based on treaties or ad hoc arrangements. However, the law of extradition operates nationally as well as internationally. International law governs the international relationship between sovereign states which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State, the procedure to be followed by the courts in deciding whether extradition should be granted and on what terms, is determined by the municipal law.[1]

> "The Constitutional doctrine in England is that the Crown may make treaties with foreign States for extradition of criminals, but these treaties can only be carried into effect by the Act of the Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power." [2]

According to Professor Oppenheim, extradition is the delivery of an accused person or convicted person to the State on whose territory he is alleged to have committed or to have been convicted of a crime, by the State on whose territory the alleged criminal for the time being happens

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1. Wheaton: International Law, vol.I, 6th ed., p.213.

2. Jugal Kishore More, ibid., at p.1175.

to be.[1]

Extradition must be distinguished from transportation and from deportation, which also result in the removal of a person from the country.

In either case, questions of expediency loom large. The consequence of disregard of extradition will only lead to virtual exclusion of citizens of this country from all foreign countries. No country is going to tolerate Indian citizens coming and injuring their citizens and then escaping. Secondly, India will be helpless if culprits committing offences in Indian territory slip out to contiguous countries. In fact, Bentham pointed out in another connection:

> "If all the criminals of all the countries has assembled and framed a system after their own wishes, is not the abolition of extradition the very first which they would have established for their security."[2]

The early history of the practice of extradition in Roman Empire, England and France, will be found set out in Sir Edward Clarke's Law of Extradition,[3] from which it is desirable to reproduce a short summary since Indian courts have found it helpful to orientate themselves in such terms.

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1. Oppenheim, International Law; Eighth Ed., Vol.I, p.696. See also, J.G. Starke, An Introduction to International Law, 4th ed., p.260; Halsbury's Laws of England, 3rd ed., vol.16, p.560; 22 Am jur p.244, S2; Russell L.C.J., In Re Arton 1896-1, Q.B. 108; Piggott, Extradition, 1910, at p.8; Clarke, Law of Extradition, 3rd ed., p.223.

2. Quoted by Rama Swami J., In Re Chockalingam, A.I.R. 1960, Madras 548 at p.559.

3. Edward Clarke: Law of Extradition, 3rd ed., Ch.II, p.16.

(b) Practice of Extraditions

The practice for extradition amongst the nations is based upon sound principles and reasons and they are, first, to warn the criminals that they cannot escape punishment by escaping or fleeing to a foreign country or territory, and secondly, that it is the interest of the territorial State that a criminal who has fled from another country after having committed the crime and taken refuge and shelter in its territory should not be left free, because he may commit a chain of crimes and continue endlessly escaping to other states, and thus, may get a free hand to commit endless crimes without fear of punishment. Extradition is based upon the principle of reciprocity; and the third reason for recognition of the practice of extradition amongst nations is that the territorial state which has been asked to surrender a fugitive criminal may have, in turn, to request an extradition from the requesting State at some future date. The fourth reason for recognition of the practice is in fulfilment of the maxim: "aut punire aut dedere", meaning that the offender must be punished either by the State of asylum or the State within whose territory the fugitive is found or by the State within whose territory the crime was committed.

To put it tersely, the following rational consideration has conditioned the law as to extradition: the general desire of all States to ensure that serious crimes do not go unpunished. Frequently, a State in whose territory a criminal has taken refuge cannot prosecute or punish him because of some technical rule of criminal law or lack of jurisdiction.

Therefore, to close the net round such fugitive offenders, international law applies the maxim "aut punire aut dedere", i.e. the offender must be punished by the State of refuge or surrendered to the State which can and will punish him.[1]

The State on whose territory the crime has been committed is best able to try the offender, because the evidence is more freely available there, and that State has the greatest interest in the punishment of the offender and the greatest facilities for ascertaining the truth. It follows that it is only right and proper that to that State should be surrendered such criminals as have taken refuge abroad.

With the increasing rapidity and facility of international transport and communications, extradition began to assume importance and preminence in the 19th Century. On the one hand, customary international law imposed no duty upon States to surrender alleged or convicted offenders to any other State, while on the other hand, it did not forbid the State to refuse to deliver over the alleged delinquent to the State requesting his surrender.[2] Therefore, because of the negative attitude of customary international law on the subject extradition was first dealt with in bilateral treaties. These treaties, in as much as they affected the rights of private citizens, required, in their turn, alterations in the laws and statutes of the States which had concluded them. Hence, the general principles became established that without some formal authority either by treaty or by statute fugitive criminals would not be surrendered, nor would

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1. Hingorani, R.C., The Indian Extradition Law, p.6.

2. Arnold McNair: Extradition and Exterritorial Asylum, B.Y.I.L., 1951 at p.172.

their surrender be requested. For this reason, extradition was called by some writers a matter of "imperfect obligation". In the absence of any treaty or statute, the grant of extradition depended purely on 'reciprocity' or 'courtesy'. In bygone times, common criminals had rarely the opportunity of escaping and chiefly so-called political criminals succeeded. Quick transportation has altered radically this state of things. Further, on account of the variations in the definitions of crime in different countries, there has been a reluctance to surrender persons who, whatever their alleged crimes elsewhere, have not committed offences against the laws of the country in which they are actually present.[1] This, in course of time, encouraged the States entering into treaties and their passing of extradition statutes to obviate, generally, these difficulties and impediments in the way of surrender of fugitives.

But the granting of asylum as opposed to a fugitive's entry as an escape from criminal justice, presupposes that there will be no extradition, as has been held by the World Court in the Asylum case.[2] The Indian Plane hijacking case, in which the so-called Azad Kashmiris hijacked the Indian plane from Kashmere to Lahore and blew it up, is a recent instance of an asylum being given to criminals, not allowing them to be extradited to India. But this presupposition may not come out true in all cases, because the requested State may later on change its mind or because of pressure from other nations may extradite the criminal in

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1. Encyclopaedia Brittanica, 19/0. Ed., Extradition . . Vol.9, p.1 and following.

2. (1950) I.C.J. Reports, 266.

spite of asylum having once been granted. The Mexican Supreme Court in 1882 held in the Mas case that extradition of a fugitive criminal is a moral duty even in the absence of a treaty. But according to Oppenheim, "In the absence of extradition treaties stipulating to the contrary, no state is by any international law obliged to expel or deliver him up to the prosecuting State."[1] In some countries, extradition is not permitted in the absence of treaties. Thus, in the cases in which, notwithstanding, a fugitive is extradited without treaty obligation, it is done because of 'comity', 'polity' or 'courtesy' of international law and not because of any international duty or obligation.

India inherited treaties between the former British Government and other foreign States for the extradition of criminals from and to India. Similarly, the British Government had entered into treaties with the erstwhile princely States of India for extradition, but after India became sovereign democratic Republic after independence, those later treaties lapsed,[2] and became incapable of execution by the merger of the princely States in either of the Indian or Pakistan Dominions.

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1. Oppenheim, International Law, 8th Ed., Vol.I, p.677.
2. Dr. Ram Babu Saksena v. The State, A.I.R. 1950 S.C. 155.

(2) THE HISTORICAL BACKGROUND OF THE EXTRADITION ACT, 1962

The earliest law in India regarding extradition of fugitives from British India was the Extradition Act, 1870, passed by the British Parliament and made applicable to India in pursuance of section 17. Similarly, the Fugitive Offenders Act, 1881, was applied to India by virtue of section 32 of that Act. Until 1903, these two British Acts were applicable to India and comprised the whole of the law of extradition.

The Indian Extradition Act of 1903 was the first Indian legislation in the field of extradition; but this enactment did not affect the British Extradition Act of 1870 or the Fugitive Offenders Act, 1881, which had been made applicable to India, but was passed to supplement them. Like the two British enactments, the Indian Extradition Act of 1903 made a distinction between foreign and non-foreign States. Countries which later formed the Commonwealth and British colonies were categorised as non-foreign States; whereas other States were categorised as foreign States. However, extradition requests between India and French Indian possessions were governed by treaty of 1815 which stipulated for surrender of fugitive criminals without furnishing of prima facie proof of evidence against the fugitive, and the French and Portuguese possessions were not treated as foreign States for the purposes of extradition.[1] Princely States in India were not treated as foreign States for the purposes of extradition. Chapter III of the 1903 Extradition Act regulated extradition proceedings with regard to non-foreign

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1. In re Muthu Reddi, 59 M.L.J. 278. See also, S.K. Agarwala: International Law, Indian Courts and Legislature, pp.197-198.

States, and Chapter II governed extradition proceedings with regard to foreign States. United Kingdom extradition treaties with foreign States were made applicable to British India also.

The Foreign Jurisdiction and Extradition Act, 1879 (21 of 1879) was amended and supplemented on more than one occasion and practical difficulties arose, however, in its administration and questions arose about its scope and construction of some of its provisions. Thus, as regards extradition, the British Indian Government on the one hand, had been confronted with the advice that section 14 of that Act had no application to a requisition for surrender made by native States in India; on the other hand, doubts were suggested as to whether the section could be applied where such a demand was presented by or on behalf of an European State, and it led a few years later to the passing of the supplementary enactment in the form of the Extradition (India) Act, 1895 (Act No.IX of 1895).[1] The law as it stood before the passing of the 1903 Act contemplated the extradition of 'accused' or 'suspected persons' only, and the result was that there was no provision or procedure applicable to the case of a convicted criminal who had escaped into British India or had been surrendered on the demand of the British Government.[2]

The passing of the Fugitive Offenders Act, 1881,[3] had introduced in respect of criminals seeking refuge from

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1. Statement of Objects and Reasons : (The Indian) Extradition Act, 1903: Gazette of India, part V, p.24.

2. Ibid., p.24.

3. 44 and 45, Vict. C.69.

other parts of His Majesty's dominions, a procedure which was not consistent with the laws of British India. Various matters were unprovided for, such as the means of enforcing against absconders by proclamation and attachment warrants issued in extradition proceedings, and the method of dealing with the applications for surrender of persons under trial or sentence in British India for offences other than those for which their extradition was desired. In the circumstances, the necessity for further legislation engaged the attention of the Government of India. The proposal as first formulated, took the shape of a consolidating and amending bill, repealing and re-enacting, with the modifications desired, the whole of the Act of 1879 which related both to foreign jurisdiction and extradition. But the two subjects were quite distinct in England. They are dealt with by different statutes, while in India they were prior to 1872, similarly dealt with by Acts No.1 of 1849 and VII of 1854; and the courts before which extradition cases came for disposal are by no means always the same as those which had to exercise foreign jurisdiction. Although, then, it appears to have been deliberately decided, when Act No. 11(XI) of 1872 (eventually superseded by Act No.21(XXI) of 1879) was passed, to frame a general Act relating to foreign jurisdiction and extradition, the Government of India after careful consideration and communication with His Majesty's Secretary of State, arrived at the conclusion that the law would probably be clearer and more intelligible if the two matters were once more kept apart; and in view of this, the 1903 Act was made.

The legislation in India had to make provision for extradition of criminals in cases of two different kinds, viz. firstly, where the Government was asked by a friendly State to surrender a person in fulfilment of treaty obligations imposed by a treaty to which the British Extradition Act, 1870,[1] applied; where it was so, it seemed expedient that the provisions of the English Statute and more especially, those which were intended for the protection of accused persons should be followed as closely as might be; and secondly, the surrender of an accused or convicted person might be sought by a native State in India, or by a neighbouring Asiatic State in pursuance of the terms of a treaty or friendly understanding, to which the Government of India was a party, and it was desirable that the procedure prescribed should be both simple and expeditious.[2]

The Select Committee to which the bill was referred, submitted its report on 18th March, 1903, to the Council of the Governor-General in India for the purpose of making laws and regulations to consolidate and amend the law relating to extradition and rendition of criminals. The Select Committee suggested considerable alterations.[3]

The United Kingdom Extradition Act, 1870, in its applications to India, authorised the extradition of fugitive offenders between India and 'foreign States', a term which meant states to which that Act was made applicable

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1. 33 and 34 Vict. C.52.

2. Taken from Statement of objects and reasons to the Extradition Act, 1903, published in the Gazette of India, 1901, Part V, p.24.

3. Gazette of India, 1903, Part V, p.469.

by Her Britannic Majesty's Order in Council. The Fugitive Offenders Act, 1881, on the other hand, provided a method whereby extradition of Fugitive Offenders could be effected between the British dominions and possessions by a simplified form of procedure. The Indian Extradition Act, 1903, modified and supplemented the other laws by:

a) prescribing the procedure for the surrender of fugitive criminals in the case of 'Foreign States';

b) providing a special machinery for the surrender of fugitive criminals in case of states other than 'Foreign States', and

c) specifying the officers in India who may exercise the powers conferred by the Fugitive Offenders Act, 1881.

To turn to the post-Independence situation, The Indian Extradition Act, 1903, was not extended to Part B States when the Part B States (Laws) Act, 1951, was enacted, as it was felt even then that this should be done by a separate law after a proper examination of the position. The result was that the legal position relating to the surrender of fugitive criminals to 'foreign States' and Commonwealth countries under the existing law from the erstwhile Part B States was somewhat doubtful.[1] After the passing of the Indian Extradition Act of 1903, an Order in Council[2] dated 7th March, 1904, had declared that Chapter IV of the Indian Extradition Act, 1903, might beconsidered as a part

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1. Agarwala, S.K., International Law, Indian Courts and legislature, p.199.

2. Gazette of India, 1904, Part I, p.363.

of the Fugitive Offenders Act, 1881. The cumulative effect of these Acts was that fugitives could be extradited to the Commonwealth or colonial countries without the procedure of formal proof, of prima facie evidence.

The President of India adapted the Extradition Act, 1903, in certain particulars. The Fugitive Offenders Act, 1881, and the Extradition Act, 1870, in their application to India were, however, not repealed by the Indian Parliament, and to the extent that they were consistent with the constitutional scheme, they remained applicable by virtue of Article 372 of the Constitution. In order to maintain the continued application of laws, the British Parliament notwithstanding India's becoming a Republic, enacted the India (Consequential Provisions) Act, 1949, which by Section 1 provided:-

> "(1) On and after the date of India's becoming a Republic, all existing law, that is to say all law which, whether being a rule of law or a provision of an Act of Parliament, or any other enactment or instrument whatsoever, is in force on that date or has been passed or made before that date and comes into force thereafter, shall, until provision to the contrary is made by the authority having power to alter that law and subject to the provisions of sub-section (3) of this Section, have the same operation in relation to India, and to persons and things in any way belonging to or connected with India, as it would have had if India had not become a Republic."
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> "(3) His Majesty may by Order in Council make provision for such satisfaction of any existing law to which this Act extends as may appear to him to be necessary or expedient in view of India's becoming a Republic while remaining a member of the Commonwealth and sub-section (I) of this Section

shall have effect in relation to any such laws as modified by such an order insofar as the contrary intention appears in the Order. An Order in Council under this section:-

a) may be made either before or after India becomes a republic, and may be revoked or varied by a subsequent Order in Council; and

b) shall be subject to annulment in pursuance of a resolution of either House of Parliament." [1]

In 1954, the Supreme Court was called upon to decide a case relating to extradition to Singapore, a British Colony, of a person alleged to be a fugitive offender, an Indian National.[2] In that case, Menon and his wife were apprehended and produced before the Chief Presidency Magistrate, Madras, pursuant to warrants of arrest issued under the provisions of the Fugitive Offenders Act, 1881. Arrests were made in pursuance of a requisition made by the Colonial Secretary of Singapore requesting the assistance of the Government of India to arrest and to return the Menons to the colony of Singapore under warrants issued by the police magistrate of Singapore. The Menons pleaded that the Fugitive Offenders Act, 1881, under which the action was sought to be taken against them, was repugnant to the Constitution of India, and was void and unenforceable. The Chief Presidency Magistrate referred two questions of law for the decision of the High Court of Madras:-

1) whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950, when India

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1177.

2. State of Madras v. C.G. Menon, A.I.R. 1954 S.C.517.

became a Sovereign Democratic Republic; and

2) whether, even if it applied, it or any of its provisions, particularly Part II thereof was repugnant to the Cpnstitution of India and was therefore, void or inoperative.

The High Court held [1] that the Fugitive Offenders Act was inconsistent with the Fundamental Right of equal protection of the laws guaranteed by Article 14 of the Constitution and was void to that extent and unenforceable against the petitioners.

On appeal brought before the Supreme Court, it was then observed:-[2]

> "It is plain from the above provisions of the Fugitive Offenders Act as well as from the Order in Council that British possessions which were contiguous to one another and between whom there was frequent intercommunication were treated for the purposes of the Fugitive Offenders Act as one integrated territory and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those possessions, were substantially the same, the requirement that no fugitive will be surrendered unless a 'prima facie' case was made against him was dispensed with. Under the Extradition Act, 1903, also a similar requirement is insisted upon before a person can be extradited."
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> "The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation

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1. In Re C.G. Menon, A.I.R. 1953 Madras 279.

2. State of Madras v. C.G. Menon, A.I.R. 1954 S.C.517 at p.519, paras.10, 11.

> on those lines, it seems difficult to hold that Section 12 or Section 14 of the Fugitive Offenders Act has force in India by reason of the provisions of Article 372 of the Constitution. The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone; India is no longer a British possession and no Order in Council can be made to group it with other British Possessions."
>
> "The political background and shape of things when part II of the Fugitive Offenders Act, 1881, was enacted and envisaged by that Act having completely changed, it is not possible without radical legislative changes to adapt that Act to the changed conditions. That being so, in one opinion, the tentative viewexpressed by the Presidency Magistrate was right."
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> "The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and coming into force of the new Constitution by no stretch of imagination could India be described as a British possession and it could not be grouped by an Order in Council amongst those possessions. Truly speaking, it became a foreign territory so far as other British possessions are concerned, and the extradition of persons taking asylum in India, having committed offences in British Possessions, could only be dealt with by an arrangement between the Sovereign Democcratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Government has not so far enacted any law on the subject and it was not suggested that any arrangement has been arrived at between these two Governments. The India Extradition Act, 1903, has been adapted, but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament has been left severely alone."

After this judgment was delivered, the Government of India, Ministry of External Affairs, issued a notification on 21st May, 1955, to all the State Governments of

Parts A, B, C and D states as an interim arrangement. The notification of the Government of India dated 21st May, 1955, was an interim arrangement and not a law. It was an executive fiat which continued up to the time when the new Extradition Act came into force in 1962.[1] We read in it:[2]

> "... In a certain case of extradition of an offender, the Supreme Court of India recently ruled that in the changed circumstances, the English Fugitive Offenders Act, 1881, is no longer applicable to India. There can therefore, be no question of issuing a warrant of arrest, addressed to a foreign police or a foreign court, in respect of persons who are residing outside India, except in accordance with the Criminal Procedure Code, 1898.
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> "(2) In the circumstances, to obtain a fugitive offender from the United Kingdom and other commonwealth countries, the following procedure may be adopted as long as the new Indian Extradition law is not enacted and the Commonwealth countries continue to honour our requests for the surrender of the fugitive offenders notwithstanding the decision of the Supreme Court.
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> (a) The Magistrate concerned will issue warrant for the arrest of the fugitive offender to Police officials in India in the usual form prescribed under the Code of Criminal Procedure, 1898.
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> (b) The warrant of arrest, accompanied by all such documents as would enable a prima facie case to be established against the accused, will be submitted by the Magistrate to the Government of India in the Ministry of External Affairs, through the State Government concerned.

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1. State of West Bengal v. Jugal Kishore More, A.I.R., 1969 S.C. 1171 at p.1182.

2. State of West Bengal v. Jugal Kishore More, ibid., at p.1178.

> " (c) This Ministry, in consultation with Ministry of Home Affairs, and Law, will make a requisition of the surrender of a fugitive offender in the form of a letter requesting the Secretary of State (in the case of Dominions, the appropriate authority in the Dominions) to get the warrant endorsed in accordance with law. This letter will be addressed to the Secretary of State (or other appropriate authority in case of Dominions) through the High Commissioner for India in the United Kingdom/Dominion concerned and will be accompanied by the warrant issued by the magistrate at (a) para.2 above and other documents received therewith."

With respect to these British statutes which were applicable to India before the commencement of the Constitution, the Law Commission of India, in its Fifth Report dated 11th May, 1957, made the observation [1] that:

> "We have got a law of our own on the subject - the Indian Extradition Act (15 of 1903). This lays down the procedure to be followed in India after a valid requisition for extradition is received from a Foreign State. The right of a foreign Government to make such requisition, however, rests on treaty between the two countries concerned. ... Now, so far as the right of England or any British possession to demand extradition from India is concerned, the law is provided by the English Statutes mentioned above and the Indian Extradition Act proceeds on the assumption that these statutes apply to India. These statutes, however, apply to 'British Posessions'.[2] The Supreme Court held that India was no longer a 'British Possession' and the English Statutes will, therefore, no longer be applicable to India after it had become

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1. Law Commission of India, Fifth Report, 1957, pp.49, 50, 54.

2. State of Madras v. C.G. Menon, A.I.R. 1954, S.C.517.

> a Republic ... observations were made by the Supreme Court as to the need of making fresh treaties with the Republic of India and the need for fresh legislation in this respect.[1] Government should take early steps in the matter of fresh legislation in view of the observations made by the Supreme Court."[2]

In view of the Law Commission's Report, the Act of 1962 was enacted and received the assent of the President on 15th September, 1962, and was published in the Gazette of India on 5th January, 1963, as provided in Section 1(3) of that Act from which date it came into force.

The Act of 1962 was passed by Parliament in exercise of the powers given to it by Entry No.18, schedule 7, list I, of the Constitution of India. This entry is held to empower Parliament to make laws in regard to extradition even of aliens.[3] Extradition is a different and distinct subject from expulsion, although both may overlap in certain aspects.[4] Entry 19 of the same List empowers Parliament to make laws in regard to expulsion. The Union Government is vested with absolute power to expel foreigners from India. There is no provision in the Constitution to fetter this discretion. Entries Nos.9, 10, 17, 18 and 19 in the Union List confer wide powers on the centre to make laws about, among other things, admission into and expulsion from India, about extradition and aliens and about preventive detention

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1. State of Madras v. C.G. Menon, A.I.R., 1954 S.C., 517 at p. 519.

2. Law Commission of India, Fifth Report, dated 11th May, 1957, pp.49, 50, 54.

3. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367 at p.374.

4. Hans Muller, ibid., at p.374.

connected with foreign affairs. Therefore, the right to make laws about both the extradition of aliens and about their expulsion from India is expressly conferred, extradition and expulsion are contained in separate entries indicating that, though they may overlap in certain aspects, they are distinct subjects. The Foreigners Act, 1946, deals, amongst other things, with expulsion. The Foreigners Act, 1946, confers the power to expel foreigners from India. It vests the Central Government with absolute discretion, and as there is no provision in the Constitution fettering this discretion, an unrestricted right to expel a foreigner remains in the Central Government. The law of extradition is quite different. Because of treaty obligations, it confers a right on certain countries to ask that persons who are alleged to have been accused of or convicted of those offences by these courts, be handed over to them. However, the Government of India is not bound to comply with the request and has an absolute discretion to refuse extradition of the fugitive criminal whether he be an alien or citizen of India.[1]

However, on the question posed in Menon's case, viz. whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950, when India became a Republic, the Supreme Court in Jugal Kishore More's case [2] disapproved of its earlier decision in the Menon's case and re-answered the question in the affirmative, and it

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367 at p.374.

2. State of West Bengal v. Jugal Kishore More, A.I.R. 1969, S.C. 1171 at p.1182.

was observed:[1]

> "In Re Government of India and Mubarak Ali Ahmed,[2] an attempt to resist in the High Court in England, a requisition by the Republic of India to surrender an offender who had committed offences in India and had fled from justice, had failed. Mubarak Ali, a native of Pakistan, was being tried in the courts in India on charges of forgery and fraud. He broke his bail and fled to Pakistan and thereafter to England. He was arrested on a provisional warrant issued by the London Metropolitan Magistrate on the application of the Government of India. After hearing legal submissions, the Metropolitan Magistrate made an order under Section 5 of the Fugitive Offenders Act, 1881, for Mubarak Ali's detention in custody pending his return to India to answer the charges made against him. Mubarak Ali then filed a petition for a writ of habeas corpus before the Queens Bench Division. It was held that the Fugitive Offenders Act 1881, was in force between India and Great Britain on 26th January, 1950, when India became a Republic and it continued to apply by virtue of Section 1(i) of the India (Consequential Provisions) Act, 1949, and therefore, the Magistrate had jurisdiction to make the order of return of the applicant. Pursuant to the requisition made by the Government of India, Mubarak Ali was surrendered by the British Government. Mubarak Ali was then brought to India and was tried and convicted. On one of the offences for which he was tried and convicted, an appeal was brought to the Supreme Court of India and failed there."[3]

There were other cases as well, in which orders were made by the British Courts complying with the requisitions made by the Governments of Republics within the Commonwealth

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1180.

2. In Re Government of India and Mubarak Ali Ahmed (1952) 1 All E.R. 1060.

3. Mubarak Ali Ahmed v. State of Bombay, A.I.R. 1957 S.C. 857.

for extradition of offenders under the Fugitive Offenders Act, 1881. An offender from Ghana was ordered to be extradited pursuant to Ghana (Consequential Provisions) Act, 1960 (like the Indian (Consequential Provisions) Act, 1949) even after Ghana became a Republic.[1] Kwesi Armah who was a Minister in Ghana, fled from the country in 1966 and took refuge in the United Kingdom. He was arrested under a provisional warrant issued under the Fugitive Offenders Act, 1881. The Metropolitan Magistrate being satisfied that the Act of 1881 still applied to Ghana, even after Ghana became a Republic, and that a prima facie case had been made out against him in respect of two alleged contraventions of the Ghana Criminal Code, 1960, by corruption and extortion when he was a Public Officer, committed Kwesi Armah to prison pending his return to Ghana to undergo trial. A petition for habeas corpus before the Queens Bench Division was refused. Edmund Davis J. (as he then was) was of the view that the Act of 1881 applied to the Republic of Ghana in its new form, just as it did before the coup d'état of February, 1966. The case was then carried to the House of Lords.[2] Before the House of Lords it was not even argued on behalf of Armah, appellant, that a fugitive offender from a Republic which was a member of the Commonwealth could not be extradited under the Fugitive Offenders Act, 1881, like the argument in the Menon's case before the Supreme Court of India. In the Menon's case,

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1. Re Kwesi Armah (1966) 2 All E.R. 1006: On 1st July, 1960, Ghana remaining by virtue of the Ghana (Consequential Provisions) Act, 1960, a member of the Commonwealth, became a Republic.

2. Armah v. Government of Ghana (1966) 3 All E.R. 177 (H.L.)

the India (Consequential Provisions) Act, 1949, was not brought to the notice of the Supreme Court, whereas it was brought to the notice of the English Courts in Mubarak Ali's case;[1] and in Armah's case [2] where similar provisions were present in Ghana and the Fugitive Offenders Act, 1881, was held continued to apply to Ghana. The Menon's case decided by the Supreme Court is no longer good law, as explained by the Supreme Court in the case of Jugal Kishore More. That Court expressed regret that the provisions of the Consequential Provisions Act, 1949, were not brought before the Court and the Supreme Court did not think it proper to refer the case to a larger bench, because they thought that as the new Indian Extradition Act, 1962, had come into force, there would in future be no cases under the Fugitive Offenders Act, 1881.

It may be further mentioned that Lord Denning in Gohoho's case,[3] a civil writ applying the Ghana (Consequential Provisions) Act, 1960, (giving the same reasoning as in Mubarak Ali's case,[4] wherein it was held that the Fugitive Offenders Act, 1881, remained operative as if Ghana had not become a Republic) held that Ghana was still in the Commonwealth. To the same effect, the Supreme Court of India in the case of Jugal Kishore More held that by virtue of the provisions of the India (Conse-

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1. In Re Government of India and Mubarak Ali Ahmed (1952) 1 All E.R. 1060, supra.

2. Re Kwesi Armah (1966) 2 All E.R. 1006, supra

3. Gohoho v. Guinea Press Ltd. and another (1963) 3 W.L.R. 1471: (1962) 3 All E.R. 785 at P 787, Lilies A&C. Not a case under The Fugitive offenders Act 1881 or Extradition Act, 1870, but a civil writ case.

4. Mubarak Ali's case (1952) 1 All E.R. 1060, and in Armah's case (1966) 1 All E.R. 1006.

quential Provisions) Act, 1949, the Fugitive Offenders Act, 1881, was still in force in India; that the Fugitive Offenders Act, 1881, had not been expressly repealed even after 26th January, 1950; it had a limited operation; and other countries of the Commonwealth were apparently willing to honour the international commitments which arose out of the provisions of that Act. The Court was not called upon to consider whether in exercise of the powers under the Fugitive Offenders Act, a magistrate in India may direct extradition of a fugitive offender from a 'British Possession'. The question was left open,otherwise the Supreme Court would have examined the case of C.G. Menon in this light after taking into consideration the provisions of the India (Consequential Provisions) Act, 1949, and the dicta uttered in the cases of Mubarak Ali Ahmed,[1] Armah,[2] and Gohoho,[3] in the English courts and a dictum uttered in the Federal Court of Pakistan,[4] in which it was held that in view of the Consequential Provisions Act passed by the British Parliament, the Fugitive Offenders Act, 1881 is in force and effect in Pakistan.

Ohene-Djan has stated: Even though Ghana has repealed the Fugitive Offenders Act, 1881, and therefore, it is inoperative in that country (Commonwealth), she has from time to time, exercised the right to ask for return

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1. Mubarak Ali Ahmed's case, supra
2. Armah v. Government of Ghana supra
3. Gohoho v. Guinea Press Ltd. supra,
4. E.M. Bhaba v. The Crown. P.L.D., 1954 Sind.101.

of the alleged Ghanian fugitive offenders from Britain and other Commonwealth countries where the Act is still in operation.[1] This reasoning and the reasoning in Jugal Kishore More's case are based on the principle of reciprocity and the surrender or extradition to Ghana or India is dependent on 'courtesy' or 'comity' and the willingness of those countries to honour international commitments which arose out of the provisions in force in these countries.

It must be noted that India,(Ghana, too) became a Republic within the Commonwealth. The Fugitive Offenders Act will be in effect between all Commonwealth countries (after leaving Commonwealth Pakistan would be an exception to it), whether they are Republics or Realms within the Commonwealth, because of the provisions of the Consequential Provisions Act passed for such Commonwealth country by the British Parliament, it being customary to pass such acts in anticipation of their gaining independence in order to allow the continuance of the existing laws in those countries until the proper authority repeals and replaces them by other laws, "unless provision has been made to the contrary in the laws of the particular Commonwealth country". And even where a country like India (or Ghana) has specifically repealed the Fugitive Offenders Act, she may still exercise her right to ask for surrender or return of a fugitive offender under the Act from any Commonwealth country in which the Act has not been repealed.[2] The decisions of the Supreme Court

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1. Ohene-Djan, I.L., The Fugitive Offender and the Law of Extradition in the Commonwealth, unpublished Ph.D. Thesis,1965,London University, p.143.

2. Jugal Kishore More, supra, A.I.R. 1969 S.C. 1171; Ohene-Djan, op.cit., p.143.

to that extent in the case of More is correct for it was a case of extradition to India "extradition in reverse", and not a case of extradition from India. But the legality of the proposition in a converse case of extradition from India would be subject to objections and the converse would not be true.

Section (1)(i) of the India (Consequential Provisions) Act, 1949, makes provision for the continuance of the existing laws 'until provision to the contrary made by the authority having power to alter that law', and the Indian Parliament in exercise of the powers given to it by Entry 18, Schedule 7, List I of the Constitution enacted the Indian Extradition Act and repealed the Fugitive Offenders Act, 1881, and all other previous existing laws including the Extradition Acts, 1870 to 1932, insofar as they applied to and operate as part of the law of India, by section 37 of that Act. That being so, it could not be said that the Fugitive Offenders Act, 1881, or the Extradition Acts, 1870 to 1932 made the Fugitive Offenders Act applicable to India after the Indian Extradition Act, 1962, came into force in India merely by virtue of section 1(1) of the India (Consequential Provisions) Act, 1949.

Besides, the continuation of an existing law by Article 372(1) of the Constitution is subject to other provisions of the Constitution; and the continuance is only until altered or repealed or amended by a competent legislature.[1] So when the Indian Extradition Act, 1962, repealed the Fugitive Offenders Act, 1881, (and the Extradition Acts, 1870 to 1932) insofar as they applied to and

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1. Thaivalappil Kunjuvaru Vareed v. State of T.-C. A.I.R. 1956 S.C. 142 at p.145 Cl.

operate as part of the law of India, how could the Fugitive Offenders Act, 1881, remain in force by virtue of section 1(i) of the India (Consequential Provisions) Act, 1949, and Article 372(1) of the Constitution? To this extent, the dictum of the Supreme Court in Jugal Kishore More's case[1] seems not to be correct. The Supreme Court thus left the matter open whether in exercise of the power under the Fugitive Offenders Act a magistrate in India may direct extradition of a fugitive offender from a 'British Possession' who had taken refuge in India. To leave such a question open reveals, it would seem, a want of comprehension of the law which their Lordships had already correctly understood: the want of actual reciprocity was, and remains, intelligible. It seems that if India had not enacted its Extradition Act, 1962, and had not repealed the Fugitive Offenders Act, 1881, so far as India is concerned, the Act of 1881 would have continued by virtue of Section 1(1) of the India (Consequential Provisions) Act, 1949, and the fugitive could have been extradited from India under the provisions of that Act, but when another Act of 1962 has been passed by Parliament repealing the Fugitive Offenders Act, 1881, the India (Consequential Provisions) Act, 1949, could hardly keep the Fugitive Offenders Act alive, especially when that very Act contemplates the continuance of existing laws 'until provision to the contrary made by the authority having power to alter that law'.

Therefore, the Fugitive Offenders Act is, it is submitted, not in force in India after the coming into force of the Indian Extradition Act, 1962, by virtue of the provisions

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1. State of West Bemgal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171.

of the India (Consequential Provisions) Act, 1949. Proceedings under that Act can be held contrary to Article 21, and as and when the occasion arises the Supreme Court would reconsider the dictum uttered in the case of Jugal Kishore More so far as the continuance of the Act of 1881 is concerned. Until then, indeed, that case, including the unfortunate dicta in it, is part of the law of the land; all courts in India are bound by it by virtue of Article 141 of the Constitution.[1]

It may also be mentioned here that in More's case, it was not necessary to decide about the continuance of the Fugitive Offenders Act, 1881, as it was a case of straightforward extradition. More had not been brought to India, as happened in Savarkar's case (below), and especially after the court had held that there was no bar in securing the extradition of the Fugitive Offender through diplomatic channels, by the Ministry of External Affairs of the Government of India, if it was able to persuade the Colonial Secretary of Hong Kong to deliver More for trial in India. The procedure was held neither to be illegal nor irregular. Even otherwise the jurisprudence of the common-law countries has consistently denied that the circumstance under which a person may have been brought before a competent court in any way affects the jurisdiction of the court to try him. Scott C.J. in the case of Savarkar had observed:

> "where a man is in the country and is charged before the magistrate with an offence under the Penal Code, it will not avail him to say that he was

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1. B.M. Lakhani v. Malkapur Municipality A.I.R. 1970 S.C. 1002 at p.1003.

> brought there illegally from a foreign country."[1]

This case received the approval of the Supreme Court in More's case (supra) where Justice Shah observed:

> "But on the principle of Savarkar's case (1911)[2] the contention about the invalidity of the arrest cannot affect the jurisdiction of the courts in India to try More if and when he is brought there."

To the same effect were the judgments of British Courts in Ex parte Susannah Scott and other cases.[3]

In Eichman's case, the District Court of Jerusalem relying upon the British, American and Israeli authorities, took a similar view.[4] For Eichman had been kidnapped, but this did not render his trial in Israel illegal.

However, Paul O'Higgins,[5] considering the proposition that a British court would probably exercise jurisdiction over a person brought before it in violation of international law, and argues that there is no precedent which necessarily binds any British courts to this view.

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1. Emperor v. Vinayak Damodar Savarkar & others (1911), I.L.R. 35 Bom. 225 at p.228.

2. Savarkar's case (1911) I.L.R. 35 Bom. 225, supra.

3. Ex parte Scott (9 B. & C. 446) (1829); Sinclair v. H.M. Advocate (1890) 17 R.J.C. 38; Ex parte Elliot (1949) 1 All E.R.373; and of the American courts, Ker v. Illinois (1886) 119 U.S.436; Frisbie v. Collins, (1951), 342, U.S. 519; United States v. Sobell (1957) 244 F 2d 520 2nd Cir.; U.S. v. Unver Sagt (1924) 299 Fed. 1015; U.S. v. Dixon (1947) 73 F Supp. 683, and by the South African court in Abrahamas v. Minister of Justice (1963) So.Afr. L.R. 542.

4. Attorney-General of the Government of Israel v. Adolf Eichmann, 36 Int. Law Rep. 5- 56-57.

5. 'Unlawful seizure and irregular extradition', 36 British Year Book of International Law, 279 at p.319 (1960).

Re the second question in Jugal Kishore More's case, viz. whether even if the Fugitive Offenders Act, 1881, applied to India after the coming into force of the Constitution, Part II of theAct was repugnant to the Constitution, the Supreme Court answered in the affirmative that the Act of 1881 still applied to India and Part II was not inoperative, and observed:

> "merely because for the purpose of the extradition procedure, in a statute passed before the attainment of independence, by the former colonies and dependencies,certain territories continue to be referred to as 'British Possessions' the statute does not become inapplicable to these territories. The expression'British Possession' in the old statutes merely survives as an artificial mode of reference, undoubtedly not consistent with political realities, but does not imply, for the purposes of the statute or otherwise, political dependence of the Government of the territories referred to. It is not for the courts of India to take umbrage at expressions used in statutes of other countries and to refuse to give effect to the Indian laws which govern the problems arising before them. It is interesting to note that by express enactment, the Fugitive Offenders Act, 1881, remains in force as a part of law of the Republic of Ireland: See Ireland Act, 1949 (12, 13 & 14 Geo.6 c.41)."[1]

Whether India be termed, after coming into force of the Constitution,as Her Majesty's Dominions, the Supreme Court quoted, with approval, passage from Halsbury's Laws of England as under:

> "The term 'Her Majesty's Dominions' means all the territories under the sovereignty of the Crown and territorial waters adjacent thereto.

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at 1181.

> In special cases it may include territories under the protection of the Crown and Mandated and Trust territories. Reference to Her Majesty's Dominions contained in statutes passed before India became a Republic are still to be construed as including India; it is usual to name India separately from Her Majesty's Dominions in statutes passed since India became a Republic."[1]

The Supreme Court commenting on the above passage from Halsbury, further observed:

> "In footnote (1) on page 433, it is stated, British India, which included the whole of India except princely states; and the Government of India Act, 1935, as amended by section 8 of the India and Burma (Miscellaneous Amendments) Act, 1940, formed part of Her Majesty's Dominions and was a British Possession; although it was not included in the definition of a 'Colony'. The territory comprised in British India was partitioned between the dominions of India and Pakistan (Indian Independence Act, 1947), but the law relating to the definition of Her Majesty's Dominions was not thereby changed and it was continued in being by the Indian (Consequential Provisions) Act, 1949 (12, 13 and 14 Geo.6 C.92) passed in contemplation of the adoption of a republican constitution of India. India is now a sovereign republic but that by itself does not render the Fugitive Offenders Act, 1881, inapplicable to India."[2]

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1. Halsbury's Laws of England, 3rd ed., Vol.5, Art.987, p.433.

2. State of West Bengal v. Jugal Kishore More, A.I.R. 1969, S.C. 1171 at p.1182.

(3) EXTRADITION AND EXPULSION: FORMAL ASPECTS

There are important differences between the two Acts, viz. The Foreigners Act, 1946 (Act 31 of 1946), and the Extradition Act. In the first place, the Extradition Act applies to everybody, citizen and foreigner alike, and to every class of foreigner, that is to say, even to foreigners who are not nationals of the country asking for extradition. But because of Article 19 of the Constitution of India, no citizen can be 'expelled' (as opposed to extradition) in the absence of a specific law to that effect; and in India there is none; moreover, a law touching expulsion (as opposed to extradition) would have to be restricted in scope if it were to apply to a citizen. That is not the case where a foreigner is concerned, because Article 19 does not apply to an alien. A citizen of India who has committed certain kinds of offences abroad can only be 'extradited' if the formalities prescribed by the Extradition Act are observed and completed. A foreigner has no such standing; he can be expelled without any formality beyond the making of an order by the Central Government.[1] Thus, an alien has got no right to be heard before deportation.[2] Admittedly, there are cases where without a hearing it might not be clear whether he is a foreigner or a citizen. The hearing may not be necessary when admittedly one who is going to be expelled is a foreigner, but when the facts are in dispute a hearing is in the interest of justice and in consonence

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367.

2. Hans Muller's case, ibid., and R.V. Heman Street Police Inspector Ex parte Venicoff (1920) 3 K.B. 72.

with the salutary principle, 'Audi alteram partem'(a principle of natural justice) - no man should be punished unheard; no order should be passed in violation of principles of natural justice. A deportation order without determination of citizenship is invalid.[1] On the other hand, if the foreigner is 'extradited' instead of being 'expelled', then the formalities of the Extradition Act must be complied with. The importance of the distinction between extradition and expulsion will be realised from what follows and that applies to citizen and foreigner alike.[2]

The Extradition Act is really a special branch of the law of criminal procedure. It deals with criminals and those accused of certain crimes. The Foreigners Act on the other hand, is not directly concerned with criminals or crime though the fact that a foreigner has committed offences, or is suspected of that, may be a good ground for regarding him as undesirable. Therefore, under the Extradition Act warrants or summonses must be issued; there must be a magisterial enquiry, and when there is an arrest it is by way of action by the police. When the person to be extradited leaves India, he does not leave the country as a free man. The police in India hand him over to the police of the requisitioning State and he remains in custody throughout.[3]

In the case of 'expulsion', no idea of punishment is involved, at any rate, and if a man is prepared to leave

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1. Mukhtar Ahmed v. State pf U.P. A.I.R. 1965 All 191 at p.193; Government of A.P. v. Syed Md. Khan, A.I.R. 1962 S.C. 1778 at p.1780.

2. Hans Muller v. Presidency Jail, Calcutta A.I.R. 1955 S.C. 367 at p.375.

3. Hans Muller v. Presidency Jail, Calcutta A.I.R. 1955 S.C. 367 at p.375.

voluntarily he can ordinarily go as and when he pleases. But it is not his right so to do. Under the Indian Law, the matter is left to the unfettered discretion of the Union Government, and that Government can prescribe the route and the port or place of departure, and can even place him on a particular ship or plane.[1] Whether the Captain of a foreign ship or plane can theoretically be compelled to take a passenger he does not want, or to follow a particular route, was left untouched by the Supreme Court in Hans Muller's case, as that question did not arise in that case. But assuming that he is willing to do so, the right of the Government to make the order vis-a-vis the man expelled, is absolute. This may not be the law in all the countries. For example, Oppenheim says that in England until December, 1919, the British Government had

> "no power to expel even the most dangerous alien without the recommendation of the Court, or without an act of Parliament making provision for such expulsion except during war or on an occasion of imminent national danger or great emergency."[2]

Here, the matter of expulsion has to be viewed from three points of view.

(1) Does the Constitution permit the making of such a law?

(2) Does it place any limits on such laws? and

(3) Is there, in fact, any law on this topic in India and if so, what does it enact?

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1. See Sec.3(2)(b) and 6 of the Foreigners Act, 1946: Hans Muller v. Superintendent, Presidency Jail, Calcutta A.I.R. 1955. 367 at p.375.

2. Oppenheim, International Law, Vol.1, 7th ed., p.631.

(1) and (2) have been answered in the affirmative by the Supreme Court in Hans Muller's case. As to the third question, this matter is embodied in India in the Foreigners Act, 1946, which gives an unfettered right to the Union Government to expel. But there is this distinction. If the order is one of 'expulsion' as opposed to 'extradition', then the person expelled leaves India a free man. So far as India is concerned, there must be an order of release if he is in preventive custody, and though he may be conducted to the frontier under detention, he must be permitted to leave a free man and cannot be handed over under arrest. In the case of 'extradition', he does not leave a free man. He reamins under arrest throughout and is merely handed over by one set of police to the next. But in that event, the formalities of the Extradition Act must be complied with. There must be a magisterial enquiry with a regular hearing and the person sought to be extradited must be afforded the right to submit a written statement to the Central Government, and to ask, if he so chooses, for political asylum. He has the right to defend himself and the right to consult and to be defended by a legal practitioner of his choice (Article 20(1)).

Of course, he can also make a representation against an order of expulsion and ask for political asylum apart from any Act, but these are not matters of right as under the Extradition Act.[1] A foreigner is not allowed to

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta A.I.R. 1955 S.C. 367 at p.375.

flout the orders to leave the country.[1] According to the S.C. in Hans Muller's case, the Foreigners Act, of 1946, is not governed by the provisions of extradition. The two are distinct and neither impinges on the other.

Even if there is a requisition and a good case for extradition, the Government is not bound to accede to the request. It is given an unfettered right to refuse. Sec.3(1) of the Extradition Act of 1903 says 'the Central Government may, if it thinks fit', like Sec.5 of the Extradition Act of 1962. Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it could. The right is not his and the fact that a request has been made does not fetter the discretion of the Government to choose the less cumbersome procedure of the Foreigners Act of 1946 where a foreigner is concerned, provided always that in that event the person concerned leaves India as a free man. If no choice would have been left with the Government, the position would have been different but as the Government is given the right to choose, no question of want of good faith can arise merely because it exercises the right of choice which the law confers.[2]

The right to expel is conferred by Sec.3(2)(c) of the Foreigners Act, 1946 on the Central Government and the right to enforce an order of expulsion and also to prevent any breach of it, and the right to use such force as may be reasonably necessary 'for the effective exercise of such

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1. Registrar Judicial Commissioner's Court v. S. Francisco, A.I.R. 1970 Goa. 56 at p.59.

2. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367 at p.376.

power' is conferred by section 11(1) also, on the Central Government. Therefore, a State Government has no right either to make an order of expulsion or to expel, for the conferring of the right can only mean that the State Government is given (at most), the power to decide and to satisfy itself whether expulsion is desirable or necessary. If it thinks it is, then it may detain the person concerned until proper arrangements for expulsion are made - one of them, and an essential one, being reference to the Central Government for final orders. It is evident that the authorities must be vested with wide discretion in the present field where international complications might easily follow in a given case. Unless a State Government has authority to act in anticipation of orders from the Centre, it might be too late to act at all.[1] There is, as we have seen, implicit in the right of expulsion a number of ancillary rights; among them, the right to prevent any breach of the order and the right to use force and to take effective measures to carry out those purposes. The most effective method of preventing a breach of order and ensuring [2] that it is duly observed and obeyed is by arresting and detaining the persons ordered to be expelled until proper arrangements for expulsion can be made. Therefore, the right to make arrangements for an expulsion includes the right to make arrangements for preventing any evasion or breach of the order and the Preventive Detention Act of 1950 (Act 4 of 1950) (see below),[3]

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1. Hans Muller's case, supra, at p.372.

2. Hans Muller's case, ibid., at p.372.

3. Preventive Detention Act of 1950 (Act 4 of 1950).

confers the power to use preventive detention as one of the methods of achieving this end. How far it is necessary to take this step in a given case is a matter that must be left to the discretion of the Government concerned, but, in any event, when criminal charges for offences said to have been committed in this country and/or abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. Detention of the foreigner in such circumstances is rightly termed preventive and falls within the ambit of the Preventive Detention Act of 1950 and is reasonably related to the purpose of the Act.

Now the Preventive Detention Act of 1950 expressly confers the right to detain 'with a view to making arrangements' for the expulsion upon both the State and the Central Government and the satisfaction required by Section 3(1)(b) can be of either Government. The right to satisfy itself that the drastic method of preventive detention is necessary to enable suitable arrangements for expulsion to be made is, therefore, expressly conferred on the State Government, and as a State Government cannot expel, the State Government must be construed to have the power to decide and to satisfy itself whether expulsion is desirable or necessary and if it thinks it is, then to detain until proper arrangements for expulsion are made.

Section 3(1)(b) of the Preventive Detention Act of 1950 lays down, to this end, that:

> "The Central Government or the State Government may ... (b) if satisfied with respect to any person who is a foreigner within the meaning of the

> Foreigners Act 1946 (31 of 1946) that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary to do so, make an order directing such person to be detained."

The section, therefore, gives power both to the Central Government and the State Government to make an order of detention against a foreigner, on satisfaction, 'with a view to make arrangements for his expulsion from India'.

The competence of the Central Legislature to enact a law dealing with this aspect of preventive detention is derived from Entry 9 of the Union List read with Entry 10. The scope of Entry 9 is in regard to 'Preventive detention for reasons connected with ... Foreign Affairs' and the scope of expression 'Foreign Affairs' is indicated in Entry 10; 'Foreign affairs; all matters which bring the Union in relation with any foreign country'. It is well settled that the language of these Entries must be given the widest scope of which their meaning is fairly capable, because they set up a machinery of Government and are not mere Acts of a legislature subordinate to the Constitution. Giving Entry 9 its widest range, it is impossible to hold that legislation that deals with the right of a State to keep foreigners under preventive detention without trial does not bring the Union into relation with a foreign country. Every country claims the right to the allegiance of its subjects wherever they may be, and in return, guarantees them the right of diplomatic protection when abroad. It is, therefore, the privilege and anxiety of every civilized nation to keep vigilant watch over its subjects abroad and to ensure for them, as far as that is possible through diplomatic channels, fair play and

justice administered along lines of what is called, broadly for want of a better term, natural justice. A foreign State has a very direct interest in what is done to its subjects in a foreign land. Therefore, legislation that confers jurisdiction upon Governments in India to deprive foreigners of their liberty can not but be a matter that will bring the Union into relation with foreign States, particularly when there is no public hearing and no trial in the ordinary courts of the land. In cases of expulsion or deportation of a foreigner from India, the relation with a foreign Government is direct. The Preventive Detention Act provides for the detention of the foreigner with a view to expel him from India. A foreign State has deep interest in knowing where and how its subjects can be forcibly expelled from India. The legislative competence of the Indian Parliament to deal with this question is clear, and this covers not only section 3(1)(b) of the Preventive Detention Act of 1950, but also the Foreigners Act, 1946, insofar as it deals with the powers of expulsion and the right of the Central Government to restrict the movements of foreigners in India and prescribe the place of their residence and ambit of their movement in the land.[1]

While legislative competence may be clear, the delicate questions of choosing between expulsion and extradition, when a foreign State requests extradition, and whether or not to employ preventive detention in case the

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta A.I.R. 1955 S.C. 367 at pp.370-371.

Government decides upon the former method, require treatment on a broad basis, in which the distinction between the requirements of law and the needs of policy for the time being must be constantly borne in mind. An accurate impression of the exact requirements of the law, not exaggerating them, nor undervaluing them, is essential before theGovernment, whether it be the State Government within its restricted but often vital sphere, or the Central Government, can decide which course it is expedient, or even necessary, to take. Extradition, as we have seen, lies between municipal and international law in a peculiar sense.

(4) EXTRADITION VERSUS DEPORTATION

Extradition is the legal procedure for bringing the fugitive criminal to stand trial in accordance with law at the place where the offence was committed by him. Deportation is the exercise of the sovereign right of the territorial State to expel any alien whose presence is not considered desirable within its territory. Both have different purposes though sometimes deportation may have the semblance of extradition. Sometimes deportation may be merely a way of extraditing persons. Extradition may be refused if the offence is a political one, or non-extraditable or the evidence is not adequate to sustain an order of surrender or the prosecution for the offence according to the law of the requesting State or country is barred by time, or because of the rule of 'speciality' or because of the doctrine of 'double criminality' or on any of the grounds mentioned in sections 29 and 31 of the 1962 Act. There may be a legal bar for extraditing the fugitive criminal, for want of extradition treaty, where the fugitive can not be surrendered in the absence of such treaty or for absence of issue of notifications under section 3(1) and 3(2) and 12 of the Extradition Act, 1962. Yet deportation may be feasible on the political plane, and pressure is used by way of effecting extradition because extradition is usually too technical, cumbersome, time-consuming and costly procedure, especially if the Government may refuse to extradite for the reasons mentioned in sections 29 and 31 of the India Extradition Act, 1962, or in its discretion, pure and simple.

In some cases, the fugitive cannot be extradited for a number of reasons and nations, therefore, have in a circuitous way resorted to the practice of securing the fugitive from a territorial State to the State of domicile or even a different and another foreign State, if the latter State happens to be interested in obtaining custody of him for purposes of prosecution in its territory. Such a procedure is highly irregular, if not altogether illegal, and is frowned upon. Paul O'Higgins has said (though not a propos of India) that the case of Dr. Soblen in 1962 revealed a device whereby the safeguards of the relevant Extradition Act could be evaded by means of deportation.[1] He has also said that there was clearly no doubt but that Soblen's case had obscured the distinction between deportation and extradition. Soblen's departure was much frowned upon when the Home Secretary made the order in the United Kingdom. Similar was the case of Hans Muller in India.[2]

Deportation is obtained amongst the friendly nations by political pressure when extradition is not possible. Behind-the-scenes diplomatic activities persuade a friendly territorial State to order the deportation of the fugitive to the State of his nationality on the plea that he is not a 'desirable' man. This process of 'back door extradition' bypasses extradition treaties (if any), and tends to obscure the distinction between extradition and deportation. Of course, international law does not prohibit the prosecution of a criminal whose custody has been obtained from the other

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1. 1963 Criminal Law Review, 805.

2. Hans Muller's case, supra, A.I.R. 1955 S.C. 367.

State through the back door. The prosecution of such persons is legal.[1] In India, the deportation is provided under the Foreigners Act.[2] In Government of A.P. v.Syed Mohd. Khan,[3] however, the Supreme Court held that an order of deportation passed by the State Government against an alleged Pakistani found in the State, could not be sustained if there has been no inquiry by the Central Government under Section 9(2) of the Indian Citizenship Act, 1955, about his status, whether he is a Pakistani National or Indian National, or has voluntarily acquired the citizenship of Pakistan. A basic safeguard is thus secured to the deportee. In Britain, the court would probably look into the allegations of mala fides to set aside the order of illegal deportation, and if it finds there is an ulterior motive, set aside the order; otherwise, the King's prerogative power of expelling an alien has been historically exercised to 'send him home', and the national State of the deportee was obliged by the internal law to accept him.[4]

A deportee who complains about his deportation as 'extradition in disguise', complains of deprivation of the rights to which he would be entitled if he were extradited, particularly, his right not to be returned to the demanding State for an offence of a political character, and for the

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1. Ex parte Elliot (1949) 1 All E.R. 373 at pp.376-377. See f.n.3 above at p.48.

2. See Sec.3(2)C of the Foreigners Act, 1946: Hans Muller, supra, A.I.R. 1955 S.C. 367 at p.371.

3. Government of A.P. v. Syed Mohd. Khan (1962) supp.3 S.C.R.288.

4. R. v. Brixton Prison (Governor) ex parte Soblen (1962) 3 All E.R. 641.

principle of speciality or doctrine of double criminality. A deported person may find himself in an unprotected situation, and he may enjoy no provision at all for appeal in both the deporting and receiving territory. A deported person, a national of a third State may be protected by protest of his state; but most of the cases of deportation pertain to nationals of the receiving State. In such cases before deportation, the intended deportee may move the High Court or Supreme Court for a writ of habeas corpus complaining about the mala fides of the Government. Extradition and deportation are distinct both in form and purpose (Hans Muller's case, supra), but it is (at least) a justiciable question whether the use of one in order to effect the other could constitute an abuse of power under Indian law,[1] as under English law. The Supreme Court (as we shall see) has taken the view that 'abuse of power' cannot be relied on by the deportee, but it is not certain that the climate will continue to favour the executive to this degree.

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R., 1955, S.C. 367 at p.376.

(5) DEPORTATION OF ALIENS

(a) General

In England, the Home Secretary may order the deportation of an alien, requiring him to leave and to remain outside the United Kingdom, where (i) the alien has been convicted of an offence punishable with imprisonment and the court has recommended his deportation, or (ii) where the Home Secretary 'deems it to be conducive to the public good'.[1] Since 1956, the Home Secretary has allowed aliens in clase (ii) above, whom it is proposed to deport on grounds other than illegal entry or security to make representations to a Metropolitan Magistrate at Bow Street, provided that if he has been in the United Kingdom for less than 2 years he has observed the regulations. The Chief Magistrate hears the representations and advises the Home Secretary, who almost invariably accepts the advice, whether the proposed order should be made. This is the minimum safeguard of individual interests required by European Conventions, whereas in India in the discretion of the Central Government, he can be expelled and deported.[2] The court can go behind an alleged deportation order to see that it is an order of the Home Secretary himself and that it is for the bona fide purpose of deportation [3] of an alien,[4] but in India no question of

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1. The Aliens Restriction Act, 1914; Aliens Order, 1953; Aliens Order, 1960.
2. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955, S.C. 367 at p.375.
3. Per Scrutton L.J., R. v. Chiswick Police Superintendent Ex parte Sacksteder (1918) 1 K.B. 578 at p.592 (C.A.)
4. E. Shugbayi Eliko v. Government of Nigeria (Officer Administering) (1931) A.C..662 (P.C.). Also see, Government of Andhra Pradesh v. Sayed Md. Khan, 1962(2) S.C.R. 288.

bona fides can be raised.[1]

The Home Secretary has no power to deport an alien to a particular country; but he may cause the alien to be placed on board a particular ship (or aircraft) and be detained therein until it leaves the United Kingdom which, in most cases, will have the same effect. This was decided by the Court of Appeal,[2] considering a deportation order in fulfilment of a mutual treaty with France in the First World War to deport each other's nationals who were of military age. The action of the Home Secretary has been regarded as an abuse of power under the Aliens Order, as the case should have been dealt with under the Extradition Act, but as far as the Home Secretary is concerned, the ship may be diverted, or the person rescued by his friends, or he may escape overboard outside British waters.[3] The Home Secretary need not first give the alien an opportunity of leaving the United Kingdom voluntarily, e.g. to avoid being taken to a particular country.[4] But the Supreme Court of India in Hans

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta A.I.R. 1955 S.C. 367 at p.376.

2. Per Swinfen Eady L.J., R. v. Home Secretary Ex parte Duke of Chateau Thierry (1917) 1 K.B. 922 at p.931; also R. v. Chiswick Police Superintendent Ex parte Sacksteder (1918) 1 K.B. 578 at p.591; Cooperative Committee on Japanese Canadians v. Attorney General, L.R. (1947) A.C. 87 (P.C.) per Lord Wright, followed in Attorney-General for Canada v. Hallet & Carry Ltd., L.R. (1952) A.C. 427 at p.451 (P.C.) per Lord Redcliffe.

3. Paul O'Higgins, Disguised Extradition : The Soblen Case (1964) 27 M.L.R. 521 at pp.525-530.

4. Per Singleton, L.J., R. v. Governor of Brixton Prison Ex parte Pawel Sliwa (1952) 1 K.B. 169 at p.178 (C.A.).

Muller's case has held that the Central Government may deport him or give him a chance to leave the country and he then leaves a free man.

The relation between deportation and extradition was pointedly raised in Soblen's case.[1] Solblen was a United States citizen who had been convicted in the United States of conspiring to convey secret defence information to Russia. He jumped his bail pending appeal and escaped to Israel on a false passport, but he was deported thence by a plane bound for New York. He inflicted wounds on himself, so that when the plane landed in London en route he had to be taken to hospital. Notice of refusal of leave to land was served on him there, and his application for habeas corpus on the ground there was an implied grant of leave to land was unsuccessful. The Home Secretary then made a deportation order, with the intention that Soblen should be put on an aircraft bound for the United States. Soblen again applied for habeas corpus, mainly on the ground that, as the United States had requested England for his return, deportation order was invalid as it was being used for the purpose of extradition. The Court of Appeal held [2] first that the Home Secretary may deport an alien to whom he has refused leave to land; and secondly, that the Home Secretary need not hear any representation on behalf of the alien before making a deportation order for reasons of security; and thirdly, that a bona fide deportation order may

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1. R. v. Home Secretary Ex parte Soblen (1963) 1 Q.B. 829 (C.A.); See also Hans Muller's case supra.

2. R. v. Brixton Prison Governor, ex Parte Soblen (1963) 2 Q.B. 243 (C.A.).

be used in such a way as to send the alien back to his own country (which has requested for him) for an offence committed there, although it is not an extraditable offence. The action of the Home Secretary has been strongly criticised as 'disguised extradition'.[1] It is true that deportation otherwise than on the recommendation of a court must be 'conducive to the public good'. Practically the only judicial control (apart from the question whether the person is an alien) is whether the exercise of the power is bona fide. It might not be bona fide if it were exercised in response to a request from a foreign country for the surrender of a fugitive criminal, though the burden of proof would be on that person. But the mere fact that the country of which that person is a national requests his surrender does not itself invalidate a deportation order.[2]

States are generally recognised as possessing the power to expel, deport and reconduct aliens. Like the power to refuse admission (exclusion) this is regarded as an incident of a State's territorial sovereignty. Not even a State's own citizens are immune from this power, as witness the denationalisation and expulsion by certain States of their own nationals in recent times.

The power to expel and manner of expulsion are, however, two distinct matters. Expulsion (or reconduction) must be effected in a reasonable manner and without unnecessary

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1. Paul O'Higgins 'Disguised Extradition': The Soblen case (1964) 27 M.L.R. 521. See also C.H.R. Thornberry, "Dr. Soblen and the Alien Law of the United Kingdom" (1963) 12 I. C.L.Q. 414.

2. O. Hood Phillips, Constitutional and Administrative Law, 4th ed., pp.420-422.

injury to the alien affected. Detention prior to expulsion should be avoided, unless the alien concerned refuses to leave the State or is likely to evade the authorities. Also, an alien should not, it is generally felt, be deported to a country or territory where his person or freedom would be threatened on account of his race, religion, nationality or political views. Nor should he be exposed to unnecessary indignity.

International law does not prohibit the expulsion en masse of aliens, although this is resorted to usually by way of reprisals only. It may, however, be treated as an unfriendly act.[1] As distinct from expulsion, reconduction amounts to a police measure whereby the alien is returned to the frontier under escort.

If the Home Secretary is honestly satisfied that the deportation of an alien is conducive to the public good and there is some basis for his belief, his deportation order is valid although the practical effect (and perhaps the desired effect) of the order is to secure the extradition of an alien to another country seeking his rendition for a non-extraditable offence.[2] In Soblen's case, the Home Secretary's decision was couched in subjective terms and was exercisable on 'policy' grounds.[3] With regard to the control of aliens for the security of the realm in time of war,

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1. Starke, An Introduction to International Law, 4th ed., p.260.

2. Per Lord Denning M.R., R. v. Ex Parte Soblen, supra (1963), 2 Q.B.D. 243 at p.302.

3. Judicial Review of Administrative Action by S.A. De Smith, Second ed., pp.309-310.

the original distinction between enemy and friendly aliens is commonly used. Wartime legislation and emergency powers during both the two world wars gave the Crown very extensive powers of control over enemy aliens in this sense. Legislation in England expressly preserved the Crown's prerogative in relation to enemy aliens. At common law, their licence to remain at large may be revoked at any time at the complete discretion of the Crown, and they can be interned.[1] The internment of an enemy alien is an act of State, and he has no right to apply for a writ of habeas corpus against the executive to challenge the Crown's power to intern or deport.[2] It has been discussed, but not decided, whether an interned enemy alien is in the position of a prisoner-of-war. Internment, however, does not revoke the licence to bring civil actions in the courts; or, probably, to commence habeas corpus proceedings against private persons.[3]

The Home Secretary is also authorised by Part II of the Commonwealth Immigrants Act, 1962, to deport from the United Kingdom Commonwealth citizens. An offender who is both a citizen of the United Kingdom and Colonies and a citizen of another Commonwealth country is not exempt from deportation,[4] but the Home Secretary has stated that he will

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1. R. v. Commandant of Knockalor Camp (1917) 117 L.T. 627; Ex parte Liebmann (1916) 1 K.B., 268; Ex parte Weber (1916), A.C. 421; Att.-Gen. for Canada v. Cain (1906) A.C. 542 at p.546 (P.C.); Netz v. Ede (1946) Ch.224.

2. R. v. Bottrill Ex parte Kuechenmeister (1947) K.B. 41 at p.56 (C.A.).

3. Per Asquith L.J. in Bottrill's case (1947) K.B. 41 at p.57 (C.A.)

4. R. v. Sabri; The Times, Nov. 10, 1964 (C.A.).

not deport such persons, British protected persons, now as defined in the British Protectorates, Protected States and Protected Persons Order, 1965, and Irish Citizens, except persons connected with the United Kingdom by birth, parentage, naturalisation, adoption or registration and their wives (Section 6). Deportation of Commonwealth immigrants is only authorised if they have been convicted of an offence punishable with imprisonment, and the Court which convicted them or an appeal court recommends that a deportation order be made; and no recommendation shall be made if the person has been ordinarily resident in the United Kingdom for at least 5 years before conviction (section 7). As at least 7 days notice must be given to a person before the Court may make a recommendation for his deportation, he may appeal to the appropriate appellate court either against the recommendation or against the conviction on which it is made (section 8). Deportation is not a part of conviction.[1]

The House of Lords [2] on the illegal entrants deportation held that the Immigration Act of 1971 had retrospective effect and the Commonwealth Citizens who illegally entered could be deported, though the persons 'settled' were allowed to stay in the United Kingdom. Section 1(2) of the Immigration Act, 1971, was interpreted to benefit all those persons as 'settled' who (i) as Commonwealth citizens arrived before the period of control, namely the Act of 1962; (ii) Commonwealth citizens who arrived after the Act of 1962 but before the Act of 1968, but otherwise than through the port of entry;

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1. See R. v. Edgihill (1963) 1 Q.B. 593 (C.C.A.); Cf. R. v. Lynch (1966) 1 Q.L.R. 92; (1965) 3 All E.R. 925 (C.C.A.).

2. Azam v. Secretary of State; Khera v. Secretary of State; Sidhu v. Secretary of State (H.L.); The Times, 11 June, 1973.

they were not in breach of any immigration laws; and (iii) Commonwealth citizens admitted unconditionally under the pre-1973 Control Procedure. They were held to be treated as having indefinite leave to remain. But persons who entered the United Kingdom unlawfully after a refusal (as Sidhu) and persons whose original entry was lawful but who had remained unlawfully, because the conditions on which they entered were not complied with, such persons, however long they had remained in the United Kingdom were excluded from those deemed to have leave to remain. But Lord Wilberforce held that though the Act of 1971 had to be construed as retroactive effect, it also made provision for the Secretary of State for the Home Department to consider each case and give full weight to human factors in deciding whether or not an individual illegal entrant should remain in the United Kingdom.

The power to deport in such cases is possessed by practically every other territory in the Commonwealth. The Supreme Court of India in the case of Hans Muller has held that the power to expel (deport) an alien is inherent in the Central Government as distinguished from the act of extradition, which action can be taken and orders passed for the same on the fulfilment of certain conditions precedent and which order is subject to judicial review. But there are no conditions or prerequisites precedent to the passing of the order of expelling an alien by the Central Government if, in its discretion,it exercises its powers: a mere expulsion may result in and have the effect of extraditing an alien. But it is submitted the same principles would not apply so far as the citizens of India are concerned, and if they are deported or expelled, the chapter of Fundamental Rights will come to their rescue and the aggrieved party may move the High Court or the Supreme Court for a writ

of habeas corpus or prohibition or certiorari as the circumstances of the case require.

(b) Deportation of Pakistani Nationals

There are cases of deportation of former Indian Nationals who migrated to Pakistan after 26 January, 1950, Pakistan Nationals or other nationals, and these can constitute exceptions. The Supreme Court of India held [1] that prosecution of an Indian national under section 14 of the Foreigners Act,1946, on a charge of over-staying in India the period of whose Pakistani permit has expired, is not maintainable, where there is no determination by the Central Government under section 9 of the Citizenship Act that he had acquired Pakistani nationality, and had thereby, become a foreigner. The Supreme Court in that case, held that the respondent even though held to be a Pakistani and therefore, a foreigner before the charge framed against him was entitled to the protection of Indian laws. The ratio of the decision in that case, even after the determination under section 9 of the Indian Citizenship Act, 1955, was based on the finding that the determination by the Central Government in that case could not have the effect retrospectively rendering penal an act which was not so at the time of its commission by ex post facto legislation.

But the Supreme Court left the matter open for the Central Government to take such action against the respondent as it thought fit either under the Foreigners Act, 1946, or under any other provision of the law which might be applicable to him; for the purpose of either deporting him or otherwise dealing with him as it thought fit.

1. State of U.P. v. Rahmatullah, A.I.R. 1971 S.C. 1382.

(6) Irregular or Mistaken Extradition

There can be a mistaken extradition or irregular surrender. It may occur when the fugitive criminal is surrendered to a foreign State without formal extradition proceedings or the fugitive is surrendered in situations where he could not and should not have been surrendered. Savarkar's was an instance: the French Police surrendered Savarkar to the Captain of the ship without any authority from the Paris Government, and without proper extradition proceedings.[1] Savarkar was a revolutionary who was being transferred to India for prosecution on charges of treason in India, according to the allegations of the British Government. He believed that Britain would leave India only by the use of force by Indian Nationalists. He was a political offender and he could not have been extradited or surrendered. Such instances may occur in case of aliens in India, and such surrenders will be mistaken ones. Deportation, expulsion, kidnapping or mistaken extradition do not affect the prosecution of the criminal, and he can still be prosecuted validly as if there has been valid extradition.[2]

On the other hand, if the accused has been secured without extradition, the prosecuting State has no limitations as it would have had under the rule of speciality had he been brought through the proper extradition proceedings. This is a situation where the law-breaker State is in a more advantageous

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1. More instances are given by Professor Oppenheim at p.703.

2. 1919-1920 A.D., Case No.185. Delivery without Extradition (Germany) case: 1929-1930 A.D., Case No.107, Extradition (Germany-Italy) case; State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171; Ex parte Elliot (1949) 1 All E.R. 373; In the matter of Rudolf Stallmann, I.L.R. 39 Cal. 164, decided on 21st, 1911.

position than the State who may have obtained the extradition and surrender of the fugitive offender legally. In a very few cases, to arrive at the same effect of deportation, kidnapping is another form which is resorted to, for securing the custody of the offender. This mostly happens in cases of political offenders who cannot otherwise be extradited and in whose kidnapping sometimes the Government also may be interested. Eichman was kidnapped by Israel's agents in Argentine, and prosecuted and executed in Israel for his crimes against Jews during Hitler's regime in Germany. The Moroccan leader, Mehdi Ben Berka, was kidnapped and murdered in France. There are a number of instances of kidnapping. Deportation and kidnapping differ in that while in cases of deportation, the foreign State is a willing and active party in surrendering the fugitive to the requesting State; in the case of kidnapping, it is the forceful removal of the fugitive against the will of the State where he is, though in some cases, the States may be a conniving party by keeping silent, though the other State may be a party in the forceful removal of the offender to take him to its territory.

(7) Extradition and Asylum

(a) General

The liberty of a State to accord asylum to an alien overlaps to a certain extent with its liberty to refuse extradition of him at the request of some other State, an overlapping best seen in the grant, commonly, of asylum to political offenders, who correspondingly are not as a rule, extraditable. Asylum stops, as it were, where extradition begins, and this interdependence makes it convenient to consider the two subjects viz. extradition and asylum together. No question of asylum and, therefore, of interdependence between it and extradition, arises however, where a State is requested to extradite its own resident nationals.

The concept of asylum in international law involves two elements:- (a) shelter, which is more than merely temporary refuge; and (b) a degree of active protection on the part of the authorities in control of the territory of asylum.

Asylum may be territorial (or internal), i.e. granted by a State on its territory; it may be extra-territorial, i.e. granted for and in respect of legations, consular premises, international headquarters, warships and merchant vessels to refugees from the authorities of the territorial State. The differences between the principles applying to the two kinds of asylum flow from the fact that the power to grant territorial asylum is an incident of territorial sovereignty itself, whereas the granting of extra-territorial asylum is rather a derogation from the sovereignty of the territorial state insofar as that State is required to acquiesce in fugitives from its authorities enjoying protection from apprehension.

Consistently with this distinction, the general principle is that every State has a plenary right to grant territorial asylum unless it has accepted some particular restriction in this regard, while the right to grant extra-territorial asylum is exceptional and must be established in each case.

Both types of asylum have this in common, that they involve an adjustment between the legal claims of State sovereignty, and demands of humanity.

(b) Territorial Asylum

A State's liberty to grant asylum in its territory is of ancient origins, and extends not only to political, social or religious refugees, but to all persons from abroad, including criminal offenders. It is one aspect of a State's general power of admission or exclusion from its territory. Normally, however, persons not being nationals of the territorial state, and who are held in custody on foreign vessels within that State's waters will not be granted asylum. It is a matter of controversy whether a State may grant asylum to prisoners-of-war detained by it but unwilling to be repatriated.[1]

It is now sometimes said that the fugitive has a 'right of asylum'. Judge Lauterpacht has suggested that there is such an individual right because the fugitive is not usually surrendered, in the absence of an extradition treaty, and because if his offence is political, he is not generally subject

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1. Starke, Introduction to International Law, pp.266 and 372.

to extradition.[1] But according to J.G. Starke, this is inaccurate, as fugitives have no enforceable right in international law to enjoy asylum, either by grant from the State of refuge, or by acquiescence as against the pursuing State. The only international legal right, according to Starke, flows from the right of the State of refuge itself to grant asylum. Muncipal legal systems [2] do indeed, sometimes provide for a right of asylum to individuals fleeing from prosecution, and an example of a modern international instrument (not being a binding convention) providing for an individual right of asylum from prosecution is the Universal Declaration of Human Rights, 1948 (see Article 14). But, so far, no such individual right is guaranteed by international law, although proposals to secure recognition of this right are under consideration by the United Nations.

The liberty of States to grant asylum may, of course, be cut down by treaties between the States concerned, of which extradition treaties are the commonest illustration, and these treaties will be an exception to the right of the State of refuge to grant asylum.[3]

(c) Extra-territorial asylum

(i) Asylum in legations

Modern international law recognises no general right of a head of a mission to grant asylum in the premises of the

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1. H. Lauterpacht: The Law of Nations and Punishment of War Crimes. B.Y.I.L. 1944 at pp.87, 88.

2. See, for example, France and Italy.

3. Starke, Introduction to International Law, 4th ed., pp.265-266.

legation. Such grant seems rather prohibited by international law where its effect would be to exempt the fugitive from the regular application of laws and administration of justice by the territorial State. The lack of any such general right of diplomatic asylum was affirmed by the International Court of Justice in the Asylum case.[1] In the Haya de la Torre case [2] arising out of the same facts, the court held that where asylum in legation premises has been granted without justification, the head of the mission concerned is not obliged to deliver the fugitive to the local authorities, in the absence of any treaty binding him to do so.

(d) Right of Asylum

Persecution in the home State is the usual incentive for crossing its frontiers and taking refuge in the State of Asylum. These persecutions may be mainly on grounds of political opinions, race, religion, linguistic reasons, etc. Everyone has a right to seek and enjoy in other countries asylum from persecution.[3] A sovereign State exercises its territorial supremacy over all persons on its territory. It is a right of every State to offer refuge to those who ask for such protection and resist all demands, where one is made for the extradition of the individual granted asylum. But the right of asylum cannot be claimed as of right, but it is a right of the State to grant asylum at its discretion, which could be granted if the prerequisite conditions are fulfilled. Generally, an asylum is asked for by people whose extradition is

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1. (1950) I.C.J. Reports 266.

2. (1951) I.C.J. Reports 71.

3. Commd. 7662, 1948 B.Y.I.L. 374.

demanded and the fugitive claims that he is a political offender, and if he successfully proves it in extradition proceedings, his surrender is refused, and he is given asylum to remain permanently or provisionally in the country of asylum.[1]

International customary law recognises the legal right of the States to admit and grant asylum to refugees within their territorial jurisdiction, whether the refugees' extradition is demanded or not. Political asylum has been described as an institution of a humanitarian character and therefore, not subject to reciprocity and that any person may resort to its protection whatever his nationality.[2] Such protection is necessary in order to secure to the members of a racial, religious (as in the case of Jews in Germany), or linguistic group, just and fair conditions of life. Danger in regard to life or liberty from political or other forms of persecution,[3] and serious danger to the life and liberty and subjection to persecution of such nature as to render life insupportable [4] in case of return of the asylee to his home State were stated to be grounds for grant of political asylum in British practice,[5]

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1. Ohene-Djan , I.L., The Fugitive Offender and the Law of Extradition in the Commonwealth, unpublished Ph.D. Thesis, London University at pp.281, 282.(1965).

2. Article III of the Convention on Political Asylum adopted by the Pan-American Conference held in December, 1933.

3. 529 H.C. Deb. 1508, 1st July, 1954.

4. 668 H.C. Deb. 429, 28th November, 1962. Br. Home Secretary, Mr. Henry Brooke, and 613 H.C. Deb. 495, 11th November, 1959, Minister of State at Home Office (Mr. Renton).

5. Ohene-Djan, op.cit., pp.285-286.

and no different patterns would be adopted in India on the subject.

In the case of grant of political asylum claimed by aliens in India, the fear of persecution should be shown to be well-founded and also the life and liberty of the asylee in peril, because of his views and activities. This test is difficult for the asylee to prove and injustice may not be eliminated in a few cases but it would weed out frivolous applications for asylum; and in case of refusal, the applicant asylee will meet deportation. Dr. Ohene-Djan [1] has noted two cases of Nikola Martinovic and Captain Galvao, who were refused asylum, because they could not prove that there was any evidence of their prospective persecutions.

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1. Ohene-Djan, op.cit. (f.n.94A) ; p.285.

(9) Salient Features of the Indian Extradition Act, 1962

(a) Basis and Extent of Extradition

The basis and extent of extradition differ in different countries. The law of England with regard to extradition is based entirely on statutes. A fugitive criminal found in England may be surrendered to a foreign State only in accordance with the provisions of the Extradition Acts, 1870 to 1935, by proceedings which are regulated and authorised by those Acts. The Extradition Acts do not apply in the case of any foreign State unless Her Majesty so directs by Order in Council. The Acts extend to the Channel Islands and the Isle of Man as if they were part of the United Kingdom and, when applied to a foreign State unless the Order in Council provides otherwise, and extend, subject to certain modifications, to every "British Possession".[1] Prior to the Extradition Act, 1870 (33 and 34 Vict. Ch.52), there was no general statute giving legal validity to extradition treaties concluded with Foreign States by Her Majesty, and a separate Act had to be passed on the occasion of each new treaty. This statute, as subsequently amended — it was the subject matter of a review by Royal Commission appointed in 1877,consisting of eminent jurists like Cockburn, Lord Selborne, Lord Esher— has been the foundation of the law of extradition in the whole of the British Empire, except in the case of Canada, whereby an Order in Council dated 6 July, 1907, issued under Section 18 of the Act, the operation thereof in Canada was suspended so long as Part 1 of Ch.155 of the Revised Statutes of Canada (and now the revised Statutes of

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1. See Halsbury, Laws of England, 3rd ed., Vol.16, p.360.

Canada, 192, C.322) continued in force.[1]

The Extradition Acts, 1870 to 1935, do not apply in the case of any foreign State unless Her Majesty so directs by Order in Council (just like the provisions contained in Sections 3 and 12 of the Indian Extradition Act of 1962). The application of the Act of 1870 to 'British Possessions' outside the United Kingdom has been provided by Section 17, while Section 18 provides for the saving of laws of 'British Possessions'. By an Order in Council, dated 7 March, 1904, it was declared that Chapter II of the Indian Extradition Act will have effect in British India as if it were part of the Extradition Act, 1870 (vide Section 18 of that Act). This chapter was intended to substitute the Indian procedure for that contained in Sections 7 to 12 of the Extradition Act, 1870.[2]

The basis and extent of extradition in the U.S.A. is set out,[3] as follows:-

> "There is no obligation upon a Government, under the law of nations, to surrender fugitive criminals to a foreign power, and the sovereign power upon which demand is made may exercise its discretion and may investigate the charge upon which the surrender is demanded. In United States it is well settled that independently of statutory or treaty provision, no authority exists in any branch of the Government to surrender a fugitive criminal to a foreign Government, although in 1864, Mr. Steward, Secretary of State of the United States, with the sanction of President Lincoln, directed the arrest of a fugitive from Cuba, as a purely executive Act in a case in which this country had no extradition treaty with the country from which the criminal had fled, and there are text writers and dicta in

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1. Ramaswami, J. In Re Chockalingam, A.I.R. 1960 Mad. 548 at p.551

2. Ramaswami, J. In Re Chockalingam, ibid. at p.551.

3. 25 Corpus Juris, pp.273 to 275 (Ss.52-53).

some cases which assert that it is the duty of one nation to surrender fugitive criminals upon demand to another nation, especially in the case of more heinous offences as a matter of 'international comity' in the absence of treaties.

"It is the present doctrine in England and Canada that the extradition of a fugitive criminal cannot be granted in the absence of specific legal authority. As the United States do not surrender fugitive criminals in the absence of a treaty stipulation, its practice is to decline requests of extradition from a foreign Government with which this Government has no treaty providing for surrender, although there are isolated cases in which this Government has requested to foreign Governments the surrender of fugitive criminals as an act of comity, but in these cases, the request has always been accompanied by the statement that under our law 'reciprocity' cannot be granted.

"As no authority exists in any branch of this Government to surrender a fugitive criminal in the absence of treaty stipulation, extradition can be granted, where a treaty exists, only for an offence enumerated in the treaty and this Government will request extradition from a foreign Government only for an offence included in the treaty and the same rule of law has been laid down by the Canadian Courts, although there appears to be some authority for the doctrine that the existence of an extradition treaty between two countries does not prohibit the surrender by either Government of a person charged with a crime not enumerated in the treaty. Where a person charged with a crime not provided for by treaty is delivered to the authorities of the United States as an act of comity, such person is not entitled to be discharged on habeas corpus, and none of his personal rights have been violated. It is within the power of the Congress to provide by statute for the extradition of fugitives from justice of a foreign country without regard to any reciprocal treaty obligation, and this power is not affected by the character of the criminal procedure of the foreign country or by the fact that the alleged offender is a citizen of United States.

"International extradition in United States is based on treaty stipulation. The United States has treaties of extradition with most Governments. A treaty stipulation on the part of the Government of the United States to surrender fugitives

> from justice is a lawful stipulation, and within the authority of the treaty-making power. The treaties of Great Britain with United States have been extended to include the surrender of the fugitive offenders between the States of North Borneo and the Phillipine Islands or Guam."[1]

There is an interesting study of extradition in the Soviet Union and Eastern Europe.[2] The provision in the Soviet law dealing with extradition is para.2 of Section 16, Basic Principles of Criminal Procedure of the Union of Soviet Socialist Republics. It reads:-

> "Section 16 (para.3)
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> The extradition of persons against whom the investigation is pending or who are committed for trial or convicted by judicial bodies and whose extradition is requested by a foreign Government from the Government of U.S.S.R. shall be permitted only in cases and in the manner established by the treaties, agreements and conventions of the U.S.S.R. with Foreign Governments, as well as by a special law, enacted in the form of Federal legislation."

The Soviet Union has entered into treaties with their associate States of Eastern Europe from 1957.

Assuming a treaty to exist, or even in cases where no treaty exists but a territorial State (as in India's case) surrenders fugitive offenders by way of extradition to the requesting country, there remain two sides to the procedure, and both must conform to the requirements of the case before it will come within the concept of 'extradition'.

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1. See also 22 American jurisprudence, p.244 - Basis of Rights of Extradition.

2. Edited by Vladimir Gsovski and Kazimiers Grzybowski (1959) in two volumes published by Stevens & Sons Ltd., London; "Government law and Courts in the Soviet Union and Eastern Europe".

The functions which the courts in the two countries perform are different. The court within whose jurisdiction the offence is committed decides whether there is a prima facie evidence on which the requisition may be made to another country for the surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid, the requisition is transmitted to the police authorities, and the courts of that country consider, according to their own laws, whether the offender should be surrendered.[1]

The sanction behind an order of extradition is, therefore, the international commitment of the State under which the court functions, but courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender.[2]

The Indian Extradition Act of 1962 envisages the extradition both of citizens and alien fugitives from India under three situations. It may be on the basis of a treaty which the requesting State has entered with India. It is immaterial whether the treaty has been entered into after India gained independence, 1947, or the treaties were entered into earlier by the Government of the United Kingdom on behalf of India, or by India's own Government.

The second situation is that a non-treaty State can also request the surrender of the fugitive if it is one of the States which have been notified under Section 3(1)(a) of the 1962 Act; and similarly, under Section 3(1)(b) of the Act.[3]

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1176.
2. Jugal Kishore More, ibid. at p.1175.
3. For the texts of these clauses, see Appendix A, p.584, below.

A similar notification may be made with respect to a Commonwealth country which has made no extradition arrangements with India.

The third situation is when a Commonwealth country which has entered into an extradition agreement with India may also request for the surrender of a fugitive without proof of prima facie case against him. In all these three situations, the notification of the Central Government in the Government of India Gazette is essential either under Section 3 or Section 12 of the Act.[1] In the United Kingdom and the U.S.A. Fugitive Criminals cannot be extradited without extradition treaty between them and the requesting State.[2] But in India such a treaty is not essential for securing the extradition of a fugitive criminal. In this respect, the Indian Extradition Act of 1962 is like the Canadian Extradition Act of 1889 or the French Act of 1927, wherein extradition can be demanded even by a non-treaty State, so long as the crime attributed to the fugitive is listed in the second schedule of the Indian Extradition Act of 1962 and notification has been made in the Gazette, under Section 3(1) of the Act, to the effect that the State mentioned therein is entitled to secure extradition. Therefore, it is a prerequisite condition that before any requisition is made, there must have been notification in the Government Gazette of the applicability of the Act to the requesting State, irrespective of whether it is a treaty State or otherwise.

Section 3(1) of the Act of 1962 provides that the Central Government may, by notified order, direct that the pro-

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1. See Appendix.

2. Felice Morgenstern, The Right of Asylum, 1949 B.Y.I.L. pp.328-329.

visions of this Act other than Chapter III shall apply (a) to such foreign State or part thereof; and (b) to such Commonwealth country or part thereof to which Chapter III does not apply as may be specified in the order. Notification is also necessary under Section 12 of the Act with regard to Commonwealth countries which have extradition arrangements with India. Sections 3(1) and 12(2) imply that in order that a foreign State may have delivery of a fugitive in whom it may be interested, it is essential that notification as to the applicability of the Act with regard to that State has been made under the relevant section. This is so, even with regard to foreign States that have extradition treaties with India. Regarding treaty States, section 3(3) provides that the notification should publish the relevant treaty in full. Non-publication of the treaty may vitiate the notification. While the validity of the notification with regard to a treaty State is limited to the tenure of treaty and terms of the treaty, there is no such limitation with regard to States which have neither an extradition treaty nor an arrangement for extradition with India, and the latter categories of countries are in a more advantageous position. Thus, the 1962 Act becomes effective with regard to a given State only after the appropriate notification of the applicability of the Act to that State.

(b) Necessity for Treaties and Municipal Laws in Extradition Matters

Extradition is a political question, the law governing it having been created by statute and treaty. Common law so far as it protects the subject, deals with two questions. First, the personal liberty of all persons who came within the area of its application; and second, territoriality of all laws, unless it is specially expressed to apply extra-territorially. The law

on these two questions can be put thus: A person who has not committed an offence against the laws of the country in which he is actually present is a free man and can apply to the courts to protect him from any violation of his personal liberty. The law of extradition is an exception to the common law doctrine of personal liberty of a subject or a person who comes within the peace of the king. The common law doctrine of personal liberty involves the notion of right to liberty and locality of the crime. The latter means that crime is local in its commission; local in its legal effect; local in its punishment; that is a specific illustration of the larger doctrine that all laws are territorial-local to the country in which they have been promulgated - which in turn, is based upon the larger doctrine that sovereignty is local and its exercise circumscribed by the limits of the territory subject to the sovereign. Each phase of this doctrine is involved in the common-law right of liberty upon which extradition encroaches. The Government of the country whose laws are violated feels powerless in all its branches either to punish or to bring to punishment the offender who escapes to another territory; and conversely, the Government in whose territory he has escaped feels powerless to punish him because none of its laws have been violated or infringed. Hence, the necessity for treaties and enactment of municipal law for extradition.

In the United States, treaties are 'self-executing' and no municipal law is necessary,[1] as Art.VI of the U.S. Constitution makes the treaties 'the Supreme Law of the land' and such treaties are to be regarded in Courts of Justice, as equivalent to an act of the legislature, whenever it operates of itself,

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1. McNair, Law of Treaties, 78-81.

without the aid of any legislative provision. But when the terms of the stipulation impose a contract when either of the parties engages to perform a particular act, the treaty addresses itself to the political department not the judicial department, and the legislature must execute the contract before it can become a rule for the courts.[1] But in the United Kingdom, no treaty is self-executing. Municipal law has to be passed by Parliament; if this does not occur, the relevant treaty will not be executed. If per incuriam it is done, the Crown is internationally omnicompetent in the matter, but the British courts would not give effect to it if it conflicts with the law of the land.[2]

Lord Atkin observed:

> "within the British Empire there is a well-established rule that making of a treaty is an executive Act, while the performance its obligations, if they entail alterations of the existing law, requires legislative action."[3]

As regards English municipal law, the special traditions of common law conditioned the necessity for treaty and statute. At common law, the Crown had no power to arrest a fugitive criminal and to surrender him to another State; furthermore, treaties as to extradition were deemed to derogate from the private law rights of English citizens, and required legislation before they could come into force in England. The

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1. C.J. Marshal in Foster v. Neilson (1829) (quoted by McNair, ibid. p.80); Dickinson, Law of Nations, p.1057; Fujji v. State of California, 38 Cal. 2d-718; 242 F-2d 617.

2. McNair, ibid. p.82.

3. Attorney-General for Canada v. Attorney-General for Ontario: 1937 A.C. 326 at p.347, per Lord Atkin.

British practice as to treaties, as distinct from customary international law, is conditioned primarily by the constitutional principles governing the relations between the Executive (i.e. Crown) and Parliament. The negotiation, signature, and ratification of treaties are matters belonging to the prerogative powers of the Crown. If however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically, and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliament's approval.

Hence, it is established in England that among other things, treaties which affect the private rights of British subjects or involve any modification of the common or statute law by virtue of their provisions or otherwise, must receive Parliamentary assent through an enabling Act of Parliament and, if necessary, any legislation to effect the requisite changes in the law must be passed.[1] Under the above-mentioned rules, a British treaty is required to be implemented by legislation, and a mere general or vague allusion to the treaty in a statute is not sufficient to constitute the necessary legislative implemention.[2] Thus, from both points of view, legislation was essential and the solution adopted was to pass a general extradition statute - the Extradition Act, 1870 (which was made applicable to India also), which applies only in respect of countries with which an arrangement for the surrender of fugitive offenders has been concluded, and to which the Act itself has been made

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1. Walker v. Baird (1892) A.C. 491 at p.497. The Parliament Belge (1879) 4 P-D.129; Attorney-General for Canada v. Attorney General for Ontario (1937) A.C. 326 at p.347.

2. Republic of Italy v. Hambros Bank (1950) Ch.314.

applicable by an Order in Council.

Two principles are to be kept in mind in the surrender of the criminal. Treaty-making power is the prerogative of the sovereign and in India, of the executive, i.e. the Central Government,and the treaty per se requires no ratification. Law-making power is the prerogative of the Parliament. From these two principles emerge that the Executive cannot alter the law; nor command anything, to be done in violation of law. The right of the Indian citizen or an alien within the territory subject to Indian law, to his personal liberty, cannot be invaded by the Executive even though it binds itself by treaty with another State to do so. Consequently, in order to carry out that violation of common law, including any fundamental or legal right which is involved in the surrender to foreign country of persons who have committed no offence against Indian law,both the legislative and the executive wings of India must be in agreement that it should be done; and in addition to the treaty there must be municipal law in existence in India for extradition of persons whether citizens or aliens. Thus, it has come about that the machinery for extradition from this country is contained in two documents, of coordinate but independent authority, viz. the treaty and the statute. But treaty is always not essential for extradition; this is based on the policy of making reciprocity the basis of extradition, and this is how in the Indian Extradition Act, separate chapters have been provided for extradition of fugitives to treaty and non-treaty, extradition arrangement and non-extradition arrangement countries.

The sanction of the Parliament for enacting municipal law is necessary because the surrender of the fugitive will involve his arrest and the arrest will deprive the fugitive of

his personal liberty and therefore, it necessitates the authority of Parliament, though expulsion and exclusion simpliciter would not need such a sanction. Mere arrest and surrender on requisition are obviously not contemplated, for some enquiry is essential in order to ensure proof of the fact that the fugitive not only is a criminal, but also is the person he is alleged to be, so as to safeguard the liberty of the person. Such enquiry would naturally be by an independent judiciary and in order to see that the offence committed is not only against the laws of India, but is against the laws of the foreign State, the necessary jurisdiction to hold the inquiry must be derived from Parliament. Thus, it follows that the whole procedure of surrender of the fugitive criminal from the arrest onto his final delivery over to some person to take him out of this country, must be created by statute, and this is why the earlier English and Indian Statutes and the present Extradition Act of 1962 have been enacted by Parliament and both the procedural law and the substantive offences have been mentioned in the Act with a liberty to the Executive to enter into treaties with foreign States.

The Constitution of India in Chapter III has given fundamental rights regarding personal liberty to citizens and aliens - though their enforcement in terms of emergency can be suspended by the President under Art.259-and the Supreme Court and the High Courts, being the sentinels of the Fundamental rights, have, under Art. 32 and 226 of the Constitution, been given power to safeguard the personal liberties and therefore, the Extradition Act is silent on this, and they are thus not specifically dealt with as part of the extradition machinery, and require no special legislation to warrant their interference. Of course the question of the infringement of personal liberty would not

arise in case generally when a fugitive criminal is surrendered by a foreign State to India, though on account of the 'Equality before law' or 'Equal protection of law' clauses, a person surrendered to India can move in India for constitutional remedies available, if any, to him. Specific provisions are not needed in this respect, and the Indian Extradition Act, 1962, has by section 20 therefore, provided that the person surrendered from a foreign country will be dealt with in accordance with law in force in India. When once he is surrendered, he is amenable to the jurisdiction and laws of India and he may be innocent, but once charged, he will be tried according to the laws in force in India. Therefore, there are no authorities to whom jurisdiction must be given by Parliament specifically; this is why fundamental rights provided under Chapter III of the Constitution and the constitutional remedies are not separately mentioned in the Extradition Act.

Reciprocity is the obvious and common basis of treaties, but it is not insisted on in the Act.

Treaties <u>per se</u> are not law and this is why Section 3(3)(c) of Indian Extradition Act, 1962, provides for the implementation of the treaty by a separate notified order. So also Section 3(3)(a) provides for the setting out the treaty in full in the notified order so that the other States and everybody concerned may know about it.

Further, Section 3(3)(b) provides about the duration of the treaty, viz. that the treaty shall not remain in force after its period. Section 3(i)(a) and (b) empowers the Central Government to make the Act applicable for the surrender of fugitives, by a notified order other than the provisions of Chapter III: (a) to such foreign States, or part thereof

or (b) to such Commonwealth Country or part thereof to which Chapter III does not apply. Section 12 of the Act empowers the Central Government to apply Chapter III to such Commonwealth Countries with extradition arrangements which it deems expedient. In regard to extradition, for the applicability of the provisions of the Act or treaties the principle may again be emphasised that the order of the Central Government as required under Section 3 of the Act is necessary for the applicability of the provisions of the Act and treaty, if any, made for surrender of fugitives from India. But conversely, it is not necessary and essential that there should be a treaty in force between India and foreign country for the surrender of criminals by foreign States to India and no notification under Section 3 of the Indian Extradition Act, 1962, is necessary and a mere initiative from the Central Government for requisition from a foreign Government of the fugitive criminal is enough.[1]

(c) Pre-Independence Treaties and their Continuity

Oppenheim says that in the absence of extradition treaties stipulating to the contrary no State is obliged by international law to expel or deliver a fugitive offender to the prosecuting State.[2] No State considers itself under any international duty to extradite a fugitive unless there is some treaty obligation on it.[3] From time to time, attempts were made to conclude a convention governing extradition requests amongst nations

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171, supra.

2. Oppenheim, International Law, 8th ed., Vol.I, at p.696.

3. Arnold McNair, 'Extradition and Territorial Asylum', 1951 B.Y.I.L., pp.174-177; Felice Morgenstern, 'The Right of Asylum', 1949, B.Y.I.L., p.327; Factor v. Laubenheimer, 290 U.S. 276 at p.283.

but nothing was achieved. In the absence of any extradition convention amongst nations, nations have resorted to bilateral extradition treaties by which they have agreed between themselves to surrender the accused or convict to the requesting State in case such a person comes within the purview of the given treaty.

France was the pioneer in the development of bilateral extradition treaties. As early as 1371, France entered into a treaty with Savoy and with Austria and Spain in 1612. By 1668, France had extradition treaties with 53 States. For the sake of convenience, and to avoid misunderstanding, extradition treaties generally enunciate a list of crimes for which extradition may be demanded and granted. When disputes arise about the interpretation of clauses of treaties, the territorial state courts decide it. Bilateral treaties at the national level are supplemented by national laws or legislation at the municipal level. Belgium which is ,also, considered as one of the pioneers in extradition law, was the first country to bring out national legislation on the subject in 1833. It remained a solitary power in the field for quite some time, until Great Britain passed theExtradition Act in 1870. These municipal laws purport to implement the obligations undertaken by the territorial State under extradition treaties. Besides they also prescribe the procedure to be followed in case of any request for the surrender of the fugitive.[1]

The Indian Extradition Act, 1962, has been enacted for this purpose. Section 2(d) of the Act defines an extradition treaty as including a treaty which was entered into 'before the

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1. Hingorani R.C., The Indian Extradition Law, p.8.

15th day of August 1947 which extends to, and is binding on India', prior to Independence. Apart from treaties with foreign States, there were agreements between the British Government and the princely States in India. With regard to the princely States, British paramountcy lapsed and they became free to remain independent enclaves or to join one or the other sovereign States, viz. India or Pakistan. With this merger, the extradition arrangements and treaties between the erstwhile princely States and the British Government lapsed. In the altered circumstances, the princely States having merged in independent India, lost their separate identity and therefore, their sovereignty, and consequently, the treaties became incapable of execution.[1] The mention of pre-Independence treaties inSection 2(d) of the Extradition Act of 1962 consequently excludes the treaties between the British Government and princely Indian States. In Oppenheim's view such treaties are political and therefore, do not pass on to the new State.[2] But the Government of India by the 1962 Act has considered unilaterally pre-Independence or pre-1947 treaties as binding on itself, and therefore, section 2(d) has set at rest the controversy whether or not extradition treaties are inherited by a new State. Treaties with Nepal, Bhutan and Sikkim were made after Independence, whereas treaties with other countries by which India considers itself bound were made and entered into between the British Government and the Foreign States.

There seems to be no reason why a successor State should not feel bound by the treaties of the extinct State and

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1. Dr. Ram Babu Saksena v. The State, A.I.R. 1950 S.C. 155; see below, p. 99.

2. Oppenheim: International Law, Vol.I, p.159.

this seems to be the reason why India by enacting section 2(d) has said that it is bound by the pre-Independence treaties.[1] Though India feels bound by the pre-Independence treaties with foreign States,nothing could be said about their attitude when the question arises between those States and India whether those States feel bound by the treaties which they entered with the British Government. When the circular letters were issued by the Government of India to the various foreign Governments with which extradition agreements and treaties were entered by the British Government and the Indian Government asked them if they feel bound by its treaties; many countries gave no reply, others said they are bound by it and others said they have entered into fresh treaties with the British Government and the old treaties stood cancelled.[2]

A further question again arises as to which branch of the Government namely, executive or the judiciary has the privilege, authority and jurisdiction to say whether a treaty exists between India and another country regarding extradition of aliens and nationals. The United States District Court has decided that it is not exclusively the privilege of the executive department to determine whether such a treaty between the two countries exists; and that it can as well be a judicial question to be decided by the court.[3] Although the superior court, namely the United States Circuit Court, set aside the

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1. See L.C. Green: 'Recent Practice in the Law of Extradition' (1936) 6 Current Legal Problems 274 at p.295.

2. For the list of replies, see R.C. Hingorani, 'The Law of Extradition', p.119.

3. Artu v. Boyle, 107 F. Supp. 11 at p.33.

above decision it assessed the existence of a treaty on the basis of historical facts.[1] The view of the District Court of United States in Artu's case seems to be correct. The Indian Supreme Court in Ram Babu Saksena's case had to consider whether a treaty entered into between the British Government (Government of India) and Tonk State before Independence existed or not, and the Supreme Court said that with regard to princely India, British paramountcy lapsed, and it became free to remain independent enclaves or join one or the other sovereign States; resultantly all the States merged with Pakistan or India and with this merger, the extradition treaties or arrangements between the erstwhile princely States and British Government also lapsed.[2]

A certification by the Ministry of External Affairs in India that a treaty exists between India and another country should be enough to show that such a treaty exists between the two countries and such a certificate should be conclusive proof of the fact of existence of treaty between India and a foreign State or a Commonwealth country; otherwise a contrary judgment of the court to the certification about the existence or non-existence of a treaty may embarrass the Government. It is within the domain and province of the executive wing of the Government of India to enter into treaty with foreign Governments or Commonwealth countries to extradite the criminals, and consequently, if the executive wing certifies that a particular treaty exists on a date and the treaty is binding upon the Government of

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1. Ivancevic v. Artucovic, 211 F. 2d. p.565.

2. Ram Babu Saksena, supra, A.I.R. 1950, S.C. 155.

India, the courts of law should take such a statement. Be that as it may, in some cases the Government should be left free to decide whether a treaty in fact and as such exists or not; of course, the question of validity or interpretation of the treaty can be a subject of decision by a competent municipal court.

(d) Characterisation of States and Extraditable Offences

Parliament enacted the Indian Extradition Act, 1962, which came into force on 5 January, 1963, by publication in the Government of India Gazette, published by virtue of Section 1(3) of that Act. This Act was enacted to consolidate and amend the law relating to the extradition of fugitive criminals. It makes provisions by Chapter II for extradition of fugitive criminals to foreign States and to Commonwealth countries with no extradition arrangement, to which Chapter III does not apply. Chapter III deals with the return of fugitive criminals to Commonwealth countries with extradition arrangements. By Section 12 it is provided:

> "(1) This chapter shall apply only to any such Commonwealth country to which by an extradition arrangement entered into with that country, it may seem expedient to the Central Government to apply the same.
>
> "(2) Every such application shall be by notified order, and the Central Government may, by the same or the subsequent notified order, direct that this chapter and chapters I, IV and V shall, in relation to any such Commonwealth country apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement."

Section 13 provides that the fugitive criminals from Commonwealth countries may be apprehended and returned. Chapter IV deals with surrender or return of the accused or convicted

persons from foreign States or Commonwealth countries.[1] Extraditable offences are provided in the Second Schedule of the Act or may be provided in the treaty.

(e) Extradition with or without Formalities

Under the Indian Extradition Act, 1962, which applies equally to Indian citizens and aliens, the States have been divided into two categories: one is foreign States and another the Commonwealth countries. Foreign States have been further subdivided into 'treaty States' and 'non-treaty States'; Commonwealth countries similarly have been divided into two categories, viz. one having an extradition arrangement with India and the others having no such arrangements. From the point of view of extradition procedure States are divided into two categories. In one case, extradition is granted on proof of prima facie evidence against the fugitive offender. This category includes States which have entered into an extradition treaty with India or which is benefited by notification under Section 3(1)(a) without having any extradition treaty, or even a Commonwealth country which has no extradition agreement with India but which is benefited by notification under Section 3(1)(b) of the Act.

The second category includes Commonwealth countries which have extradition arrangements with India and regarding whom notification under Section 12(2) of the Act has been made. Extradition will be granted to these Commonwealth countries without proof of prima facie evidence against the accused. The delivery of the fugitives to these countries will be regulated under Chapter III of the Act and a simple endorsement of a warrant

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1. State of West Bengal v. Jugal Kishore More, supra, A.I.R. 1969, S.C. 1171.

signed by any authorised officer of the Commonwealth country will be enough.

The Extradition Act envisages two types of extradition offences as mentioned in Section 2(c)(i) and (ii). Section 2(c)(i) provides that with regard to a treaty State, extradition offences may be given in the treaty. As regards other States benefited under the Act, the extradition offences are enumerated in the Second Schedule as per Section 2(c)(ii). The latter category includes all Commonwealth countries irrespective of whether or not there is an extradition arrangement with India. The extradition agreement, therefore, has to be confined to only such offences as are given in the Second Schedule, unless the list is revised, for which power has been given under Section 3(3)(c) of the Act.

The Indian Extradition Act, 1962, provides two types of procedure for determining the surrender of the fugitive criminal, whether alien or citizen. In one case, the surrender is to be ordered only if the prima facie case is established and made out against the fugitive criminal or convicted fugitive by evidence produced before the magistrate. This kind of procedure provided in Chapter II will apply to a request for surrender of the fugitive offender or convicted criminal from any foreign State, including any Commonwealth country which has no extradition arrangement with India, Another and second type of procedure is provided in Chapter III of the 1962 Act for the surrender of a fugitive criminal or convicted fugitive without a prima facie case having been established against him if the request is made for surrender by a Commonwealth country which has an extradition treaty or arrangement with India. Authentication of a warrant from such a Commonwealth country is enough to order his surrender.

But there are exceptions to this procedure. By virtue of Section 32, are made applicable to trials under chapter III of the Act of 1962 Sections 29 and 31 of the Act, and the latter sections put limitations on the surrender and benefits the fugitive on the grounds given in those sections. In other words, if in such a case the authentication of the warrant is enough for the surrender of the fugitive criminal and no prima facie case need be established against him, the surrender may be refused on the ground mentioned in Sections 29 and 31 of the 1962 Act in both cases. The magistrate and the Central Government have both been given concurrent powers with regard to restrictions imposed upon the surrender of fugitives, under Section 31 of the Act, which provides that a fugitive shall not be surrendered if:

a) the offence is of a political character or his surrender has been demanded with a view to try and punish him for an offence of a political character;

b) it is barred by lapse of time according to the law of the requesting State;

c) there is no rule of speciality either in the national law or in the treaty of the requesting State;

d) he is under trial or is undergoing any sentence in respect of any other offence.

Even if the magistrate has already considered the restrictions on surrender, as provided under Section 31, there is no bar to the Central Government reopening the above issues and reconsidering them, and make an adjudication thereupon afresh and deciding for itself whether the fugitive should benefit by any of these restrictions on surrender. Therefore, he is invited (Section 17(3)) to submit a written statement in regard to that which he may like

to be considered by the Central Government before it decides whether or not to extradite him. But the magistrate or the Government is not obliged to call for the written statement of the fugitive criminal.[1] The magistrate's report is not binding on the Central Government, although his report is likely to weigh considerably with it. Therefore, even if the magistrate holds that the offence is not a political one, or the prosecution for the offence is not time-barred or that the rule of speciality has been complied with, the Central Government may and can still decide otherwise and refuse extradition.[2]

The British Courts have also held that even if the court orders extradition, the Home Secretary can refuse to implement the order.[3] It follows, therefore, that even after the magistrate has committed the fugitive and submitted his report to that effect to the Central Government under Section 7(4) and Section 17(1), a new stage of executive enquiry is started wherein the Central Government has to consider the report of the magistrate in the light of the restriction placed by Section 29 and 31 of the Extradition Act, 1962. The Central Government may agree or disagree with the magistrate and even refuse extradition in its discretion and for that the Central Government have to give no specific reasons, although the giving of the substance of the finding to the requesting State will be conducive to maintain good relations with that State and avoid misunderstandings or future

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1. Harihar Chaturbhai v. Union of India, A.I.R. 1963 Gujrat 330 at p.336.

2. Hans Muller's case, supra, A.I.R. 1957 S.C. 367 at p.374.

3. Zacharia v. Cyprus (1962) 2 All E.R. 438, but for the contrary view, see Ex Parte Enahoro (1963) 2 W.R. 1260.

complications. Giving of the substance is desirable, particularly when the finding of the Central Government seems counter to the finding of the magistrate. Under Section 31, powers have been given both to the magistrate and the Central Government to consider the restrictions, but under Section 29, the power to stay proceedings or cancel the endorsement on a warrant and withhold the surrender of the fugitive criminal have been given to the Central Government only if it appears to the latter that:-

1) The offence is of a trivial nature, or
2) The application for the surrender of the fugitive criminal is not made in good faith, or
3) the application has been made for political reasons, or
4) the application for surrender is not in the interest of justice, or
5) it is unjust or inexpedient to surrender the fugitive.

It would appear thus, that the power under this section can be exercised by the Central Government even before the magistrate is nominated, or during the pendency of the judicial inquiry and committing the criminal to custody and submission of the report by the magistrate to the Central Government. The powers whether under Section 29 or 31 of the Central Government are supreme and in its discretion, the Central Government may accept or refuse extradition of a foreigner or Indian national. This is a good example of the peculiar character of extradition law, for such executive interference with judicial functions would normally be regarded as highly anomalous.

The very natural question arising from the fact that in one case proof of <u>prima facie</u> case was a prerequisite before extradition order was passed, and in another case extradition

could be ordered without proof of a prima facie case, and that this might be a discriminatory treatment under Article 14 of the Constitution, which guarantees equality before law and equal protection of law, irrespective of the fact whether he was an Indian citizen or alien or foreigner, came before the Madras High Court for consideration in the Menons' case arising under the old Indian Extradition Act of 1903.

The Madras High Court held that Section 14 of that Act was ultra vires Article 13 (1) of the Constitution and that there would be a denial of equal protection of law if the fugitives were extradited without the requirement of prima facie evidence against them, as any surrender without proof of prima facie evidence was opposed to the principles of natural justice.[1] When the matter went before the Supreme Court in appeal, the Supreme Court did not consider the question whether Section 14 of the 1903 Act was ultra vires Article 13(1) of the Constitution or whether the equal protection clause contained in Article 14 of the Constitution was infringed or not. The Supreme Court[2] upheld the judgment of the Madras High Court, on other grounds, and it was decided firstly that after the achievement of Independence and coming into force of the new Constitution, India could not be described as a 'British Possession'; secondly, that the Indian Extradition Act, 1903, has been adapted, but the Fugitive Offenders Act, 1881, which was an act of the British Parliament, had been severely left alone, and on this ground the Supreme Court held that no surrender could be effected without proof of a prima

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1. In Re. C.G. Menon and Another, A.I.R. 1953 Mad. 279.

2. State of Madras v. C.G. Menon, A.I.R. 1954 S.C. 517.

facie case. Later on, this case was held to be no good law in More's case,[1] as we have already seen (pp. 34, 39-43). The Madras case, therefore, was never affirmed by the Supreme Court on the ground of 'equal protection'. But it is submitted that the Supreme Court [2] had held that grouping of countries for treating them differently is permissible and in number of cases the Supreme Court held that classification under Article 14 was permissible.[3] In view of the permissibility of classification of countries under the other Acts according to the Supreme Court, it cannot be said that extradition without proof of prima facie evidence on grounds of reciprocity is an infringement of Article 14 of the Constitution, particularly where the Commonwealth countries which have extradition treaty arrangements with India have the same system of administration of justice and judicial impartiality.[4] In the absence of a ruling by the Supreme Court, the matter is open to argument from the points of view of abstract justice as well as expediency. The surrender or extradition of the fugitive alien is not his condemnation; the trial is yet to begin in the case of accused fugitive and in any case, if the requests for surrender or requisition is mala fide he can challenge the requisition on the grounds mentioned in Sections 29 and 31 of the 1962 Act. That gives ample scope and power to the

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1182.

2. In C.G. Menons' case, A.I.R. 1954 S.C. 517, and in Hans Muller's case, A.I.R. 1955 S.C. 367.

3. Budhan Chowdhry v. TheState of Bihar, A.I.R. 1955 S.C. 191; Chiranjit Lal v. Union of India, A.I.R. 1951 S.C. 41; Ram Krishna Dalmia v. Justice Tendolkar, A.I.R. 1958 S.C. 538.

4. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 supra.

inquiring magistrate, and to the Central Government, to withhold or refuse his extradition or surrender. Particularly when the requesting State is the country of origin or of which the alien is a national, he should be surrendered on the pure and simple warrant, without any necessity or proof of prima facie evidence against him. Of course, in cases of an alien being demanded by a Government of which he is not a national, whether it is a foreign Government or a Commonwealth country, even with extradition arrangements with India, insistence should be made on proof of prima facie evidence.

(f) The Rule of Speciality

Rule of speciality is embodied in Section 31(c) of the Indian Extradition Act of 1962. It applies to the cases of extradition both of aliens and citizens from India. Conversely, the Government of India by Section 21 of this Act, has also bound itself by this Rule of Speciality, in case of fugitives who have been extradited to India from foreign countries and for surrender of whom India has made a request. Prior to the rule of speciality being embodied in Section 31(c) (or conversely, Section 21) of the 1962 Extradition Act, the Rule of speciality was not found in the Act of 1903, nor was it approved, nor looked upon with favour by the Indian Courts. Mubarak Ali who had been extradited from England under the Fugitive Offenders Act took this plea of the Rule of speciality before the Supreme Court of India,but this plea did not find favour and was rejected. Justice Jagannadha Das speaking for the court said the principle or rule of speciality could not be considered as a general rule or rule of general applicability in every case.[1] The

1. Mubarak Ali Ahmed v. State of Bombay,A.I.R. 1957 S.C. 857 at p.866.

Rajasthan High Court also, considering the applicability of Section 7 and First Schedule to the Indian Extradition Act, 1903 has held that a person arrested under a warrant issued under Section 7 of that Act and extradited to a native Indian State (meaning the then Indian Princely State) could be tried in that State for some other offence in addition to those mentioned in the warrant, even though such offence is not an extraditable offence.[1] But these decisions were given because of the absence of the rule of speciality in the Indian Extradition Act of 1903.

In order to avert the difficulty of non-availability of the rule of speciality to a fugitive offender in the absence of clause in the Extradition Act of 1903, this new clause was inserted as Section 31(c) and 21 in the Act of 1962. Section 31(c) applies to cases of extradition of fugitive criminals, both Indian citizens and aliens, in which their surrender is requested by a foreign Government or a Commonwealth country with or without extradition treaty or arrangements with India.

The rule of speciality according to Oppenheim, is a universally recognised rule of international law that a fugitive criminal whose extradition has been obtained in connection with some given offence cannot later be tried for another offence before surrendering him to the country which extradited him.[2] This rule is an attempted safeguard against fraudulent extradition, and is an extension of the above rule enunciated by Oppenheim that no person should be extradited on the pretence

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1. Nanka v. Government of Rajasthan, A.I.R. 1951 Raj. 153 at p.154.

2. Oppenheim, 'International Law', Vol.I, p.702, f.n.3.

and pretext of extraditable crime, while the ulterior motive was either to try and punish him for an offence of political character, or an unextraditable crime. In the Extradition case, the German Reichsgerecht acquitted the petitioner on the ground that in the absence of a treaty, the accused's trial after extradition was governed by customary rules of international law which stipulates that the accused could only be tried for the offence for which extradition has been granted.[1] The rule of speciality guarantees protection to the fugitive against a fraudulent securing of his custody with a view to try him for an offence other than the one for which he was ostensibly extradited. Section 31(c) of the Indian Extradition Act, 1962, purports to make it obligatory that the inhibition of the trial for an offence other than that for which he has been extradited should either be incorporated in a treaty or arrangement with the foreign State or Commonwealth country or it should find place in the legislation of the foreign State or Commonwealth country when extradition is sought without a treaty or arrangement. Lawrence [2] has tersely placed the rationale behind the rule of speciality as follows:

> "The object of this proviso is to guard against the surrender of a person for one offence when the real reason for demanding him is to try him for another, possibly a political crime, possibly an offence not mentioned in the treaty. The condition is perhaps not unreasonable in view of the great divergencies of political conditions and theory between some of the most powerful states of the civilised world, though it may easily operate in favour of a criminal whom it was eminently desirable to punish."

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1. Germany and Czechoslovakia, 1919-1922, A.D. case No.182.

2. Lawrence: The Principles of International Law, 1937, p.238.

A further question arises if an alien or subject of a third State [1] is extradited to his own State or a third State, why Section 31(C) should insist on the rule of speciality. His own State, once he is there, has jurisdiction to try him for any offence and it is no business of the surrendering State to ask the foreign State to send him back and then again submit prima facie proof or get another warrant and then extradite him or refuse extradition. In the case of aliens, they cannot stay unless a visa is granted by India. So the rule of speciality would create complications if India insists on this rule for aliens.

Two questions arise, further, whether a fugitive criminal may raise the point of speciality and whether the rule of speciality may be waived by him. Regarding the first question, Paul O'Higgins is of the view that he can.[2] The better view seems to be that the accused may raise the plea of speciality if it is either in the treaty or in the national legislation, but if there is no such provision either in the treaty or national legislation, the plea should not be entertained. This is how the Supreme Court, in Mubarak Ali's case repelled the plea of speciality.

Regarding the second question,[3] it was held outside India that the accused may waive the rule of speciality and thus be tried on the charge on which he was not extradited. But in

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1. McNair: Law of Treaties, p.336.

2. Paul O'Higgins:"Unlawful Seizure or Irregular Extradition", 1961 B.Y.I.L. 279 at p.318.

3. In Re Arietto et al. ,1933-34,A.D. Case No.140.

a contrary view,[1] it has been held that the consent of the accused does not waive the rule of speciality. It is obvious that the problem has a different aspect when viewed in the country requested to surrender the person who takes this plea, and when the plea is raised by the extradited accused before the court in the country to which he has been extradited. It requires great self-command for the legal system of the receiving country to deny itself the right to try the accused on a charge of its own choice merely because the extradition was requested on a different, but perhaps equally sustainable charge. A gradual increase in sophistication in extradition law can be observed. It was stated in rather old case-law outside India [2] that a fugitive who had been returned by a Commonwealth or Colonial territory might well be tried for an offence other than that upon which he has been returned. But now by virtue of Section 21 of the 1962 Act, India has taken upon itself the strict observance of the rule of speciality and the prisoner extradited from another country can successfully move the court or the Central Government that he should not be tried for any offence other than that for which he has been extradited.

(g) Territory to which the Act Applies

(i) General

Notification of the application of the Act to a given country may mention therein whether it is to be applied to the whole of its territory or part thereof: Section 3(1) of the

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1. Vallini v. Grandi, 1935-37,A.D. case No.176.

2. In R. v. Phillips, 1858 1 F. & F. 105 and R. v. Cohen,(1907) 71 J. p.190, and R v. Esser 9 Natal Law Reports, Vol.7-9, (1886-1888) 238.

Indian Extradition Act of 1962 contemplates the situation when the Act may be applied to a part of a foreign State, although in practice no such occasion may arise except in cases where part of the territory is held by rebels or where it is not under the control of the treaty state for whatever reason.[1] Of course, it is possible that the Act may be applied on the basis of a treaty or otherwise to only the metropolitan territories of a foreign State, thus excluding colonies or so-called overseas provinces of foreign States.[2]

Section 2(e) of the 1962 Act defines a foreign State as:

> "any state outside India other than a Commonwealth country, and includes every constituent part, colony or dependency of such State."

The definition of a foreign State is exhaustive and it is clear, therefore, that unless non-metropolitan territories are specifically excluded, notification under Section 3(1) with regard to any foreign State would include the latter's constituent parts, colonies and dependencies.

(ii) Constituent part

The further question arises what is meant by 'constituent part'. Is it de jure part or de facto as well. In the case of Schtraks, where the fugitive claimed that Jerusalem was not a de jure territory of Israel, which was claiming the extradition of the petitioner for his having committed a crime in Jerusalem, the House of Lords held that since territorial juris-

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1. Hingorani, R.C. The Indian Extradition Law, at p.27.

2. Hingorani, ibid., at p.27.

diction was exercised by Israel in the City of Jerusalem, the place would be considered as de facto territory of Israel for purposes of extradition.[1] Consequently, any territory which is under the de facto jurisdiction of the State would be considered as a part of it, even though its de jure position may be doubtful. This matter pointedly arose before the Indian Court[2] where the petitioner put forth the pleas that Goa was under the de jure suzerainty of Portugal and he being a Portuguese national could not be expelled or deported out of Goa. The Court held that the petitioner was a foreigner and Goa was both de facto and de jure Indian territory and the petitioner being a foreigner was not permitted to flout the orders to leave the country. It is hard to see how an Indian court could take another view.

(iii) Dependency

The word 'dependency' seems to be quite vague. If it is to be taken in a liberal sense, 'dependency' would mean that any territory which is dependent upon a given State for its national or international relations would be treated as its 'dependency'. On this basis, the trust territories as well as protectorates and vassal States would be included in one's dependencies. In practice, mandated or trust territories are treated as territories of the State for purposes of extradition.[3]

Protectorates and vassal States cannot technically be considered as dependencies but the foreign relations of these States are regulated by the protecting State or Suzerain State

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1. Schtraks v. Government of Israel & others (1962) 3 W.L.R. 1013 at p.1022.

2. Registrar Judicial Commissioner's Court v. Francisco, A.I.R. 1970 Goa 56.

3. See N. Bentwich, The Mandates System (1930) at p.105.

and, therefore, any extradition treaty concluded by a sovereign State would also be normally applicable to its protectorate or vassal State.[1] The foreign relations of Sikkim and Bhutan are governed by India and therefore, the surrender of fugitives from Sikkim and Bhutan can be had only through the Government of India, which governs the foreign relations of these two countries though they are not the dependencies of India. India itself has extradition treaties with Sikkim and Bhutan.[2] The Indo-Sikkim treaty does not say anything about how a fugitive from a foreign country can be extradited to Sikkim. But as would be evident from para. 3 of the notification, the Extradition Act of 1962 has been mentioned to define a 'fugitive offender' so the procedure mentioned in that Act will govern the proceedings. The agreements are reciprocal.

(h) Extraditable Offences

(i) Characterisation of Extraditable Offences in the Extradition Act of 1962 and Treaties

The inadequacy of the range of offences covered by treaties is a most serious drawback in extradition law. The reasons may be that treaties do not keep pace with the increasing range of offences or novel offences; and we note the habit of specifying extraditable offences by name in treaties, with greater chances

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1. Article 21 of the Anglo-Polish Extradition Treaty of 11 January 1932, bring the British Protectorates under the perview of the treaty. Article 20 of the Anglo-Iraq Treaty of 2 May, 1932, also brings British protectorates under the perview of the treaty. Article 16 of the Anglo-American Treaty of 1931 extends the treaty to Protectorates as well as Mandated territories. Cited by R.C. Hingorani: The Indian Extradition Law, p.27, f.n.5.

2. The notification for the treaty with Sikkim treaty was made on 7 July, 1966. Hingorani, ibid. Appendix IV.

an omission of offences of a more serious criminal nature, and the restricted interpretation of the enumerated offences in treaties by municipal courts, especially in interpreting the offence under the 'same name' in both the requesting and requested State.

Extradition offences are either specified by name, termed as the 'enumerative method', or defined by reference to their punishability according to the laws of the requesting and requested State by a minimum standard of severity, called the 'eliminative' or 'no list' method.

The Indian Extradition Act, 1962, has adopted the 'enumerative method' and the omissions in the list of the offences can be filled in by amending the terms of the treaty and its due notification under Section 3(1)(c) of the Act, or by amendment of the Second Schedule and notification under Section 12. The defects of this method of 'assurance of reciprocity' and 'ad hoc arrangements' by filling omissions of offences by supplementary treaties can be removed. Though they take some time, they are not time-consuming in themselves. The Anglo-American treaties did not take place on an ad hoc basis,[1] and the same is the case with India; the British treaties have employed the 'enumerative method' of specifying extraditable offences, and in the Indian Act as a succeeding law, the same method has been adopted.

The advantages of the 'eliminative method' are that a 'standard of severity' would ensure that serious and not trifling crimes were made extraditable, and also the inconvenience of different descriptions of offences in the requesting and requested State and of chance omissions would be avoided.[2]

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1. Shearer, op.cit., p.28,,Extradition in International Law.
2. Shearer, ibid., pp.133-134.

Though it appears that in the Extradition Act of 1962, the enumerative method has been adopted, as also in the treaties, the Act itself says that extradition for offences of a trivial nature will be refused. The Act exhaustively provides the list of offences in the Second Schedule and in treaties offences are enumerated and both the chances of defects in the two methods have been brought to a minimum. Provision for a supplementary treaty in the Act is an added factor which cures the defect, if any, of the 'enumerative method'.

The Indian law seems to have not adopted the 'eliminative method' for the obvious reasons that the standards of severity of minimum or maximum punishment are not the true guide under these systems. Now the idea is that the punishment is for the offender and not the offence, due to advanced correctional methods in criminology and penology; and specific instances are the Acts like Probation of Offenders Act where, though the court finds the accused guilty and awards sentence of punishment, by giving the offender the benefit of Section 4 or 6 of that Act, as the case may be, lets him off on probation for good behaviour. The 'eliminative method' would hardly fit in, in the legal system in India and this is why the 'enumerative method' is adopted as the more appropriate. This argument will find further support from the fact that in India, murder is made punishable by the death sentence, but due to mitigating circumstances punishment by a sentence of life imprisonment can be awarded, whereas in cases of culpable homicide not amounting to murder and/or in other offences of a less severe nature, less punishment in the discretion of the court may be awarded. Countries appear to be (transitionally) out of step in these matters.

(i) Principle of double criminality

The requirement of the doctrine or rule of 'double criminality' is that an act shall not be extraditable unless it constitutes a crime according to the laws of both the requesting and the requested States. The basis of this rule is in part the principle of reciprocity and in part the maximum 'nulla poena sine lege'.

This rule ensures that a person's liberty is not restricted as consequence of offences not recognised as criminal by the requested State. In India, the provisions of Article 21 of the Constitution would be attracted and this seems to be the reason why this rule, unlike the rule of speciality, was not found necessary to be incorporated in the Extradition Act of 1962.

Under the 'reciprocity' principle, this rule ensures that a State is not required to extradite categories of offenders for which it, in turn, would never have occasion to make a demand for extradition. This rule seems to be universally established as a customary rule of international law. The use of this rule itself would be superfluous because the rule appears 'expressis verbis' in the Second Schedule of the Indian Extradition Act, 1962, and the treaties entered into by India with different countries. Further, the superfluity of appealing to this rule is not only because it has a sure basis in customary international law, but also because it is implicit in the precise specification of the offences in the Second Schedule of the 1962 and the treaties. A further direct importation of the rule is to be seen in Chapter II of 1962 Act and the treaties where the requirement of the establishment of prima facie case of guilt is

a prerequisite condition according to the laws of the requested State. Also some of the treaties [1] mention that the offence for which extradition may be demanded must be extraditable by the laws of both the countries, i.e. the High Contracting parties. The notion of 'double extraditability' necessarily subsumes the principle of 'double criminality'.[2]

This doctrine is capable of producing great inconvenience and subjects the extradition process to unnecessary perils of litigation in cases where the courts of the requested country (for example, Indian courts and the Central Government too) are required judicially to determine foreign law, i.e. the law of the requesting State,[3] to determine whether the offence constitutes an offence according to the lex loci delicti. The House of Lords [4] undertook a detailed examination of the law of Israel in response to a submission on behalf of the fugitive that the facts alleged do not constitute an offence against the laws of the requesting State, but in doing so, the Court expressly assumed that the Israeli rules of statutory interpretation were the same as English law; it may be so in the case of India with Britain and other countries, the systems of jurisprudence of which are the same, but in cases where the systems of jurisprudence are different, the task for the courts of the requested State and its Government would be arduous to examine the foreign laws, in different languages based on different jurisprudential

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1. Like the Indo-American treaty of 1966, clause 3.
2. Shearer, Extradition in International Law, p.138.
3. Lex fori or lex loci delicti.
4. Schtraks v. Government of Israel (1962) 3 All E.R. 529 (H.L.)

systems, with different rules of interpretation, and the courts of lex loci or lex fori without the evidence of experts on foreign law are sometimes ill-equipped, and expenses must be incurred and the results may sometimes be based on speculation. The extradition proceedings, particularly for examination of the lex loci delicti, will be subjected to additional hazards of proof of criminality according to a law unfamiliar to the Court before which the fugitive is brought. The non-mention or express insertion of the rule of 'double criminality' in the Extradition Act of 1962 may be a pointer to a probability that Parliament assumed that a foreign State would make a request for extradition only when the offence stated was punishable by the law of that country. It may be conjectured that it did not give a mandate to the courts or the Executive (Central Government) to embark upon the inquiry whether the offence was punishable according to lex loci delicti. It contended itself by providing in the Act that the courts in the requested State (India) should determine whether the Act for which extradition is claimed or requested would, if committed in India, constitute an offence within the Second Schedule.

Similar difficulties would be faced by the courts of India in examining the prescriptive period of limitation of the requesting State. Here also, some nice points of foreign law of limitation may arise, which the courts of India may be ill-equipped to determine. But in this regard, Section 31(b) of the Indian Extradition Act, 1962, gives a mandate both to the judiciary and the executive to refuse the surrender of the fugitive if prosecution for the offence in respect of which his surrender is sought is 'according to the law of that State or country barred by time.' Obviously, therefore, the courts and the

executive have to inquire into the law of prescription of the requesting State, whatever difficulties there may be. This clause also presupposes that firstly there should be an offence according to the law of the requesting State for which the request has been made, and a subsequent step is to see if prosecution under such law for such offence in the requesting territory has become barred by the operative law of limitation. The rule of 'double criminality' or 'double extraditability' seems to be implicit in clause (b) of Section 31 of the 1962 Act. The presence of expert witnesses to testify to the foreign laws of limitation is thus presupposed by the Act. Happily the fact may be found more readily than the fact whether an act is or is not a particular crime in that jurisdiction.

The rule of speciality, as incorporated in Sections 21 and 31(c) of the Indian Extradition Act, and the words 'other offences proved by the facts' used tend to resolve one problem which often arises before the municipal courts both under the 'no list' treaties and treaties in which the 'enumerative method' is used; whether the act, to be extraditable, must be punishable in the requested State under the 'same name' as it is punishable by the laws of the requesting State (lex loci delicti) or whether it is sufficient that the facts adduced in support of the claim for extradition, while not constituting the 'named crime' by the laws of the requested State, constitute crime by the law of that State.

Many acts constitute offences by the laws of both the States but are designated differently. What constitutes 'false pretences' in one country may constitute 'abuse of confidence' in another; the same act may be larceny or embezzlement in yet other countries. The British Court in the case of

Dix [1] held that it was not essential that the offence be called by the 'same name' in both countries, and that the facts alleged would constitute one of the special offences created under Section 18 of the Act of 1924. Reliance was placed in the case of Dix on Re Arton [2] where Lord Russell of Killowen, C.J. had observed:

> "Is extradition to be refused in respect of acts covered by the treaty, and gravely criminal according to the law of both countries, because in the particular case the falsification of accounts is not forgery according to English law, but falls under that head according to French law, and I think not."

The Federal Court of Germany [3] held that:

> "the set of facts underlying the offence charged was decisive, and that Germany was under a duty to extradite notwithstanding that the legal qualifications of the offence according to German law differed from its legal qualification according to Swiss law."

The Court observed:

> "When dealing with a request by a foreign country to extradite, the basis of the request is not the legal qualifications of the offence according to the foreign law concerned, but the facts underlying the offence as ascertainable from the warrant or judgment, as the case may be."[4]

The provisions containing the words as 'proved by the facts on which his surrender or return is based' as used in Sections 21 and 31(c) of the Indian Extradition Act, 1962, have

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1. R. v. Dix (1902) 18 T.L.R. 231. See Sections 21 and 31(c) of The Extradition Act, 1962, where the words 'offence proved by the facts' have been used. See Appendix I.

2. (No.2) (1896) 1 Q.B. 509 at p.517.

3. In Re Gerber 24 Int. Law Reports 493 (1957).

4. In ReGerber 24 Int. Law Reports 493 (1957). See also Re Bellencontre (1891) 2 Q.B. 122; U.S. v. Watson (1924) 63 Que. S.C. 19; Re Insull (1934) 2 D.L.R. 696.

been modelled on the lines of the reasoning of the above cases. Thus, the Indian legislature seems not to have adopted the narrow approach which would require an 'identity' of the offence charged and the offences made out by the law of the requested State, as was done in Hatfield, [1] and in Factor's case.[2]

Shearer is also of the view that the requesting State is free to try the fugitive for any offence established by the facts adduced in support of the request, provided only that this offence is also a treaty offence; and that there is no limitation to the nominal crime proved by the facts.[3]

It is possible, however, to construe Section 21 and Section 31(c) of the Indian Act of 1962 as requiring that the extradited person shall not be tried for any offence other than the extradition offence proved by those same facts on which his surrender or return was actually based; and proof of the same crime by other facts would not suffice. This is a more sophisticated and advanced understanding of the law than Shearer proposed, extending (in principle) a greater protection to the requested person.

(j) Objects of Extradition - General

From a practical standpoint, extradition is only requested in cases of particularly serious crime or crimes of some public important. It is generally a slow and expensive procedure and, as between countries separated by vast stretches of ocean

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1. Hatfield v. Guay 87 F. 2nd 358 (1st Cir. 1937).

2. Factor v. Laubenheimer 290 U.S. 276 (1933). See contrary view, to Factor's case in Collins v. Loisel 259 U.S. 309 (1922).

3. I.A. Shearer: Extradition in International Law, p.146.

is not frequently availed of.

International law concedes that the grant of and procedure for extradition are mostly left to municipal law. There are some divergencies on the subject of extradition between the different State laws, particularly relating to (a) extraditability of nationals of the State of asylum; (b) evidence of guilt required by the State of asylum, and (c) the relative powers of the executive and judicial organs in the procedure of surrendering fugitive criminals.

Before an application for extradition is made through the diplomatic channel, two conditions as a rule are required to be satisfied:-

a) there must be an 'extraditable person'; and

b) there must be an 'extradition crime'.

(i) Extraditable persons

There is uniformity of State practice to the effect that the requesting State may obtain the surrender of its own nationals or nationals of a third State. But most States usually refuse the extradition of their own nationals who have taken refuge in their territory, although as between States who observe absolute reciprocity of treatment in this regard, such requests for surrender are sometimes acceded to.

(ii) Non-extradition of nationals

The word 'persons' in an extradition treaty etymologically includes 'citizens' and there is no rule of international law by which citizens are exempted from extradition unless such an exemption is made in the treaty itself.[1] Under the British

1. Charlton v. Kelly, 229 U.S. 447 at p.467 (1913).

and Indian statutes no distinction has been made in regard to the extraditability of British and non-British, and Indian and non-Indian nationals, unlike most of the civil law countries.

The fairly uniform exclusion of nationals of civil law countries from extradition presented by the municipal laws of these States is qualified by three factors. First, as in the European countries, so in Latin American countries the rule of personal jurisdiction allows an offender to be prosecuted in his home state for crimes committed abroad, provided that such crimes are cognizable and punishable by the laws of both the States. A prosecution may be instituted at the instance of the prosecuting authorities of the fugitive's own State acting on material supplied by foreign police authorities. Exercise of such jurisdiction is provided by the laws of most of the Latin American countries.[1] Secondly, in countries having civil law system, international is generally of superior force to municipal law. Thus, contrary to British and Indian common law jurisprudence an extradition treaty imposes an obligation on those countries to extradite a national, and this obligation must be discharged, notwithstanding any contrary provisions contained in the municipal law. But in India unless a treaty has acquired the force of municipal law, no international obligations can be discharged under the treaty, and if the provisions of the treaty are contrary to municipal law, its enforcement will be denied by the Court as contrary to the provisions of Articles 13 and 21 of the Constitution in habeas corpus proceedings.

Thirdly, in the Latin American countries, practice is

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1. I.A. Shearer: Extradition in International Law, p.115.

leaning towards the surrender of nationals.[1] The clauses providing for refusal to extradite one's nationals are, amongst other reasons, based on 'the risk of possible grave dangers abroad'.[2] But Lord Goddard, C.J. observed that "it would be an insult to the Indian court to refuse to return the fugitive on the ground that he would not get a fair trial."[3]

In Dharma Teja's case [4] it was again observed that the courts in India, including the High Court and Supreme Court, would not be influenced by the debates in Parliament and what has been said,about Teja in Parliament and in the Press and held that it could not be said that it would be unjust and oppressive to return him. Like the treaty clauses between India and Nepal, the Supreme Court of Nicaragua considered the clause in a treaty that the 'High Contracting parties are not obliged to surrender their nationals', and preferred the principles of 'best elucidation of truth of the facts' and 'avoiding impunity of crimes', supposing these to be met when the criminal is judged by the authorities of the jurisdiction where the crime was committed, and extradition was allowed.[5] A midway course is adopted by Argentine courts[6] by taking into account 'personal and family circumstances of the individual demanded' in exercising

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1. Shearer, ibidp.116.

2. In Re Arevals (1941-2) A.D. 329 (No.99).

3. In Mobarak Ali Ahmed, supra (1952) 1 All E.R. 1060 at p.1063. See Soblen (1962) 3 W.R. 1145 at p.1154; In Re Arton (1896) 1 Q.B. 108 at p.110.

4. R. v. Governor of Pentonville Prison,Ex parte Teja (1971) 2 All E.R. 11.

5. Re Extradition of Leocadio Rodriguez (1919-22), A.D. 269 (No. 189).

6. In Re Milazzo (1956) Int. Law Reports, 404.

its discretion under the treaties.

According to Bedi, only two principles have been consistently adduced in favour of the exclusion rule (i) that a man ought not to be withdrawn from his natural judges; and (ii) that a state owes to its subjects the protection of laws.[1] However, Shearer is of the opinion that the whole theory of application of the 'natural judges' falls to the ground where the crime has been committed in another State. On the second principle, he is also of the opinion that if it were a true rule then this duty ought equally to apply to aliens lawfully residing within the State, since international law generally obliges States to extend the equal protection of its laws to all persons within its jurisdiction.[2] This opinion is in consonance with the law contained in the Indian Constitution where Articles 13, 14, 20, 21, 22 (not 19) apply equally with other Articles to citizens and foreigners alike.

In some States, a right is guaranteed in the Constitution itself that a citizen may remain undisturbed in his homeland. But such a prohibition of the extradition of nationals, contained only in the penal code or an extradition law, would (in one view) not be a 'constitutional provision' giving ground for refusal.[3] But according to Shearer, this is a weak basis because the limited surrender of sovereignty represented by the institution is itself a form of protection of that sovereignty

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1. Bedi: Extradition in International Law and Practice, p.210 (1966).

2. I.A. Shearer: Extradition in International Law, pp.118-119.

3. Argentine Court: In Re Artaza (1951) Int. Law Reports, 333.

from the incursion of foreign criminals.[1] It will be agreed that the rule of exclusion of nationals from extradition is undesirable among States having a common legal inheritance and mutual confidence in their judicial institutions.[2]

Strict territoriality of criminal justice is a concept of Anglo-American, and more so of Indian jurisprudence. Although the laws of these countries provide for jurisdiction in respect of certain crimes committed by their subjects abroad, this jurisdiction is very limited. In general, the criminal laws of these countries are not regarded as having extra-territorial effect unless they so apply expressly or by necessary intendment. That persons committing crimes abroad should escape from the jurisdiction of the forum loci delicti and return to their homeland is not favoured by the Anglo-American jurisprudence; Indian jurisprudence has its origin there and (in this respect) similarity with it.

Practical objections and difficulties have to be faced to bring the fugitive offender home to justice from foreign countries under civil-law jurisprudence, where the rule of personal jurisdiction over the offender can be invoked. The practical difficulties are: witnesses must be brought long distances at inconvenience and expense, or else they must give their evidence in the unsatisfactory form of written affidavits. Expense and inconvenience may altogether preclude access to expert and eyewitness testimony which would otherwise be available to give a full and complete picture of the crime. Arrangements must

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1. Shearer, ibid. p.119.

2. Bedi, op.cit., p.210.

be made for transportation of documents and exhibits; and in some cases, e.g. of theft of idols from India from ancient monuments, the carrying of idols to foreign countries and the witnesses would be difficult due to paucity of foreign exchange and damage may be done to the heavy idols in the course of transportation. Possibility of a local inspection of the site or place of crime or offence, view of the locus in quo, sometimes an important advantage to a trial court is ruled out. Such and other difficulties constitute a handicap to both prosecution and defence. Looking to all these difficulties, India, like the British and American Governments, does not forbid extradition of its nationals.

There is a significant omission in the Act of 1962 with regard to the extradition of Indian nationals. The Act does not seem to throw any light on the question whether India should extradite its own nationals on a charge of having committed an extraditable offence in a foreign state or whether they should be tried in India itself. The majority of States decline to extradite their own nationals, and many of them have expressly provided in their municipal legislation for the principle of non-extradition of their nationals.[1] Such states punish the offenders according to the laws in force for crimes committed abroad. Refusal to surrender a national of the requested State appears to rest on the unwillingness of that country to expose its nationals to a trial in a foreign court and also (as we have seen) to the rooted suspicion that foreign countries cannot be trusted to administer justice fairly.[2]

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1. Harvard Research Draft (1935); 29 A.J.I.L. Supp. 125, Note 2;

2. See 'Some Problems of the law of extradition' (1959) 109 L.J. 198 by F.M.

No such provisions are contained in the Indian 1962 Extradition Act or the Municipal Statutes of India, Great Britain or other Commonwealth countries or of States under British Mandate or guidance.[1] By implication, therefore, the present Act is in line with the existing practice, that India adheres to the principle of extraditing its own nationals, permitting their extradition.

For clarity's sake, mention may be made of the memorandum on 'Extradition' submitted by the Government of India to the Asian-African Legal Consultative Committee at its third session held in Colombo in 1960, wherein it was said:

> "It is however not easy to justify on principle the policy of refusing to extradite nationals. The theory that a State should try its own nationals for crimes wherever committed fails as a suggestion for two reasons: (a) because in many cases it is impracticable to try a crime committed in another country on account of the impossibility of securing the relevant evidence, and (b) because the argument can not have any application to a national who has escaped to his own country after conviction in a foreign country since on general principles of justice such a person may not be tried again for the same offence (in the country of the refuge).
>
> "It has been suggested that if a national is alleged to have committed an offence abroad and returns home then it is only fair that he would be tried in his home country according to the laws and procedure with which he is familiar. It has been said that if a foreign national commits an offence in another State and then leaves that State for his own home State, that State may well be rid of him and the necessity of punishing that

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1. See (1935) 29 American Journal of International Law, supp.125. ibid.

> offender may not appear so great as that of a national of a State.
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> "It has also been said that in many countries notions of administration of criminal justice differ widely and he may not receive a fair trial. These considerations, however, do not seem to be sufficient justification for refusal to extradite a State's own national since a person who commits an offence in another State must be expected to take consequences like all other persons in that State according to the laws in force there."[1]

But an analysis of the extradition treaties of India indicates that in many cases, it is not bound to surrender its own nationals.[2]

A number of the States, such as France and Germany, do not, as a matter of policy, conclude treaties in which they agree to extradite their own citizens. They punish them at home.[3] Great Britain and the U.S.A. (as we have seen), have not always insisted on following the above principle.

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1. See pp.165-166 of the Report. See India-The Extradition Act, 1962; J.N. Saxena: International & Comparative Law Quarterly, Vol.13 (1964) pp.136-137.

2. See A. Palniswami: The Law of Extradition in India (1954) III I.Y.B.I.A. 328 gives a list of such countries, at pp. 335-336.

3. Oppenheim: International Law, 8th ed., p.638.

CHAPTER III

EXTRADITION PROCEDURE UNDER CHAPTER II OF THE ACT OF 1962

A. REQUISITION OR REQUEST FOR AND MODE OF EXTRADITION

(1) The Request for Extradition

(i) Nature of request

EXTRADITION of - the power to surrender - a person who infringes the law, or who is a violator of law in the requesting State, is exclusively in the sovereign prerogative of the national Government - as distinguished from the various States - (Constitution of India, Article 246 and Union List I of the Seventh Schedule, Entry 18) and Parliament is alone empowered by the Constitution to make extradition laws. The same was the case under the Government of India Act, 1935 (Seventh Schedule, List I, Entry 3).

The Supreme Court of United States has observed:[1]

> "It cannot be doubted that the power to provide for extradition is a national power; it pertains to the National Government and not the States."
>
> "A requisition is an essential element in the proceedings under the Extradition Act, 1870. The Act does not say that the requisition must precede the warrant by a Magistrate, but it must ultimately come, otherwise there is no power to deliver up the prisoner."[2]

This pattern is followed in India regarding requisition under Section 4; only after receipt of the requistion may a warrant

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1. Valentine et al. v. U.S. ex rel Neidecker (1936) 299 U.S. 5.

2. Ministry J. in R. v. Ganz (1882) 9 Q.B.D. 93 following the case of Re Counhave (1873) L.R. 8 Q.B.D. 410.

be issued by the Magistrate under Section 6, after his appointment has been made under Section 5 of the Act. The alternate method is issue of warrant by the magistrate himself under Section 9.

Therefore, requsitions can be made to the Central Government in India and not to the Government of the State where the accused is, the National Government of the requesting State, and not any State forming part of the Union, if any, where the accused committed the crime, is the proper source of the request. For instance, if a crime is committed in California and the accused is in Madras, the request should not be made by the California State to the Madras Government, but by the United States of American Government at Washington to the Central Government in New Delhi. Therefore, all requisitions for extradition must come from the Executive authority of the demanding State through its diplomatic representatives and should be made to the Central Government of India. But a prerequisite before entertaining of demand is that there is a municipal Extradition Act applicable to the requesting State, or an extradition treaty (with a foreign country) or existence of an extradition arrangement or treaty (with a Commonwealth country) which has been notified under Section 3(1)(a)(b) of the Extradition Act of 1962 applying its provisions.

Requisition for surrender is not the function of the courts but of the State. The Courts of the country which make requisition for surrender deal with the prima facie proof of the offence and leave it to the State to make a requisition upon the State in which the offender has taken refuge.

Section 4 of the Indian Extradition Act, 1962, provides that a requisition for surrender of a fugitive criminal of a foreign State or of a Commonwealth country may be made to the

Central Government (a) by a diplomatic representative of a foreign State or a Commonwealth country at Delhi, or (b) by the Government of that foreign State or Commonwealth country communicating with the Central Government through its diplomatic representative in that State or country; and if neither of these modes is convenient, requisition shall be made in 'such other mode as is settled by arrangement made by the Government of the foreign State or Commonwealth country with the Government of India'. The diplomatic representatives will include Consul General or in the absence of a diplomatic agent, a senior Consular Officer or other Agent specifically authorised for the purpose or, as an alternative to the use of the diplomatic channel, a mode settled by arrangement between the two Governments. The mode of request by direct communication between the two Governments is also provided through the diplomatic channels. Section 4 gives facilities to send requisitions either through diplomatic channels of those Governments located in Delhi or in their respective countries, or by a mode settled by arrangement. Actually, in different State practices under different treaties, one or more of the alternative modes or additional modes for request have been adopted and India has adopted them all according to Indian conditions. If the request is not through these channels it will be rejected.

(ii) Form of request

No particular form is needed as no rules have been framed by the Central Government so far under Section 36(2)(a) of the Act prescribing 'Form' in which a requisition for surrender of a fugitive criminal may be made. It should, however, be in writing supported with the required documents and in other respects, it should be in conformity with local municipal laws

or existing treaties, if any. The information upon which the requsition is based must also be in writing and on oath or affirmation in accordance with the general rules.[1] A request or requisition in cases of urgency, when the fugitive is trying to escape by plane, surface, e.g. sea or train, then the request can be sent by telegram or cabled through the Department of External Affairs to the authority in the foreign State, or may even be by telephone by the requesting State to the Central Government. Speaking in some other context, Lord Alverstone C.J.[2] said:

> "I am unable to draw any distinction between sending information by post or telephone and giving the same information by direct personal communication."

Such is the case of request by letter. Field J.[3] observed:-

> "In the case of Evans v. Nicholson [4] the Court regarded a letter as speaking continuously from the moment of its being posted until its receipt by the addressee for the purposes of giving jurisdiction and the reasoning is in this way: a letter is intended to act on the mind of the recipient, its action upon his mind takes place when it is received. It is like the case of firing of a shot , or the throwing of a spear. If a shot is fired, or a spear thrown from a place outside the boundary of a county into another county with intent to injure a person in that county within which a blow is given. So with a letter."

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1. In Re Cr. Proceedings ex parte Seitz (No.1) (1899) Que. Q.B. 345; Re Harsha (No.2) (1906) 42 C.L.J. 356.

2. In Rex v. Oliphant (1905) 2 K.B. 67 at p.72.

3. In Reg. v. Rogers (1877) 3 Q.B.D. 28 at p.34.

4. 32 L.T. (N.S.) 778 cited in Taylor v. Jones, 1 C.P.D. 87.

These two cases received the approval of the Court of Appeal,[1] wherein the defendant, resident in Northern Ireland, posted letters there by him to Pools Promoters in Liverpool falsely claiming that he had correctly forecast the results of certain competitions and was entitled to the winnings, the claims were unsuccessful and he was indicted in England for attempting to obtain property by deception. Repelling his argument that the English courts had no jurisdiction as the attempts were completed in Ireland, with the posting of the letter, the Court of Appeal, dismissing his appeal, held that the deception occurred at the moment of discovery, i.e. when the 3 letters were seen by the Pools Promoters in Liverpool, and as part of the crime was committed in England, the Liverpool Court had jurisdiction. The judgment of the House of Lords [2] is to the same effect and was considered in Baxter's case.[3]

For common law countries, telegrams and other circulations through Interpol or otherwise, can form no more than such 'information and belief' as may persuade a local magistrate to issue his warrant.[4] Further warrants issued on sworn testimony on such telegrams were held valid by Canadian Courts.[5] Arrest on information by the police on a telegram, however, was not held valid.[6] There may be cases where the Ministers or

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1. In Regina v. Baxter (1971) 2 W.L.R. 1138 at pp.1141, 1142 (C.A.).

2. In Regina v. Treacy (1971) 2 W.L.R. 112 (H.L.).

3. In Regina v. Baxter (1971) 2 W.L.R. 1138 at p.1148.

4. Rice v. Ames 180 U.S. 371 (1901); A.G. for Canada v. Fedorenko L.R. (1911) A.C. 735; Re Dickey (No.1) (1904) 8 Can Crim. Cas 318; Re Weber (1912) 19, Can Crim Cas 515.

5. Re Dickey (1904) 8 C.C.C. 318 (N.S.); Re Kollings (1874) 6 R.L.O.S. 213.

6. Re Dickey, supra.

Presidents even verbally may inform their counterparts by 'phone, and it seems there will be no irregularity in it provided the formalities are completed later.

The otherwise agreed method is demonstrated in Article 14 and 15 of the Indo-American Treaty which seemed more convenient to the parties.[1]

Some of the treaties which are considered binding upon India by virtue of Section 2(d) of the Indian Extradition Act, 1962, provide the mode of requisition.[2]

A complaint in writing would be necessary even in cases of those conventions, and treaties and statutes (if any) which do not even specifically provide for a written requisition but merely require its transmission through the diplomatic channels. Further, the requirement that it shall be accompanied by documents is mentioned in Section 10 of the Indian Extradition Act, 1962.

The alternative mode is provided of apprehending the accused by the Magistrate himself under Section 9 of the Act, if it appears to him on information under Section 190, Criminal Procedure Code, by way of complaint by the aggrieved complainant or a third party or local or foreign police, that a person in his local jurisdiction is a fugitive criminal of a foreign State or Commonwealth country. If he thinks fit in his discretion, to be exercised judicially, he may issue a warrant for

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1. Indo-American Extradition Treaty, dated 1 April, 1966, Articles 14, 15. See R.C. Hingorani, The Indian Extradition Law, p.116.

2. Article 8 of the Anglo-German Treaty of 1872; Articles 2 & 3 of the Anglo-Danish Treaty of 1873; Article 9 of the Anglo-Italian Treaty of 1873; see also Hingorani, ibid., p.29; see also, S.D. Bedi, Extradition in International Law and Practice, p.108.

the arrest of that person on such information and on such evidence as would in his opinion justify the issue of a warrant "as if the offence ... had been committed within the local limits of his jurisdiction". He can then make enquiries as provided under that section. So Sections 4 and 9 are to be read together as they lead to the same results.

In some State practices, a phrase like 'on telegraphic or other information'; in the United States of America 'direct communication', 'request made by post or letter or writing or telegraph or other means affording evidence in writing' are used in cases of provisional arrest,and sometimes for cases of emergency Interpol Organisations are used as means of communication. Television and Telstar might also be used as media of transmission or communication for the provisional arrest of the fugitive from justice.[1]

(iii) Mode of Requisition

Section 4 of the Indian Extradition Act, 1962 prescribes the procedure to be adopted by the foreign States, including to a Commonwealth country having no extradition arrangement, for requesting the surrender of the fugitive wanted by such a State. It prescribes two modes of requisition (see above). In case such an eventuality arises, requisition may be made by any other method as may be 'settled by arrangement' between the States.[2]

It is also possible to make requisition through the aggrieved complainant if the procedure is not objected to by

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1. See also Bedi, op.cit., pp.122-123.

2. Section 4(b) of the Indian Extradition Act, 1962. See also R.C. Hingorani: The Indian Extradition Law, p.28; Bedi, op. cit., p.109.

the territorial State. Another mode is contemplated by Section 9 of the Act (see above). Obviously, such a contingency is contemplated either under information from the complainant or somebody else whether affected or not.

The Central Government may yet make rules under Section 36(2)(a) of the Act. However, some treaties which are considered binding upon India already provide the mode of requisition.[1]

Article 12 of the Harvard Draft says:-

> "(i) The requisition shall be made in writing and shall be communicated by a diplomatic or consular officer of the requesting State to the constituted State.
>
> "(ii) The requisition shall contain:-
>
> (a) A description for the purpose of identification of the persons claimed;
>
> (b) A statement that a warrant of arrest, or other document of equivalent import in the prosecution of the person claimed, has been issued;
>
> (c) A statement of the act or acts for which it is intended to prosecute or punish the person claimed, together with a statement of the punishment or correctional measures which may be imposed for such act or acts by the law of the requesting State, or of the sentence for such act or acts which has been imposed by the requesting State and which remains unfulfilled.
>
> "(iii) The requisition shall be supported by:
>
> (a) the original or authenticated copy of the warrant of arrest or other document of equivalent import in the prosecution of the person claimed, or the original or authenticated

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1. Hingorani, op.cit., p.29, note 7. Article 8 of the Anglo-German Treaty of 1872; Articles 2 and 3 of the Anglo-Danish Treaty of 1873; Article 9 of the Anglo-Italian Treaty of 1873; Anglo-Polish Treaty of 1932; Anglo-Iraq Treaty of 1932.

copy of the judgment of conviction against the person claimed, and of any sentence imposed in execution of such judgment.

(b) an authenticated copy of statement of the law of the requesting State under which it is intended to prosecute or to punish the person claimed which shall show that such law was in force when the act was done for which extradition is requested.

"(iv) The requisition may be accompanied or followed by a request for the delivery of property."[1]

The Government of India, by virtue of the rule-making powers under Section 36(2)(a) of the Act might conceivably frame rules on the lines of Article 12 of the Harvard Draft providing the form of requisition. It would be reasonable to provide that the documents, including warrants and judgments and copies of statements of witnesses and provisions of other relevant law, are sent along with their authenticated English translation so that no difficulty may be faced by the Government of India or the Magistrate while taking action in extradition proceedings.

(2) Ingredients of a Request or Requisition

Section 4 of the Indian Extradition Act does not mention anything about the form or ingredients or details of a requisition made. Section 36(2)(a) of the Act (as we have seen) empowers the Central Government to frame rules, and it is necessary it should frame them on the lines adopted in the international practice. The identity of the person and extraditable offence is of an immediate importance, besides the information on which requisition is based; it must be in writing and on

1. Hingorani, op.cit., p.29, n.6.

oath or affirmation in accordance with the general rules of criminal proceedings.[1]

The written information must present all information in possession of the applicant to the requesting State so that it may serve to establish the identity of the person for whose extradition the application is made. It must furnish the name.[2] Italy once refused to surrender Rukavina because Yugoslavia could not establish his identity beyond doubt, due to some misunderstanding with regard to the name of the person demanded. The High Court of Eire [3] rejected the demand of England for extradition of the two appellants as the persons were not named in the warrants, and were only identified by general referenceas to age, height, colour of hair.[4] Details of the fugitive with alias or aliases, if any, and with a photograph when or wherever possible, shall also be given. The details should be 'as accurate as possible' or 'as detailed as possible', together with the nationality and identification marks of the person with his age and other description. The requisition, therefore, in order to avoid the possibility of arguments about the identity of the accused, should be accompanied as far as possible by a personal accurate description, with physical characteristics and particulars of the person claimed, particulars regarding his nationality or citizenship, information concerning his domicile and his

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1. Ex parte Seitz (No.1) (1899) 8 Que. Q.B. 345. Re Harsha (No. 2)(1906) 42 C.L.J. 356, supra. See also Bedi, op.cit., p.109, n.13.

2. In ReRukavina, 1949 A.D. Case No.88 decided on 29 July, 1949.

3. In the State (Rossi) and Blythe v. Bell, decided on 2 July, 1956, 23 Int. Law Reports, 1956, p.417.

4. See also Bedi, op.cit., p.109, n 14.

photograph with autographs and finger-prints, if any.[1]

In addition to the description of the identity of the person involved, the requisition must contain, in cases under investigation or accusation, a statement or description establishing the nature and gravity of the alleged crime or offence constituting the grounds of requisition, together with the place, date and time of its commission, with the names and description of the witness, if any, the circumstantial evidence, if the accusation is solely based upon it, in detail sufficient to prove the guilt of the accused beyond reasonable doubt. If documentary evidence is to be given in connection with the crime, the photostat copies should be sent. The requisition must also describe the participation of the accused in the commission of the crime. The request must be accompanied with the original or authenticated copy of the penal law relating to the said crime or offence which, according to the laws of the demanding State, authorise the prosecution and conviction of the accused person, together with its authenticated translation in the language of the requested State. All evidence in the form of depositions or original documents must be accompanied with a translation.[2]

In addition, the warrant of arrest or other substitute order having that effect in accordance with the law of the requesting State, issued by a competent court in cases under Chapter II should accompany the request, because in cases of trial under Chapter II, the Central Government nominates a magistrate under Section 5 and he issues a warrant under Section 6; or on

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1. Bedi, op.cit., pp.109-110.

2. Bedi, op.cit., pp.110-111 and 117.

information under Section 9 and Section 23 of the Act in cases of the commission of offence on the high seas or an aircraft. The request must also be accompanied with the original or authenticated copy of law of prescription of the crime together with the rule of speciality contained in the municipal law of the requesting State and a copy of the investigation proceedings made and duly certified by the appropriate legal authorities together with statements of witnesses and other reports of investigation and medical reports or other ballistic or chemical reports or other expert reports on the subject of the crime with all documents on which the reliance is to be placed in the extradition proceedings in India.[1]

In cases of requisition of persons already convicted par contumace or in absentia or where the accused is tried in person, the copies of legal evidence accepted by the competent court of the demanding State together with the original or authenticated copy of the final sentence passed against the accused with its translation must be sent.[2]

In cases of the offences resulting in material loss or injury against property - embezzlement, cheating, defrauding banks or private persons, arson, mischief, etc. - the amount of damages of such injury or loss, if inflicted or intended, should be set forth in the requisition of complaint accompanying it. Though Section 4 of the Act does not mention these details, they should necessarily be furnished so that the Central Government at the initial stage before nomination of a Magistrate, may have

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1. See Section 10 of the Extradition Act of 1962.

2. Section 10(2)(c) of the Indian Extradition Act, 1962. See also Bedi, op.cit., p.111.

the occasion to see whether it is a 'fit case' for nomination of a Magistrate, and the Central Government can come to this conclusion only if the above details are there. If the request is not accompanied by all this information and documents, it will not be possible for the Central Government to come to a conclusion whether it is a 'fit case' or not, and to this extent that section will become otiose. In international practice, the treaties between States, statutes and municipal laws of the States have made these provisions in one form or the other and they should as soon as possible be made in India too, as the rights of a citizen or a non-citizen and even his life and personal liberty may be jeopardised or curtailed in extradition proceedings.

The problem raises two intertwined questions, namely, whether the rules when framed will bind the Government of India while making a request to a foreign country or Commonwealth country and whether these rules will bind the requesting State also or whether those States may still make their requests in accordance with their own laws and rules. By the publication of extraditable offences in the Second Schedule, States have notice that persons could be extradited for these offences only. The case with a treaty is similar and they know about those offences in advance and would not make request in respect of other offences if a list of further offences is added by a treaty. Similarly, when rules are framed under Section 36 of the Indian Extradition Act about requisition the States will have notice of the rules and will make requests according to them.

The rules are required to be placed before the Parliament under Section 36(3) of the Act, so that they will then have the force of law. The Central Government on the other

hand, will of course, be bound by them and will make any request of its own for extradition in accordance with them.

But non-compliance with any such rules verbatim by the Government of the requesting State does not necessarily lead to the consequences of dismissal of the request for extradition on this ground. They will be directory and not mandatory in nature, and unless and until penal consequences follow by their non-compliance, they will be directory only; but penal consequences cannot be attached by rules as the latter would enlarge the scope of the provisions of the Act and would, in that case, be ultra vires the Act. The Act does not itself lay down any form or procedure for submission or receipt of extradition request from a foreign country and it does not say that in case of non-compliance of them the request will be dismissed. Obviously, it cannot be.

(3) Action on Requisition

When the requisition is received by the Central Government, Section 5 of the Act empowers the Government to nominate a magistrate to enquire into the prima facie guilt of the fugitive 'if it thinks fit'.[1] The Central Government has powers under Sections 29 and 31 to see whether the requisition or demand for surrender is hit by any of the provisions and clauses of these sections. In other words, the Central Government itself can also reject the requisition outright if it deems fit to do so, e.g. the offence or the person or both are non-extraditable. However, such a situation would rarely arise where either there has been no notification with regard to the requesting State as required bySection 3 or 12 of the Act or the Government thinks that the fugitive in question is not

1. Hingorani, op.cit., p.34.

charged with any extradition offence, as given in the Second Schedule or under a treaty as the case may be. The words 'as it thinks fit' would permit the Central Government to verify, before ordering an inquiry, whether or not there has been notification (see above) and secondly, whether the fugitive is charged with an extraditable offence. These are the two requisite preconditions to be fulfilled before an inquiry can be ordered, and if one of them is lacking, the Government may not, lawfully, and should not, nominate any magistrate to hold an inquiry.[1] In addition, to these two prerequisites, the Central Government may, on the grounds mentioned in Sections 29 and 31, and its general political or executive power of refusal to extradite a person, refuse the request for extradition.

(4) Nomination of a Magistrate

Under the Act, certain provisions in regard to the nomination of the magistrate differ. Under Section 5 in a trial under Chapter II, the nomination of the magistrate by the Central Government is necessary, whereas in trials under Chapter III no such nomination of a particular magistrate is necessary, but the accused can be brought before any magistrate for inquiry. No such nomination is necessary under Section 23 of the Act (offences on a vessel or aircraft). In the first case, the Central Government, if it thinks fit, may, where a requisition has been made under Section 4, issue an order to any magistrate who would have jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case. However, if the Central

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1. Hingorani, op.cit., p.34.

Government, receiving a requisition under Section 4, outright rejects the request for requisition (presumably on the grounds mentioned in Sections 29 and 31 or in its prerogative powers of the executive to refuse extradition if the person and offences are not extraditable), no question arises of the nomination of a magistrate under Section 5 of the Act.

If there are several magistrates having territorial jurisdiction to try the offence, the Central Government may nominate any one of them to make an inquiry. If the magistrate dies or is transferred or is otherwise unable to make inquiry, his successor would not automatically have jurisdiction to continue inquiry, but a formal order has to be made. The matter of nomination is an executive act only, and not a judicial or quasi-judicial function of the Central Government. The accused may object to the inquiry being made by the magistrate on the grounds of personal bias, enmity or interest of the magistrate or his mala fides, etc. before the magistrate himself, before the Central Government or before a superior court.

In proceedings under Chapter III, no such particular nomination is necessary, as in that Chapter 'any magistrate' has been throughout mentioned, viz. in Section 15 an offender on the 'backed warrant' by the Central Government can be brought before any magistrate in India. Under Section 16 of the Act, the issuance of a provisional warrant for the apprehension of the offender has been made dependent on the magistrate's having jurisdiction in the matter 'if the offence had been committed within his jurisdiction'. Section 17 also mentions a magistrate 'before whom [the accused] has been brought' and not any magistrate having been appointed or nominated by the Central Government as under

Section 5. Section 23 confers powers on any magistrate having jurisdiction in the port or aerodrome where the offence has been committed on board ship or on an aircraft, to exercise powers of inquiry conferred by the Extradition Act of 1962. Section 23 confers concurrent jurisdiction on the magistrate or the Central Government in the circumstances mentioned in Section 23, provided Indian territory is the last aerodrome or port of entry after the commission of the extraditable offence. Unlike Section 5, no nomination of the magistrate under Section 23 is necessary. The Port Magistrate by virtue of the provisions of Section 23 assumes powers as any other magistrate may assume power under Section 9(1) of the Act. However, the Port Magistrate while exercising jurisdiction, must inform the Central Government, which may (but need not) formally nominate him under Section 5 for the purposes of holding an inquiry.[1]

In all three cases, the magistrate must be a first-class magistrate as required under Section 2(g). If the inquiry is started while all or any one of the prerequisite formalities are not completed, this will be a case of inherent lack of jurisdiction and the accused may challenge the proceedings before a superior court by way of writ proceedings or criminal revision, as discussed elsewhere.

The magistrate nominated under Section 5 or working under Section 9 or 17 or 23 is more than a mere administrative officer or an official bound to show courtesy towards a friendly Government. Since Parliament has entrusted the responsibility to the magistrates (and, necessarily to the superior courts) it

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1. Hingorani, op.cit., p.36.

follows that the hearings must be held judicially and in conformity with the law, and not as simple administrative proceedings.[1]

(5) Apprehension and Detention of the Fugitive

When the magistrate is nominated under Section 5 by the Central Government by Section 6, it is provided that on receipt of such an order the magistrate shall issue a warrant for the arrest of the fugitive criminal and under this section, there seems to be no discretion vested in him to issue bailable or non-bailable warrant even if the offence is a bailable one. The same provision seems to have been implied in Sections 9 and 23 of the Act. In all these cases, as provided under Section 25, the accused may move the magistrate for bail who will exercise the powers of a sessions court to grant bail under Indian criminal procedure, which means under Sections 497 and 498, Criminal Procedure Code. Under Section 9(1) the power may be exercised by the magistrate under Sections 37, 190 and 204 of the Criminal Procedure Code.

The provisional arrest may be ordered even on the basis of the telegraphic message, as mentioned above (p.135-6)[2] and by a letter also [3] and sworn information by telegram [4] by the foreign diplomatic officer or foreign police or by international organisation like Interpol, to the effect that a fugitive criminal is suspected to be or is likely to arrive soon in the country. In such a case, the report has to be made by the magistrate to the Central Government under Section 9(2) of the Act. Unless

1. U.S.A. v. Link, 21 C.R. 177, 111 C.C.C. 225 (1955).
2. In the case of Rex v. Oliphant (1905) 2 K.B. 67, supra.
3. Regina v. Rogers (1877)(3) Q.B.D. 28; 47 L.J.M.C. 11.
4. R. v. Dickey (1904) C.C.C. 318 (N.S.); Re Kollings (1874) 6 R.L.O.S. 213.

the Central Government nominates a magistrate under Section 5, the accused cannot be detained in other cases for more than 3 months, to be computed from the date of his arrest, and if no release has been ordered he can move the High Court or the Supreme Court under Articles 226 (read with Section 491 of the Criminal Procedure Code [Habeas Corpus]) and 32 of the Constitution respectively, invoking Article 21 of the Constitution which guarantees personal liberty.

The apprehension of the fugitive is the primary object of the request for the purposes of extradition, provided as mentioned earlier, the request is supported with the necessary documentation and in other respects in conformity with local laws or existing treaties.

An interesting question arises whether the fugitive arrested under Section 6,9(1) or 23 of the Act may move the judiciary alleging his unlawful arrest without having committed an offence in India. In order to meet such a situation, Section 22 of the Act has been enacted that the person will be liable to be arrested and surrendered, subject to the provisions of the Extradition Act, whether the courts in India have jurisdiction or not. The provision is based upon the power of a sovereign State to transmit the accused, punishable for the offence according to the municipal law of the country, to the country against the laws of which he has committed the breach.[1]

According to British practice also since 1794 there can be no extradition from the United Kingdom without statutory autho-

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1. East India Co. v. Campbell (1794) 27 E.R. 1010; Mure v. Kaye (1811) 129 E.R. 239; R. v. Kumburlay 93 E.R. 890.

risation. Lord Alverstone, C.J. observed:[1]

> "We are also dealing with a branch of criminal law which affects the liberty of the subject, and that condition should under ordinary circumstances be clearly fulfilled."

and this case was followed by Lord Parker, C.J. in Shutters case. Lorde Parker, C.J. observed:[2]

> "Matters (under the Extradition Act) should be looked at strictly."

(6) Release on Bail (or Temporary Release) at Two Stages

On the arrest of a fugitive, as mentioned above, under Sections 6 or 9(2) or 23 of the 1962 Act, Section 25 of the Act makes a provision for the release of the person on bail and 'the provisions of the Indian Criminal Procedure Code, 1898, relating to bail' have been made applicable

> "in the same manner as they would apply if such person were accused of committing in India the offence of which he is accused or has been convicted, and in relation to such bail, the magistrate before whom the fugitive criminal is brought shall have, as far as may be, the same powers and jurisdiction as a court of session under that Code."

The magistrate, therefore, while exercising the powers under Section 497 of the Criminal Procedure Code will, in accordance with the well-established principles of law, exercise his discretion to grant or refuse bail looking to the circumstances of the case. As the Criminal Procedure Code, as such, regarding bail has been made applicable to the fugitive offender, the High

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1. In R. v. Brixton Prison Governor Ex parte Percival (1907) 1 K.B. 696 at p.706.

2. In Re Shutter (1959) 2 All E.R. 782 at p.785A (brackets are mine).

Court in exercise of its powers under Section 498 would be empowered to interfere and so may the Supreme Court under Article 136 of the Constitution.

This would obviate the controversy in British and other practice whether the discretion to grant or refuse bail vests in the magistrate only and not in the High Court. Terasov, a Russian sailor, was released on bail during the pendency of extradition proceedings. Depending upon the circumstances of the case, the Court will exercise its discretion, though in such cases, the amount of bail will be high due to the offender's fears of extradition and desire to seek asylum in a more convenient State. Such escape of the fugitive may embarrass the Central Government, and may result in tension between India and the demanding State. True, a difficulty arises where nobody is able to furnish bail, so that the provisions of bail may become nugatory: but they can become so even in cases of ordinary crimes committed in India, which are triable under the Indian Penal Code.

Indian Courts under the Fugitive Offenders Act, 1881, or the British Extradition Act, 1870, made applicable to India by Order in Council, refused bail to the accused because the view then was that the proceedings under the Extradition Act were not subject to any appellate or revisional jurisdiction, as the magistrate's findings were held to be in the nature of an administrative order and hence, immune from any interference by the judiciary. Similarly, there was a conflict of opinion in British Courts regarding the bail.[1] LordWright in the case of R. v.

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1. The case of R. v. Phillips (1922) All E.R. 275 was contrary to R. v. Larking (1914) 48 I.L. T.95, and also Larking's case was directly contrary to R. v. Foote (1883) 10 Q.B.D. 378 and R. v. Spilsbury (1898) 2 Q.B.D. 615.

Spilsbury [1] observed:

> "I wish to add this observation that cases arising under the Fugitive Offenders Act will not in all instances apply as precedents in cases under the Extradition Acts. Under the Fugitive Offenders Act it is generally a question between different parts of Her Majesty's Dominions, but under the Extradition Acts the jurisdiction depends in all cases on treaties with foreign countries."

In R. v. Phillips, the accused was arrested on a warrant on 11 July, 1922, under Section 8(2) of the Extradition Act, 1870, for obtaining money by false pretences in Switzerland, and owing to non-arrival of information was remanded in custody. The magistrate declined bail on the ground that it was not the practice of the Court to grant bail in extradition cases; refusing the application the Court held that a person arrested on a warrant under the Extradition Act, 1870, and charged as a fugitive criminal with a crime for which he is liable to be extradited is in the same position as a defendant under remand on charge of misdemeanour committed within this jurisdiction in that he has no right to bail, and it is up to the magistrate to refuse or or grant bail. Lord Hewart, C.J. observed:

> "The learned Attorney-General did not say that the learned Magistrate here had no power to grant bail. He denied that the accused had the right to insist upon bail. In that contention I think the Attorney-General was right. It is a matter for the discretion in the first instance of the learned magistrate whether bail in such case shall be granted or refused ... It is quite true that he said it was not the practice to grant bail in cases of extradition. That does not mean that it is the practice always to refuse bail."

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1. (1898) 2 Q.B.D. 615 at pp.624, 625.

Insisting upon the consideration of 'special grounds of caution and care' about treaty obligations, Lord Hewart C.J. further observed: [1]

> "It does not appear to me that it is true to say that he was bound to grant bail, nor does it appear to me that it is true to say that this court is bound to grant bail."

Larking's case was held to have been decided contrary to the authority of the cases of Foote and Spilsbury decided by a Full Bench of the Queen's Bench Division, and Darling J. held Larking's case was not binding upon the Court in Phillip's case.[2]

In Ezekiel's case, the applicant was committed to prison on 7 March, 1941, having been charged in India under Sections 120-B and 420 of the Indian Penal Code of 1860, by order of the Metropolitan Police Magistrate sitting at Bow Street, to await his return to India in accordance with the provisions of the Fugitive Offenders Act, 1881. He was later admitted to bail by the order of a judge.[3]

In Regina v. Spilsbury, Lord Russell C.J. observed:[4]

> "This inherent power to admit to bail is historical, and has long been exercised by the Court and if the Legislature had meant to curtail or circumscribe the known power, their intention would have been carried out by express enactment."

Thus, under British Law, a magistrate has the same jurisdiction

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1. In R. v. Phillips (1922) All E.R. 275 at p.277, F,G,H,I; Darling and Branson J.J. agreeing.

2. R. v. Phillips, ibid. at p.278.

3. In R. v. Secretary of State for India in Council and Others Ex parte Ezekiel (1941) 2 All E.R.P. 546 at p.547.

4. (1898) 2 Q.B.P. 615 at p.622.

and powers as near as may be (including the power to remand and admit him to bail) as if the fugitive were charged with an offence committed within his jurisdiction and on two occasions bail was granted.[1]

The Supreme Court of the United States [2] accepting the right of a court to admit to bail observed:

> "We are unwilling to hold that the circuit court possesses no power in respect of admitting to bail other than as specifically vested by Statute, or, that while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed."

The power of the Federal Cours to accept bail has been recognised prior to the final commitment for extradition. Court apprehending undue delay in the arrival of witnesses granted bail;[3] the court enlarged the accused on bail as the pressing circumstances were found to justify it.[4] Enlargement on bail was also allowed pending extradition proceedings.[5]

Great Britain, the United States of America (unlike India), and Canada under the municipal laws do not provide

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1. R. v. Governor of Brixton Prison Ex parte Percival (1907) 1 K.B. 696; R. v. Harvey (1895) cited in Biron & Chalmers: The Law and Practice of Extradition, London, 1903.
2. Wright v. Henkel (1903) 190 U.S. 40.
3. Re Gannon (1928) 27 F. (2d) 362.
4. In Re Mitchell (1907) 171 Fed. Rep. 289.
5. In Re Keene's Extradition (1934) 6 Fed. Supp. 308.

expressly for bail, but the right of a Court to grant bail independently of the statute is recognised, pending final commitment if the circumstances seem to warrant.[1]

India taking advantage of all these controversies, gave a statutory recognition to such power to the Courts by Section 25 of the 1962 Act, particularly by making the provisions of bail provided in the Criminal Procedure Code applicable under the Extradition Act. Thus, in the laws of the United States of America, the United Kingdom and Canada, the grant of bail in extradition proceedings pending before committal is not as of right,[2] but the Court has got every right to grant it.[3] In India, statutory recognition has been given to this power of the court. But in all cases, including India,it is the discretion of the judge whether bail should be granted or not, and in practice, it is only in the exceptional case that bail is granted.

In the United Kingdom,[4] United States of America,[5] on the one hand, and Canada on the other,[6] differ on the point whether a person held in custody after commitment for the purpose of surrender can be bailed out or is entitled to be bailed out. According to the former practice, the answer is in the negative,

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1. Regina v. Spilsbury, supra (1898) 2 Q.B. 615; United States v. Weiss (1904) 8 C.C.C. 62; In Re. Gaynor v. Greene (1905) 9 C.C.C. 542; R v. Phillips (1922) 128 L.T.R. 113; Re. Gifford (1930) I D.L.R. 800.

2. Wright v. Henkel (1903) 190 U.S. 40.

3. Regina v.Spilsbury (1898) 2 Q.B. 615; R. v. Phillips (1922) 128 L.T.R. 113; In Re. Keene (1934) 6 Fed. Sup. 308.

4. R. v. Spilsbury, supra (1898) 2 Q.B. 615.

5. Wright v. Henkel, supra (1903) 190 U.S. 40.

6. Re. Low (1932) 41 O.W.N. 468.

while in the latter case is in the affirmative.

According to Halsbury,[1] the Queen's Bench Division or in vacation, any judge thereof may ordinarily admit to bail, but a person committed with a view to being surrendered under the extradition treaty has no right to bail and this statement is based upon Lord Russell's observations and the decision in Regina v. Spilsbury (supra) recognising the inherent powers of the British Courts to enlarge people on bail in extradition cases. In the United States' practice there is no case of grant of bail after commitment. Further, the Chief Justice of the United States speaking for the Court,[2] held that allowance on bail after commitment was inconsistent with the statute (Section 5 270 of the Revised Statutes) and the demanding State, having done all required under treaty or law, is entitled to the delivery of the accused. In a case of release of the accused on bail, it might become impossible to fulfil the obligation.

Even though under powers to grant bail under Sections 498 or 497 of the Criminal Procedure Code, the High Court can grant bail after conviction, ordinarily there should be no objection to grant bail technically, but in an ordinary case if the man is in India he can be arrested and brought back, whereas in extradition proceedings if he escapes after commitment, the relations between the States may become strained.

The better view seems to be that no bail should be granted in India after the commitment has been ordered. This view is supported by the further fact that if the fugitive is not

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1. Halsbury, Laws of England, 3rd ed., Vol.16, p.571.

2. In Wright v. Henkel (1903) 190 U.S. 40 at p.62.

conveyed out of India within two months he may be discharged by the High Court on his application, unless sufficient cause is shown to the contrary by the Central Government.[1] But it seems that no dogmatic and legalistic approach in such cases may be appropriate and the High Court or the Supreme Court, while protecting the Fundamental Rights of a person, may order the person to be released on bail. This will be a midway path between the views. For in Canada, the power to release on bail after commitment has been fully recognised and once the Court of Appeal in Ontario allowed bail after commitment.[2]

There are other States which do not make any provision for release of the accused on bail before or after the commitment and the ordinary provisions of the criminal procedure are not made applicable. In Re Brain, Argentine Camera Federal de la Capital [3] rejecting the bail application, held that the provisions of the relevant Criminal Procedure Code were subject to imperative considerations of social order requiring assistance, so far as possible, in the delivery of accused persons. They did not apply to the special proceedings of extradition.

There is a provision for total prohibition for grant of bail in extradition in countries like Sweden,[4] Yugoslavia,[5] and Chile.[6]

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1. Section 24 of the 1962 Act.
2. In the Case of Re Low, supra (1932) 41 O.W.N. 468.
3. 1941-1942 A.D., Case No.105 decided on 21 February, 1940.
4. The Law of Extradition of Sweden, 1957.
5. Code de Procedure Penale, 1954.
6. Code of Penal Procedure, Book 111, Title 6 regarding extradition, Art.698. See also Bedi, op.cit., pp.113-116.

(7) Request for Provisional Arrest

A request by the demanding State for the extradition of a fugitive requires that it should be accompanied by various documents, establishing his identity, etc. (as above, p. 141), otherwise 'there can be no actual extradition without proper requisition to that effect'.[1] But all these processes are time-consuming and nowadays with fast means of communication and transportation, the accused on getting warning of his being wanted for extradition, may fly to another country and thus, make the request for extradition abortive. Therefore, the British Extradition Act, 1870, made applicable to India also by Order in Council by Section 8 authorised the magistrate to issue a warrant for the apprehension of a fugitive criminal wanted by a foreign State, whether accused or convicted of a crime, who is, or is suspected of being, in the United Kingdom or on his way to the United Kingdom. This would be a provisional warrant. The same provision was made in the Fugitive Offenders Act, 1881, the Indian Extradition Act, 1903, and Sections 14 and 16 of the 1962 Act to meet such emergencies.

France took the initiative in this respect, and the treaties of this country entered into with other countries provided that it was a duty to make provisional arrest in the absence of documents if request came by telegram through diplomatic channels. The United States also recognised the necessity of provisional arrest and the United States Supreme Court [2] expressed the same views. In most State practices, municipal foreign statutes, and treaties provisional arrest is provided for and detention of such persons pending the receipt of a formal

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1. J.B. Moore Digest, op.cit., Vol.IV, p.355.

2. In Benson v. McMohan, 127 U.S. 457.

requisition with its supporting evidence.[1]

The provisional arrest under Section 9 of the Act (where the magistrate issues a warrant on information alone) will become ineffective if the magistrate does not hear from the Central Government within three months. This may occur if the requesting State makes no request or it is rejected by the Central Government without the nomination of a magistrate under Section 5.

This provision for arrest without a preceding request from the foreign State has been provided because a requisition for the extradition of the apprehended person may reasonably be expected, and the State concerned must be given reasonable time to present a requisition for his extradition.

(8) Warrant of Arrest

(a) Form and contents

The warrant need not state that the offence charged is an offence within the Act.[2] Regarding the argument of the accused that the form and contents of the warrant for his arrest differed from the charges which were brought against him before the magistrate with particulars of the offences, Lord Parker C.J. observed:[3]

> "It would be far more satisfactory in the future if the warrant contained on its face a reference to the charges with which it is sought to deal and that those charges with proper particulars should be attached to the warrant."

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1. Bedi, op.cit., p.118.

2. Irish Free State v. Little (1931) I.R. 39.

3. In Ex parte Mourat Mehmet (1962) 2 Q.B.D. 1 at p.9.

In Ezekiel's case,[1] it was stated that no reference to the Fugitive Offenders Act, 1881, was required in the warrant of arrest and, should the Court find, relating to the person before it, evidence which raises a strong presumption that he has committed an offence named in the warrant, being one to which the Act applies, the duplicity in the warrant, i.e. that it contained another charge, is immaterial and will not render the warrant void. Humphrey J. (at p.550) observed:

> "It is clear that by English Law no objection to a warrant on the ground of duplicity can be effective although the prosecution may be called upon to elect. Rodgers v. Richards."[2]

The term 'warrant' in the case of any foreign State, includes any judicial document authorising the arrest of a person accused or convicted of a crime. Therefore, the magistrate proceeds upon the production, not of a warrant of a foreign State or power according to the technical rules of English Law , but upon any judicial document authorising the arrest of a person accused of a crime maybe a decree or a judgment of a foreign court.[3]

(b) Warrant of foreign arrest and warrant of committal in extradition proceedings

A warrant of 'foreign arrest' must be distinguished from a warrant of committal in the extradition proceedings. In the case of Fedorenko [4] the question was raised whether it is necessary in extradition proceedings to put in evidence before

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1. R. v. Secretaryof State for India Ex parte Ezekiel (1941) 2 All E.R. 546 at pp.550, 551.

2. Rodgers v. Richards (1892) 1 Q.B.D. 555 at p.557.

3. R. v. Ganz (1881-5) All E.R. 621 Pollock B. at p.625. B,C (1882) 9 Q.B.D. 93.

4. Attorney-General of Canada v. Fedorenko , L.R. (1911) A.C.735.

the judge to whom application for a warrant is made, the requisition by the foreign State requiring the extradition. Robson J. in the Court of first instance, held that it was necessary, but the Privy Council in appeal reversing the judgment held that the committal warrant was good, without the proof of a requisition having been made.

The requisition for the extradition of a fugitive criminal must be accompanied by a warrant of arrest issued by the judicial authorities in the country seeking the surrender. It does not appear that the surrender would be granted without such warrant. There is no authority to support the view that a police officer can justifiably arrest a person without a warrant, on reasonable and probable grounds of suspicion that the person had committed elsewhere an offence which would be a felony in the State of asylum.[1] Brett L.J. indeed observed (at p.706) that:

> "I doubt much whether a policeman is not justified in arresting a man without a warrant on reasonable grounds of suspicion of his having done that which would be a felony if committed in this country."

The opinion on the face of it seems reasonable, but a person's liberty cannot be curtailed otherwise than by a procedure established by law under Article 21 of the Constitution and as there is no such provision in the Indian Extradition Act, 1962, no policeman in India is authorised to arrest any person without a warrant. For extradition purposes the Extradition Act is a 'self-contained code' providing both the substantive as well as procedural and substantive procedural law. Arrest in extradition procedings without a warrant is, therefore, illegal.[2]

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1. In R. v. Weil, 9 Q.B.D. 701.

2. Diamond v. Minter and Others (1941) 1 K.B. 656 at pp.666,673.

The foreign warrant must disclose the identity of the alleged offender sufficiently to enable his apprehension to be effected.

Foreign warrants accompany a request to the Indian Government to back them under Chapter III, whereas under Chapter II, the magistrate issues the warrant under Section 6 after his appointment of nomination by the Central Government, or otherwise under Section 9. These foreign warrants are different from the warrants issued by the Indian Government or magistracy, which are a command to the Indian Police to apprehend the person, as was said in Jugal Kishore More's case (supra).[1]

The above-quoted direction in R. v. Weil was not followed by the High Court of Australia,[2] nor by the English Court [3] in a case under the Fugitive Offenders Act.

As observed in Halsbury's Laws of England:[4]

> "When a treaty has been made with a foreign State and the Extradition Act has been applied by an Order in Council, one of Her Majesty's principal Secretaries of the State may, upon a requisition made to him by some person recognised by him as a diplomatic representative of that foreign State by order under his hand and seal, signify to a police magistrate that such a requisition has been made and require him to issue his warrant for the apprehension of the fugitive criminal if the criminal is in, or is suspected of being in, the United Kingdom."

The warrant may then be issued by a Police Magistrate on receipt of the order of the Secretary of the State, or upon

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171.

2. In Brown v. Lizars (1905) 2 C.L.R. 837 at p.849.

3. In Diamond v. Minter (1941) 1 K.B. 656 at pp.666, 673.

4. Vol.16, 3rd ed., 61 at p.567.

such evidence as would in his opinion, justify the issue of the warrant if the crime has been committed or the criminal convicted in England.

A warrant issued by the Court for an offence committed in its own territory has no extra-territorial operation. A warrant issued in the State where the fugitive offender is does not have any extra-territorial significance. It is only a command by the court in the name of the sovereign to its officer to arrest an offender and bring him before the court. By making a requisition in pursuance of a warrant issued by a court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with any extra-territorial operation. If the State requested agrees to lend its aid to arrest the fugitive it is made by the issue of an independent warrant or endorsement or authentication of the warrant of the court which issued it. By endorsement or authentication of a warrant, the country in which an offender has taken refuge signifies its willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the person. The offender arrested pursuant to the warrant or an endorsement is brought before the court of the country to which the requisition is made, and the court holds an inuqiry to determine whether the offender may be extradited.

The procedure for extradition of fugitive offenders from 'British Possessions' was less complicated when the Extradition Act was applied by Order in Council, for unless it was otherwise provided by such Order, the Act extended to every 'British Possession' in the same manner as if throughout the Act

the 'British Possession' were substituted for the United Kingdom but with certain modifications in procedure.

The Extradition Acts of 1870 and 1873 sought to give effect to arrangements made with foreign States with respect to the surrender to such States of fugitive criminals. Her Majesty might by Order in Council, direct and prescribe the procedure for extraditing fugitive criminals to such foreign States.

Under Part I of the Fugitive Offenders Act, 1881, a warrant issued in one part of the Crown's Dominions for apprehension of a fugitive offender, could be endorsed for execution in another Dominion. After the fugitive was apprehended he was brought before the magistrate, who heard the case in the same manner and had the same jurisdiction and powers as if the fugitive was charged with an offence committed within the magistrate's jurisdiction. If the magistrate was satisfied, after the expiry of 15 days from the date on which the fugitive was committed to prison, he could make an order for surrender of the fugitive on the warrant issued by the Secretary of the State or an appropriate officer. There was also provision for 'inter-colonial backing of warrants' within the group of 'British Possessions' to which Part I of the Fugitive Offenders Act, 1881, had been applied by Order in Council. A more rapid procedure for the return of fugitive offenders between possessions of the same group was in force. Where in a 'British Possession' of a group to which Part II of the Act applied, a warrant was issued for the apprehension of a person accused of an offence punishable in that possession and such person is or was suspected of being on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the

warrant was issued by a person having lawful authority to issue the same, was bound to endorse such warrant, and the warrant so endorsed was sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and to bring him before the endorsing magistrate or some other magistrate in the same possession. If the magistrate before whom a person apprehended was brought was satisfied that the warrant was duly authenticated and was issued by a person having lawful authority to issue it, and the identity of the prisoner was established, he could order the prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to deliver him into the custody of the persons to whom the warrant was addressed or of any one or more of them and to be held in custody and conveyed to that possession, there to be dealt with according to law as if he had there been apprehended. This was in brief the procedure up to 26 January, 1950.[1]

In R. v. Ganz (supra) [2] it was stated that a general description of the offence in the English warrant of apprehension issued by the Police Magistrate was enough. In a case of issue of a warrant by the magistrate without authority from the Home Secretary, it was observed:[3]

> "Under the Act of 1870, the Magistrate is required to take evidence and to consider whether a case is within the Act, and therefore, after having satisfied himself in this case, his warrant sufficiently described the offences committed."

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969, S.C. 1171.

2. R. v. Ganz (1882) 9 Q.B.D. 93.

3. In the case of Re Terray (1878) 48 L.J. Ex. 214.

The facts by which the offence for which the accused is to be detained can be ascertained from the depositions sent with the requisition. But although a foreign warrant must sufficiently disclose the offence charged, it is not the warrant that is to be looked to for ascertaining what the offence or crime is, for which the man is to be detained. The facts for the arrest and detention and surrender are to be found in the depositions but not in the foreign warrant. If the foreign warrant reasonably discloses the offence charged, it need not do this in detailin order to justify the detention of the accused.

In the recent case of Gardner,[1] on a warrant issued from New Zealand . . for false pretences as a representation of a future event, not being an offence according to English law, on a petition for habeas corpus, Lord Parker C.J. accepting the petition (Lord Edward Davis L.J. and Widgery J. agreeing with him) held that the authority to proceed, albeit in general terms, must be taken as relating to offences of which the applicant was accused in New Zealand, viz. in the absence of any indication to the contrary, those which were set out in the warrants which accompanied the request to the Secretary of State, and, as it was clear that the acts complained of in those warrants would not constitute offences under the law of England, a writ of habeas corpus should issue.

Gardner's case is of the greatest importance in India, where it will certainly have great persuasive authority. It raises in an acute form the problem of the fugitive's predicament

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1. R. v. Governor of Brixton Prison, Ex parte Gardner (1968) 1 All E.R. 636 at p.641, E,G,H.

In order to discover that the offence described in the warrant - perhaps described in terms only minutely different from those used in the Indian Penal Code or other penal statute of India - does not exist in Indian law highly specialised knowledge and advice must be available to him. It is no consolation if it can be made available in an appellate or revision court after the expenditure of substantial fees and the passage of time during which he is likely to be in confinement.

By contrast, in Caldough's case,[1] a warrant of arrest of the accused, a Canadian citizen, was issued on 3 October, 1960, on four counts in Vancouver. When depositions of witnesses were being taken, the counsel for the prisoner was not allowed to cross-examine, since the Vancouver magistrate claimed the proceedings were ex parte, and the warrant issued. The objection was taken in habeas corpus that the charges were not such as, according to the law, ordinarily administered by the City Magistrate, to quote the words of Section 5 of the 1881 Act, entitled him to commit; rejecting the pleas on this ground, the court held that there was nothing in the formulation of the charges set out in the warrant that would entitle the magistrate to disregard the warrant.

In Caborn-Waterfield,[2] it had been held that the applicant would be discharged from custody, since the warrant of arrest and warrant of committal described the applicant as 'accused' of the crime of larceny, whereas by virtue of the 'jugement

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1. R. v. Governor of Brixton Prison, Ex parte Caldough (1961) 1 All E.R. 606 at p.608. In Re Campbell (1935) N.Z.L.R. 352 the C.J. of New Zealand had held that a fugitive had no right to cross-examine the witnesses deposing for this purpose.
2. R. v. Caborn-Waterfield (1960) 2 All E.R. 178: See also Section 2(b) of The Extradition Act, 1962. See also Athanassiadis v. Government of Greece (1969) 3 All E.R. 293, per Lord Diplock affirming R. v. Caborn-Waterfield (1960) 2 All E.R. 178.

iteratif, défaut' he was virtually a convicted person, and in that case no question of extradition within the meaning of Article VII(c) of the Extradition Treaty between France and England of 1876 arose. That treaty provided that 'persons convicted by jugement par défaut or arrêt de contumace shall be in the matter of extradition considered as persons accused and, as such, surrendered', and as he is not a person accused but person convicted, he should be discharged because of wrong mention.

Caborn-Waterfield's case [1] emphasises what meticulous care is necessary, what nice distinctions will be made, what specialist advice is required by the fugitive, by the Central Government, and before the magistrate (if one is appointed), and what handicaps the State requesting extradition labours under even in cases which, on the merits, fully justify an extradition.

In India, the 'jugement iteratif' in Caborn-Waterfield's case, would not be a judgment in accordance with Indian law, as the latter does not recognise conviction in the absence of accused, which is regarded as a violation of the principles of natural justice.

Regarding a second arrest, it was observed by Phillimore J. in the case of Stallmann:[2]

> "But if the second arrest is for the same cause, while the discharge in the first case was because the warrant was bad, or the return to the warrant was bad, then it would be lawful to re-arrest for the same offence with a proper warrant and one making a different return."

Following a Canadian case,[3] Phillimore J. observed:

> "That being the case, the fact that the applicant in this case was discharged,..... not because it was not an extraditable crime, or for any such reason, but because full opportunity to make his defence had not been given to him before

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1. R. v. Caborn-Waterfield (1960) 2 All E.R. 178.

2. R. v. Governor of Brixton Prison, Ex parte Stallmann (1911-13) All E.R. 385 at p.395.

3. In Re Parker Canadian Prisoner's case (1839) 5 M & W. 32 and of R. v. Batcheldor, 1 Per. & Dav. 516 and Watson's case, 112 E.R. 1389.

> the Magistrate, cannot be a reason why he should not be re-arrested and have the case fully investigated before this committal for extradition."

(c) General validity and its endorsement and proper signing of warrant

In England the endorsement on the warrant must be by the authority endorsing it and it need not be signed both by the magistrate and the Home Secretary. The word 'and' in category (2) of the authorities, who may endorse the warrant in the British Act, is used disjunctively and therefore, any such warrant need not be endorsed both by a magistrate and the Secretary for State.[1]

Section 15 of the Extradition Act, 1962, lays down that theCentral Government may, if satisfied that the warrant was issued by a person having lawful authority to issue the same, endorse such warrant in the manner prescribed, and the warrant so endorsed, shall be sufficient authority to apprehend the person named in the warrant and to bring him before any magistrate in India.[2] This section applies where the warrant has been issued for the apprehension of the fugitive criminal in any Commonwealth country with extradition arrangements made, if any, and notification has been issued under Section 12 of the Act. Thus, under Section 15 of the Act of 1962, it is only the Central Government whose satisfaction and endorsement is necessary, and unlike the British Act, endorsement by the magistracy and executive both are not necessary, and therefore, in India such a problem would not arise.

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1. R. v. Governor of Brixton Prison, Ex parte Bidwell (1937) 1 K.B. 305; (1936) 3 All E.R.1.

2. The Indian Extradition Act, 1962, Section 15.

(9) Concurrent Demands by Various States in International Practice

International law does not impose any obligation on a State of asylum to which requesting States the offender should be surrendered in case of simultaneous multiple demands for his surrender by several States for the commission of the same or different Acts.

The States are left free in the absence of a treaty or agreement to exercise their own discretion to which State the fugitive offender should be extradited, taking into consideration all the circumstances including the gravity of the alleged offence, the place of its commission, and the nationality of the person sought. On the other hand, a State entering into a treaty or agreement with other State or States, may restrict its own freedom on the subject.[1] It cannot unilaterally alter or modify the treaty or the agreement without the consent of the other party or parties.[2]

Section 30 of the Indian Extradition Act, 1962, gives a full discretion to the Central Government to determine independently a question arising out of simultaneous demands as to which State the accused should be surrendered and the Central Government 'having regard to the circumstances of the case' may surrender the fugitive to such State or country as it 'thinks

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1. Zenica Company v. Austrian Federal Railways, 1929-1930, A.D. pp.364-365 decided on 30 October, 1929.

2. In Re Brooks, 1931-1932, A.D. Case No.5 decided on 1 May, 1931. In Re Reira et al. 1943-1945, A.D. Case No.73 decided on 11 May 1944; In Re Krikor, 1943-1945, A.D. Note p.239 decided on 1 November, 1943; Bedi, op.cit., p.129.

fit'. The crux of the matter would be the interpretation of the words 'having regard to the circumstances of the case' and 'thinks fit'. The section nowhere lays down any criteria for the determination of this question. There is no mention of any treaty or international agreement with other States, in which case if it does not provide anything in this regard (like Indo-Nepalese treaty), Section 30 will prevail. If a treaty (like Indo-American treaty by Article 10) provides that in cases of simultaneous demands the accused will be surrendered to the State who made the earliest claim, the treaty may provide different modes with different States and if they all make simultaneous demands the question arises in a two-fold form, viz. whether the provisions of Section 30 of the Act would apply, or the treaty provisions in this regard, and secondly, in case of different provisions in different treaty-clauses to which State the accused will be surrendered. The answer to the first question can be disposed of by reference to and on the analogy of the principles enunciated by the British Courts;[1] by virtue of Section 3(3) of the Act of 1962 after notification the treaty must be taken to be incorporated and to limit the operation of the Extradition Act. The answer to the second question will depend upon whether the request is for the same act or for different acts, which will be considered presently. There are different international practices but so far as India is concerned, the formula of 'having regard to all the circumstances of the case' would resolve the problem, at least in legal terms.

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1. In Queen v. Wilson (1877) 3 Q.B.D. 42; R. v. Ashforth (1892) 8 T.L.R. 283; R. v. Governor Brixton Prison (1911) 2 K.B. 82.

(a) Simultaneous requests for the same act or offence

In the case of simultaneous demands for the same act municipal statutes of States generally give priority to the State within whose territory the crime was perpetrated. It is the practice of those States also who emphasise the territoriality of the act rather than of the actor.[1]

On the other hand, French Law gives first preference to the States against whose interest the wrong was done and secondly, in whose territory, the act was performed. There are other States who give first preference to the States in respect of their own nationals. States like Mexico,[2] Equador [3] give first preference to treaty States and amongst many treaty States to that State in whose territory the offence was committed - presumably, because that State is the proper forum as the evidence is there. Peru, like India, leaves it to the discretion of the executive to decided according to the circumstances of the case.[4] The exercise of discretion will be presumed also in cases of those States without any treaty or statutory provisions providing for the same. In cases of a treaty like Indo-Nepalese non-mention of anything on this point will give occasion for the 'exercise of discretion principle'.

A number of bilateral or multilateral treaties make no difference between the multiple request for one offence or different offences. The Indo-American treaty specifically lays

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1. J.B. Moore, Extradition Law, pp.134-135.

2. Extradition Law of 1897, Art.7.

3. Article 48 of 1921 Act concerning Foreigners Extradition and Naturalisation Act.

4. Peru Extradition Act of 1888, Article 7.

down the principles of surrender to the State whose claim is earliest in date, unless such claim is waived. There are other treaties making no difference for the same act and for different acts, leaving the discretion of the requested State as under Section 30 of the Indian Extradition Act, untramelled by the rule of precedence. There are treaties which give complete discretion in cases of one or different acts in whose favour it will extradite after taking into consideration all the circumstances of the case, and in particular, the seriousness and gravity of the offence, place of the commission of the offence, the date of each request, the nationality of the person claimed, and the possibility of subsequent extradition to another State. The United Kingdom and United States of America give first preference to territoriality and between two States within whose jurisdiction the offence or offences were committed, also give preference to that State which made the prior requisition in time. Such is the effect of the Indo-American treaty unless such claim is waived, and treaties between the United States of America and South Africa, and between the United Kingdom and Israel. Other State practices only give preference on the priority of requisitions without referring to the seriousness of crime or natinnality of the person wanted.

But it seems a majority of them apply the test as adopted under Section 30 of 'having regard to all the circumstances' of the case.

The conclusion can be drawn that the principle of territoriality is immaterial when the same offence is committed in the territory of more than one requesting State or in the territory of none of the requesting States, and in such cases, the principle of priority of requisition will be recognised.

The principle of territoriality will be recognised only in those cases when the offence was committed in the territory of the requesting State or States.

(b) Simultaneous requisitions under the Indian Extradition Act of 1962

Requisition can be made only for an extraditable offence. It is possible that a number of States in respect of whom notifications have been made, may make a request for the surrender of the same fugitive criminal about the same time. This is not impossible, because the fugitive may be a professional swindler or habitual offender who may have cheated or committed other extraditable crimes in different countries at different times. India had such an experience of having received at least one such person, in de Bremington, who was required by the police in 11 countries.[1]

In such cases, Section 30 of the Indian Extradition Act, 1962, provides that the Central Government may, having regard to the circumstances of the case, surrender the fugitive criminal to such State or country as that Government thinks fit.

The principle of 'first come first served' has not been made applicable by Section 30 and the Central Government may surrender the fugitive to any State although there may have been other States which requested the extradition earlier.[2] While doing so, the Government may take an undertaking for the return of the criminal after either he has been acquitted of the offence or he has served his sentence, for eventual surrender to another country or countries which has or have made similar requisi-

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1. In Re de Bremington, The Statesman, 10 October, 1964.
2. R.C. Hingorani, The Indian Extradition Law, p.30.

tions.[1]

A serious question about the priority in surrender may arise when a magistrate has to decide between Section 30, which gives discretion to the Central Government to extradite the person to any one of the foreign States or Commonwealth countries who have sent requisition for the extradition of the fugitive criminal, and the provisions of a treaty which may run counter to Section 30, and difficulties may arise in resolving this conflict. For instance, Article 10 of the Anglo-American Treaty of 1931, which is binding on India and has been notified in the Gazette of 1 April, 1966, has by Clause 10 [2]provided that:

> "If the individual claimed by one of the High Contracting parties in pursuance of the present treaty should be claimed by one or several other powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the power whose claim is earliest in date, unless such claim is waived."

In the treaty, the principle of first come first served has been recognised and accepted by the High Contracting parties, whereas in Section 30, this principle has not been recognised. In the Hungarian-Canadian Treaty for extradition of fugitive offenders, it has been provided that in case of multiple demands for surrender of the same fugitive, he shall be returned to the country where he has committed the more serious crime.[3] The pattern

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1. R.C. Hingorani, ibid., p.30.

2. R.C. Hingorani, ibid., p.115. For similar provisions, see treaties between United States and South Africa, Art.9; United Kingdom and Israel, Art.13; Iraq-Egypt, Art.13, No.152; South Africa-Rhodesia, Art.13, No.28, cited by S.D. Bedi: Extradition in International Law and Practice, p.132, note No. 163, 164, 165.

3. R.C. Hingorani, ibid., p.30, note 9.

in this treaty is different from the pattern of the Anglo-American Treaty. Pente [1] has said that there can be three ways of dealing with simultaneous requsitions for the surrender of the same fugitive:-

Formula I: a) Gravity of the offence;

b) if equal gravity, priority in time;

c) if all are of equal gravity, at the discretion of the territorial State.

II: Treaty and non-treaty States

III: Priority of presentation.

Therefore, Section 30 has been enacted on such lines that it gives discretion to the territorial State, i.e. the Central Government, to take into consideration all the attending circumstances of the case, including the principles of priority, gravity of the offence, whether either or both of the requesting States are treaty and non-treaty States, and then to use the judicial discretion - as opposed to arbitrary discretion - and finally to decide to which State the accused should be surrendered.

The magistrate, therefore, should follow the general rule of interpretation, and should try to reconcile the two provisions, viz. Section 30 and the treaty clause. In other words, the Act should be so interpreted that it will not conflict with an international undertaking in the treaty containing a priority clause. The latter will have to be given effect in such a situation so as to limit discretion of the Government and the fugitive has to be surrendered to the country that has applied earlier.[2] But if other treaties contain other clauses refer-

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1. See Julius J. Pente: "Principles of Extradition in Latin America", 1929-30, Michigan Law Review, pp.671-672.

2. R.C. Hingorani, ibid., p.30.

ring the seriousness of the offence or place of offence, etc. then those clauses will be given weight while deciding as to which country the fugitive offender should be extradited, or ultimately, the principle laid down by jurists like Pente and others should be followed in deciding the question.

It may be mentioned that Article 8 of the Harvard Research Draft has divided simultaneous requisitions into two categories:

i) When several requisitions are made for the same man and for the same crime.

ii) Requisition is made by several States for the same man but on different charges.

In the first case, Article 8(a) would provide that the man may be extradited to the country where the offence was actually committed. In the second case, Article 8(b) would provide that the person shall be extradited after taking into account:-

a) the seriousness of each charge;

b) the place of incidence;

c) the nationality of the person; and

d) the time of requisition — thus

the Harvard scholars placed mere priority lowest amongst the factors.

Section 30 of the Indian Act (in my submission) implicitly follows Article 8(b)'s principles. It is possible (as I suggested above) that in case of simultaneous requests, a treaty State may be preferred to a non-treaty State as propounded by Pente (above). In exercise of its rule-making power (above) the Central Government should frame rules laying down the criteria and guiding principles as to how the discretion is to be

used 'having regard to the circumstances of [each] case'.

(c) Simultaneous requests for different offences

In treaties where distinction is not made between multiple demands for the same or different offences, the State of Asylum is free to exercise its discretion.

The same will follow from treaties which vest the requested State with such discretion in the absence of any provision controlling the activities of the State on the subject. In cases of several offences, preference may be given to the State in whose territory the offence was committed and if several States apply in whose territories different offences were committed by the same person, then preference may be given to the State in whose territory the offence of greatest gravity was committed, and when offences are of equal gravity, to the State which applied first. In other State practices, first preference is given on the basis of relative seriousness of the offence, second on the strength of nationality of the offender, and third of the order in which the applications were received.[1] The United States and British practices give consideration to the principle of territoriality in case of the States in whose territory commission of same offence took place and in cases of multiple requests to the State which made the demand first, without taking into consideration the seriousness or gravity of the offence.[2]

In municipal laws generally, three principles are noted:-[3]

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1. S.D. Bedi: Extradition in International Law and Practice, p.134, note 177.

2. Bedi, ibid., p.134, note 178.

3. Bedi, ibid., pp.134, 135, notes 177, 180, 181.

i) preference is primarily based on relative gravity of the offence;

ii) order of receipt of applications (as under the Indo-American treaty), and

iii) on the discretion of the State of asylum, like Section 30 of the Indian Act, 1962. The United States and the United Kingdom do not make any distinction between a country in whose territory the principal offence was committed and a country where non-principal or simple offences were perpetrated. They surrender on the basis of priority of requisitions as under the Indo-American Treaty.[1]

(10) Extraditable Offences

The requisition can be made only for an extraditable offence. The Extradition Act of 1962 defines an extraditable offence by Section 2(c), as listed either in the Second Schedule or in the treaty.[2]

The language used in Section 2(c)(ii) of the Act so far as Commonwealth countries with extradition arrangements are concerned, is ambiguous. The Section says that an extraditable offence with regard to a 'Commonwealth conntry' will be as mentioned in the Second Schedule. Ostensibly here 'Commonwealth country' includes both types, viz. one having no treaty relations and the other having extradition arrangements, the request of the latter is handled favourably under Chapter III. Like the

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1. Bedi, ibid., p.135, note 183.

2. Section 2(c) of the Indian Extradition Act, 1962. See also Oppenheim: International Law, 8th ed., pp.697-700.

treaties with foreign States, the extradition arrangements between India and Commonwealth countries may enumerate extraditable offences.

A question will arise in this eventuality whether such an enumeration will be limited by the list given in the Second Schedule or it will be treated independently, if it is an extradition offence under the treaty. The Central Government has powers (see Clause 18, Second Schedule) always to amend the Second Schedule and add new offences to it and whatever is added as a supplemental provision in the agreement will be deemed to be a part of the Second Schedule, provided a notification under Section 3(1) and 12 is made in accordance with law because the whole treaty is added and reproduced in the notification.

A possible interpretation of Section 2(c)(ii) of the Indian Extradition Act, 1962, would hold that any list enunciated in an extradition arrangement with a Commonwealth country would be limited by the list in the Second Schedule, which may be supplemented under the powers given to the Central Government under the Act. Wherever there is national legislation governing extradition which also gives a list of crimes for which extradition may be granted or demanded, such legislation circumscribes the scope of treaties which that State may enter into with other countries. As Oppenheim says, 'These municipal laws furnish the basis for the conclusion of extradition treaties.' [1] Conclusively, it follows that if the list in the Second Schedule is not increased and if the extradition arrangement enumerates offences other than those listed in the Second Schedule, it will

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1. Oppenheim: International Law, 8th ed., p.697.

be a hardship for a Commonwealth country because the fugitive may not be extradited for an offence which though included in the arrangements is not in the Second Schedule.

Actually Section 2(c)(ii) of the Act needs redrafting to avoid ambiguity and anomaly, namely, a Commonwealth country, which tends to be treated more favourably under Chapter III, applying a simplified extradition procedure, should be in a more advantageous position than a treaty state which can demand extradition for offences which are found in the treaty, irrespective of whether or not they are listed in the Second Schedule.

The common practice is that either the extradition offences are mentioned in the individual treaties or are listed in municipal legislation. The Indian Government has adopted a dual method for determining extradition offences and this dual enunciation is more convenient, particularly in cases where a foreign State or a Commonwealth country wants to have a separate treaty or extradition arrangement and does not want to agree to the Schedule mentioning the list of extradition offences in the national legislation. But in that case, a Commonwealth country with a treaty arrangement should enjoy at least the same rights as a treaty State insofar as the list of extradition offences are concerned. This would require either an amendment of the Act or supplementing the Second Schedule, which power, of course, may be assumed by the Government as and when necessary.[1]

The adoption of a dual method for determining whether the offences are extraditable or not, has facilitated observance of the doctrine of double criminality on different planes.

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1. R.C. Hingorani; The Indian Extradition Law, p.33.

Thus, for example, so far as treaty States are concerned, extradition offences will be given in the treaty. In this process it is but natural that the Indian Government as well as the treaty State will agree to only such crimes being extraditable as are punishable in both the territories, although they may be called by different names and having different punishments. Similarly, the enumeration of extradition offences in the Second Schedule would enable the foreign non-treaty States, including the Commonwealth countries, to be forewarned as to the crimes for which the Government of India will permit extradition. Such states will, therefore, ask for extradition of only such fugitives as have been accused of one or more of the enumerated offences in the Second Schedule. It can be presumed that the requisition can be made only when the fugitive has committed the offence according to its municipal law, otherwise the necessity of requisition for surrender would not arise. The rule of double criminality has thus been followed here also.[1]

Generally States extradite only for serious offences or crimes,[2] the offences under the Defence of India Rules are also regarded as extraditable offences. There is an obvious advantage in limiting the list of extradition crimes since the procedure is cumbersome and expensive. Certain States, for example, France, extradite only for offences which are subject to a definite maximum penalty, both in the State requesting and in the State requested. In the case of Great Britain, extradition crimes are scheduled in the Extradition Act of 1870. In India, extradition crimes are scheduled in the Indian

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1. R.C. Hingorani, ibid., pp.33, 34.

2. War crimes are now generally treated as extradition crimes. See Felice Morgenstern, B.Y.I.L. 1948, pp.236-241.

Extraditiona Acts of 1903 and 1962.

As a general rule, the following offences are not subject to extradition proceedings:-

i) political crimes;

ii) military offences, for example, desertion; (the latter offence is an exception in Article 3 of the Indo-Nepalese Extradition Treaty of 1963);

iii) religious offences.

The principle of non-extradition of political offenders (see Chapter IV below) crystallised in the 19th century, a period of internal convulsions, when tolerant countries insisted on their right to shelter political refugees. At the same time, it is not easy to define a 'political crime'. Different criteria have been adopted:-

a) The motive of the crime;

b) Circumstances of its commission;

c) that it embraces specific offences only, e.g. treason or attempted treason; the test followed in the English cases,[1] that there must be two parties striving for political control in the State where the offence is committed, the offence being committed in pursuance of that goal, thereby excluding an anarchist and terrorist acts from the category of 'political crimes'. In a recent English decision [2] the Court favoured an even more extended meaning, holding in effect

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1. Re Mennier (1894) 2 Q.B. 415 and Re Castioni (1891) 1 Q.B. 149.

2. R. v. Brixton Prison Governor, Ex Parte Kolezynski (1955) 1 Q.B. 540: (1955) 1 All E.R. 31. See also Tzu-Tsai Cheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204 (H.L.)

> that the offences committed in association with a political object or with a view to avoiding political persecution or prosecution for political defaults, are 'political crimes'.

International law leaves to the State of asylum the sovereign rights of deciding, according to the municipal law and practice, the question whether or not the offence which is the subject of a request for extradition is a political crime.

(11) Rule of Double Criminality

As regards the character of the crime, most States follow the rule of double criminality, i.e. it is a condition of the extradition that the crime is punishable according to the law both of the State of asylum and the requesting State. The application of the rule to peculiar circumstances came before the United States Supreme Court in 1933.[1] These proceedings were taken by the British authorities for the extradition of Jacob Factor on a charge of receiving in London money which he knew to have been fraudulently obtained. At the time extradition was applied for, Factor was residing in the State of Illinois, by the laws of which the offence charged was not an offence in the State of Illinois. It was held by theSupreme Court that this did not prevent extradition if according to the criminal law generally of the United States, the offence was punishable, otherwise extradition might fail merely because the fugitive offender would succeed in finding in the country of refuge some

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1. Factor v. Laubenheimer, 290 U.S. 276.

province in which the offence charged was not punishable. On this subject, see above, Chapter II, (9)(i), p.118.

(12) Principle or Rule of Speciality

A further principle sometimes applied is known as the principle of speciality (see above, p. 108), i.e. the requesting State is under a duty not to punish the offender for any other offence than that for which he was extradited. This principle is frequently embodied in treaties of extradition and is approved by the Supreme Court of United States, where treaties are law of the land without sanction of municipal law. In the United Kingdom, its application is a little uncertain.[1] The Extradition Act was held to prevail over a treaty of extradition with France embodying the speciality principle, and it was ruled that the accused could be tried there for an offence for which he was not extradited. Such is the case in India. The Rajasthan High Court [2] held that a person arrested and extradited to a native Indian State could be tried in that State for some other offence in addition to those mentioned in the warrant even though such offence is not an extraditable offence. It appears that India as the receiving country need not obey a speciality undertaking, though whether this would be expedient politically is another (and unresolved) question.

On the current position in India with regard to surrender, see further, above Chapter II (9)(f), at p.108.

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1. R. v. Corrigan (1931) 1 K.B. 527.

2. Nanka v. Government of Rajasthan, A.I.R. 1951 Rajasthan 153; Birma v. State, A.I.R. 1951 Rajasthan 127.

B. JUDICIAL INQUIRY

(1) Necessity of Judicial Intervention

As has been seen above, extradition is that process by which one State delivers up a person accused or convicted of a crime to another State within whose territorial jurisdiction the offence or crime was committed and which State asks for his surrender with a view to administer justice.[1] The surrender of a fugitive from foreign justice is a prerogative of the executive of the State. In absence of a treaty of extradition between the two States and the non-existence of municipal law on the subject, a State is not bound to surrender the fugitive under international law.[2] Extradition, as such, does not involve the execution or enforcement of law; and thus, it is an administrative measure confirming the executive decree of rendition of the demanding State and the judiciary of the requested State has no concern in principle whether the fugitive should be extradited or not.

But judicial inquiry now has become an integral part of extradition procedure and current practice is to grant extradition only if, according to the authorities of the requested State, the evidence furnished before it by the requesting State would be sufficient to justify committal for trial, if the offence had been committed within the jurisdiction of that State.

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1. J.B. Moore, Extradition, p.4.

2. Birma v. State, A.I.R. 1951 Rajasthan 127; Nanka v. Government of Rajasthan, A.I.R. 1951 Rajasthan 153.

Previously, some States like Cuba, Egypt and Ecuador considered extradition a pure administrative act,[1] but now the self-restraint by the Governments by way of careful examination of the case by the judiciary has in practice, if not in theory, shifted the notion from treating extradition as an administrative act to treating it as a judicial act and has thus saved the territorial State from an embarrassing situation where it had to refuse extradition in some cases - for different political reasons - and has saved the territorial State from straining its relations with the requesting State.[2] Therefore, it is customary in practically all States to whom a request has been made to hold some kind of judicial inquiry after the receipt of a request. Today, no Government surrenders any fugitive without judicial determination as to the identity of the accused and his involvement in the crime attributed to him, in addition to whether the offence is extraditable or not, political or non-political, within time or barred by time, whether there are provisions of law in the requesting State for observing the rule of speciality. The magistrate has also to observe the doctrine of double criminality, rule of double jeopardy or non bis in idem, and whether the extradition demand has an ulterior motive, i.e. is made bona fide or mala fide.[3] Under national statutes, the proceedings for extradition in the requested State fall into two categories, the executive on the one hand and the facultative or judicial on the other.

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1. R.C. Hingorani: The Indian Extradition Law, p.35.

2. R.C. Hingorani, ibid., p.35.

3. SeeSection 29 and 31 of the Indian Extradition Act, 1962.

(a) The Executive method

Under this system, a request is generally made by the Minister of Foreign Affairs on behalf of the President or the King, and is transmitted to the Minister of Justice, together with the relevant documents, containing proof or prima facie evidence showing the involvement of the fugitive in the commission of the alleged offence, and the Minister decides whether the requisition should be honoured or not and accordingly advises the President or the King who, in turn, has the final authority to grant or withhold extradition. The House of Lords held, in Atkinson's case,[1] that:

> "There is however, a complete discretion in extradition cases in the Secretary of State and it will be for him to decide whether in all the circumstances the appellant should or should not be surrendered."

Lord Morris in his judgment, placed reliance upon Connelly v. Director of Prosecutions.[2]

The English Courts [3] have held that 'even if the court orders extradition, the Home Secretary can refuse to implement its order'. Under the Irish Extradition Act, 1965, the Minister of Justice is given power to refuse to permit the surrender on grounds like those on which the High Court can interfere.[4] The Supreme Court of India has held,[5] that:

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1. Atkinson v. U.S. Government (1969) 3 All E.R. 1317 at p.1327 (H.L.).
2. (1964) 2 All E.R. 401; (1964) A.C. 1254.
3. In the case of Zacharia v. Republic of Cyprus (1962) 2 All E.R. 438 (H.L.)
4. Paul O'Higgins, I.C.L.Q. 1966, Vol.15, 372 at p.393.
5. See Hans Muller's case, A.I.R. 1955, S.C. 367 at p.376.

> "The Government of India has an unfettered right to refuse to comply with a request made to it by a foreign Government even if there is a good case against the person whose extradition has been requested."

The Indian Extradition Act of 1962, by Section 29, empowers the Executive, namely the Central Government, to discharge a fugitive criminal if it appears to it that by reason of the trivial nature of the case, or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith, or in the interest of justice, or for political reasons or otherwise it is unjust or inexpedient to surrender or return the fugitive criminal. This provision is in substance akin to Section 10 as well as Section 19 of the Fugitive Offenders Act, 1881, with an important change, namely that, while the Fugitive Offenders Act empowers a superior court to discharge the fugitive, the present Indian Act vests powers in the Central Government. Under the Indian Extradition Act, 1903, read with the Fugitive Offenders Act, the Executive as well as the magistracy had powers to examine the matter. By virtue of Section 435 and 439 of the Indian Criminal Procedure Code, the High Court also could examine the order of the magistrate and after the coming into force of the Constitution of India matters arising under the 1903 and 1962 Act could be reviewed by the High Court under Articles 226 and 227, in addition to its revisional powers under Sections 435, 491, 561A and 439 of the Criminal Procedure Code, and by the Supreme Court in exercise of its original jurisdiction under Article 32 of the Constitution by a writ of habeas corpus and in exercise of its appellate powers under Article 136 against the judgment of the High Court.

The powers of the Central Government in India under

the 1962 Act to discharge a fugitive offender under Section 29 are a special feature of the Act. In addition to this power, concurrent power under Section 31 of the Act has been given to the Central Government, wherever, even after the decision and recommendation by the magistrate, it is empowered on the grounds mentioned in that Section to decline to extradite a fugitive criminal.

The powers under Section 29 are very wide and the Central Government may at any time order the stay of any proceedings pending before the magistrate on the grounds mentioned in that Section, and direct any warrant issued or endorsed under the Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged.

The Central Government has also been empowered with the discretion to appoint or not to appoint a magistrate to make an inquiry as provided under Section 5 of the Act. So after receiving the requisition it may or may not appoint a magistrate to make an inquiry and obviously it may decline to extradite the requested fugitive offender before any inquiry is made. Further, the Central Government, even after the recommendation made by the magistrate for the surrender of the fugitive to the requesting State, may refuse his extradition on grounds mentioned in that Section. The incorporation of these provisions giving vast powers to the Central Government do not leave arbitrary powers in the hands of the executive, but these are circumscribed by the provisions of the Act and demonstrate a good example of restraint by the executive on its own powers, and inspires our confidence in the Rule of Law. It will be observed that the Central Government has no power to extradite without a prior judicial enquiry.

The powers conferred by Section 29 of the present Act, upon the Central Government are far greater than the ones given to the Secretary of State under the English Fugitive

Offenders Act under which the ultimate authority to extradite rests in the Secretary of State. Recent British practice demonstrates this executive fiat. Two persons were imprisoned to await their extradition to Cyprus, one of the members of the Commonwealth. Their applications for habeas corpus and for relief under Section 10 of the Fugitive Offenders Act were dismissed by the House of Lords, but the Home Secretary, Mr.Butler, presumably on the authority of Section 6 of the Fugitive Offenders Act,intervened and their extradition to Cyprus was refused.[1] Practice under the Extradition Act, 1962, demonstrated parallel powers of the Executive.[2]

This administrative system of disposing of the request for extradition was highly developed in France in the early years of the last century, thoughFrance abandoned this system in 1929.[3] The method is still in operation in certain countries.[4] A halfway power is found in the laws of Panama, where though the power to grant or deny rests with the executive, the exercise of that power must be in keeping with the procedures established by the Courts, which require the matter to be referred to the Supreme Court for its decision on the merits. In addition to this, it provides for the right of the person claimed to move objections to his extradition.[5]

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1. 1962 Crim. L.R. 350.

2. J.N. Saxena, 'The Indian Extradition Act, 1962', 13 I.C.L.Q. 1964, pp. 116-138 at p.129.

3. The Law of Extradition of March 10, 1927, Art.11-18.

4. S.D. Bedi: Extradition in International Law and Practice, p.137, supra.

5. Panama Law of Extradition, No.44, November 22, 1930, Articles 9 and 11; Bedi, supra, p.137.

The law of Thailand is rather at the other extreme, which gives the Executive the upper hand in its decision against or in favour of the person claimed,[1] like the Indian Act of 1962.

(b) The Facultative or judicial method

The facultative or judicial method requires a decision of a Tribunal prior to compliance with a requisition for extradition. Under this system, no person can be extradited unless his case has been judicially adjudicated. This investigation must be done by an independent court: both the substantive and procedural law and the proceedings must be authorised by some municipal law of the requesting State; otherwise the extradition will be refused and the extradition proceedings will be quashed by the Courts.[2] These proceedings will in India be examined on the anvil of Articles 13, 14, 20 , 21 and 22 of the Constitution of India, as the power to surrender is subject to the fundamental consideration that the Constitution admits no executive prerogative to dispose of the liberty of the individual, whether a citizen of India or an alien.

The proceedings will be tested by the laws of the country particularly Chapter III of the Constitution which safeguards the Fundamental Rights. The general view and practice even in international law is that in the absence of a conventional or a legislative provision, there is no authority vested in any department of Government to seize a fugitive criminal and surrender him to a foreign power. There is thus no inherent executive discretion for grant of extradition where it may exist for refusal to

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1. Bedi, supra, p.137.

2. Birma v. State, A.I.R. 1951 Rajasthan 127; and Nanka v. Government of Rajasthan, A.I.R. 1951 Rajasthan 153.

extradite. The executive discretion is for refusal only and the facultative method operates both to surrender a fugitive to a foreign Government.[1] In the investigation by the Court, the involvement in the offence and the criminality of the fugitive must be proved according to the laws of the place where the fugitive was found. Under this system, therefore, extradition of persons cannot be granted without judicial authorisation; a sentence of the court favourable to the person claimed results in his immediate discharge. But an unfavourable decision does not bind the executive authority to grant extradition.[2] This system has been adopted by India,[3] Canada,[4] Iraq,[5] Israel,[6], the United Kingdom,[7] the United States of America,[8] and other Commonwealth countries, viz. Australia,[9] Tanzania,[10] as well as Ireland.[11]

In France, the traditional executive system of dealing with requests for extradition was abandoned in 1927, when provision was made for a judicial hearing and a judicial determination.[12]

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1. J.B. Moore, Extradition, p.21.
2. S.D. Bedi: Extradition in International Law and Practice, p.137,
3. The Indian Extradition Act, 1962, Chapter II.
4. Canada, Extradition Act, 1952, Articles 10-18.
5. Iraq Extradition Law of 1923, Articles 11-15.
6. Israel Extradition Law of 1954, Articles 9 & 10.
7. The United Kingdom Extradition Act of 1870, Articles 7-9.
8. The United States Criminal Code and Criminal Procedure, Section 651.
9. Extradition Acts, 1903-1950, Article 5.
10. Tanzania Extradition Act, 1965, Article 7.
11. The Irish Extradition Act, 1965, Section 11.
12. S.D. Bedi, op.cit., p.137.

As in the common law system, including Britain, the United States of America, and India, the judicial determination is final if the Court decides not to extradite, but not so if its decision is in favour of extradition.[1] Section 7(3) of the Indian Act of 1962 provides that if the magistrate is of opinion that a prima facie case has not been made out in support of the requisition of the foreign State or Commonwealth country, he shall discharge the fugitive criminal. That is the end of the whole matter and the order of the magistrate is final. If, on the contrary, the magistrate is of the opinion that a prima facie case is made out in in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government and shall forward, together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.[2]

Section 8 provides that if upon receipt of the report and statement under Section 7(4), the Central Government is of opinion that the fugitive criminal ought to be surrendered to the foreign State or Commonwealth country, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant. The hearing will be in accordance with the provisions of the Indian Criminal Procedure Code, 1898, and the magistrate will for the purpose of trial and bail enjoy the same powers as if the

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1. See Section 7(3)(4) and Section 8 of the Indian Extradition Act, 1962.

2. Section 7(4) of the Indian Extradition Act, 1962.

offence was committed within his jurisdiction,[1] subject, of course, to the supervisory jurisdiction of the High Court in exercise of its revisional powers under Sections 435 and 439 of the Code of Criminal Procedure, 1898. An Order passed in proceedings subsequent to arrest under the Act of 1903 when the magistrate was required to decide the matter raised by the accused was judicial and revisable by the High Court. Under the Orders passed by the magistrate or the Central Government when the accused was detained under the Extradition Act, 1903,[2] the court could inquire whether its somewhat detailed provisions had been complied with or not.[3] The position under the present Act is no less favourable to the fugitive.

The German Extradition Act of 1929,[4] on the other hand, makes the determination as to extradition an entirely judicial matter, for by that law not only is the judicial decision against extradition final but it is not subject to any discretion of the executive.

Between these two methods dealing with the requests for extradition indicated above, adopted by France and India and other common law system countries and Germany, Belgium has developed an intermediate system for handling applications for

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1. See Sections 9, 10 and 25 of the Indian Extradition Act, 1962, Appendix 1.

2. Also under the Act of 1962; See also Hans Muller's case.

3. Alan Geledhill: The Republic of India - The Development of its Laws and Constitution, p.177 - Hans Muller and Mubarak Ali's cases, supra.

4. See Articles 8, 28, 29(2) and 30. Bedi, op.cit., p.140, note 217.

extradition, which requires that, before extradition is granted, each case be submitted to judicial consideration, without making the judicial determination binding either for or against extradition. This system was introduced in 1833 and was modified by an Act of 18 March, 1874, now in force in Belgium.[1] The procedure under this statute is mostly similar to the procedure prescribed under the Indian Extradition Act. Under the Belgian Act, as under the Indian Act, on receiving the documents, and requisition from the requesting State, on which the application or request for extradition is based, the Minister of Justice may refuse extradition on his own authority (compare Section 5 of 1962 Act wherein the Central Government may <u>if it thinks fit</u>, issue an order to the magistrate). In both these cases, the executive can turn down the request when the case is clear on the face of documents. Under Belgian law, if the Minister does <u>not</u> reject the request, he may transmit the requisition to the Chambre de Conseil du Tribunal de Premiére Instance, of the foreigner's place of residence in Belgium or the place where he may have been found. The court thereupon issues a warrant for the arrest of the person concerned, who is arrested after the due notification. The Government also on the arrest of the foreigner, seeks the opinion, as soon as possible, of the court of Appeal, within whose jurisdiction the foreigner is arrested, and which fixes a date for hearing. The Public Prosecutor and the foreigner are heard, the hearing being public, unless it is conducted in chambers on the request of the fugitive offender. The court may assign a lawyer to assist him in the presentation of his objection. The opinion of the

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1. Bedi, <u>op.cit.</u>, p.140.

court along with the arguments are submitted within a fortnight from the date of the receipt of the documents to the Minister of Justice, who makes the final decision.[1] Under this system, there is no appeal against the advice of the lower court.[2] The same system is adopted in Mexico,[3] in Japan,[4] in Peru,[5] and in the Netherlands.[6] In the case of the Netherlands, when there is a question whether the alleged criminal is a Dutch national or not, the matter is referred for disposal to the Supreme Court which has jurisdiction over all the problems connected with nationality, and if it decides that the person concerned is a Dutch national, the accused will not be surrendered.[7] But the draft of the new constitution, prepared by the Ministry of the Interior assisted by eminent scholars in Constitutional Law, has recommended the extradition even of nationals.[8]

The majority of countries provide for a judicial hearing and determination, as a prerequisite to extradition, believing that this is essential to protect the individual against oppression

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1. Belgian Law of Extradition, 1874, Article 8. See Bedi, op.cit., p.140.

2. In re Ludic, decided on 22 November, 1948, A.D. 1948 Case No. 96, and in Re Paradiso, decided on 7 September, 1950: 17 Int. Law Reports, 1950, case No. 87.

3. Extradition Law of May, 1897, Articles 19-22.

4. Extradition Law of August 10, 1895, Articles 14-16.

5. Extradition Act of 23 October, 1888, Article 12.

6. Extradition Law of 6 April, 1875, as amended in July, 1964, Articles 11-15. See Bedi, op.cit., p.141.

7. Article 16, ibidem.

8. S.D. Bedi: Extradition in International Law and Practice, pp. 140-141.

But different countries have developed different practices with regard to the range of judicial inquiry which is essential before the person claimed is surrendered to the requesting State. The range of this inquiry is often restricted by the existing treaties and national codes in order to facilitate the giving of effect to the request. The court in the judicial inquiry has inter alia to see that the extradition proceedings have the sanction of law and are authorised by some positive law of the State.[1]

Apart from that there is no executive discretion to surrender a fugitive criminal to a foreign Government. Hence, 'it is not enough that statute or treaty does not deny the power to surrender, it must be found that statute or treaty confers the power';[2] Instances of extradition of fugitives under a treaty without giving the latter (outside the United States) a sanction of municipal law could not make extradition proceedings valid on the mere ground of past practice.[3]

The national laws of Latin American countries have explicit provisions to make it obligatory on the executive to refer any request for extradition to the Supreme Court of the Nation or some other tribunal, as the case may be, so that the court may decide after hearing the defendant and the prosecuting authorities whether or not the request should be granted.[4] There

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1. Birma v. State, A.I.R. 1951 Rajasthan 127; Nanka v. Government of Rajasthan, A.I.R. 1951 Rajasthan 153.

2. Valentine et al. v. United States ex rel. Neidecker (1936) 299 U.S.5.

3. Birma v. State, A.I.R. 1951 Rajasthan 127.

4. See Argentine Cr . P.C. Article 652; Chile Cr. P.C. Article - 692; Mexico, Extradition Law of 1897, Article 17; Peru Extradition Act of 1888, Article 12; Uruguay, Cadigo Penal of 1889, Article 12, Venezuela Cr. P.C. 1915, Article 319; See also Bedi op.cit., p.139, n.210.

are other States about which the same can be said, who have incorporated the Bill of Rights or Fundamental Rights in their Constitutions to protect individuals against arbitrary action of the executive.[1]

The Indian Act of 1962 is an admixture of all these principles or systems adopted by different countries. In the Indian Act the magisterial inquiry has been provided, but so far as the order of non-extradition is concerned, it being in favour of the fugitive has been made final, but the orders of the magistrate recommending the extradition is subject to the scrutiny of of superior courts, while it lies in the discretion of the Government to refuse or allow extradition. The provisions of Criminal Procedure Code have been made applicable. The fugitive has been granted a right to move the High Court and in the Indian Constitution, Fundamental Rights under Articles 13, 14, 20(1)(2)(3), 21 and 22 have been given alike to a citizen and non-citizen. Therefore, the proceedings may be tested on the anvil of these provisions.

The effect of those guarantees is, broadly, that no person can be deprived of his life, liberty and property without the authority of law, and therefore, it is the right of a person (including an alien) not to be handed over to a foreign jurisdiction unless it is authorised by the Extradition Act.[2] In other words, the Indian Extradition Act and the Constitution safeguard the interests of citizens and aliens by adopting the multi-method system mentioned above adopted by various States, and leave no

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1. e.g. The Constitution of Ireland, Article 40; Peaslee A.J.: Constitutions of Nations, Vol.II, The Hague, 1956; see Bedi, op.cit., p.139, n.211.

2. Birma v. State, A.I.R. 1951, Rajasthan 127, and Nanka v. Government of Rajasthan, A.I.R. 1951, Rajasthan 153.

lacuna for the arbitrary executive or magisterial action as one or the other is controlled by the provisions of the Extradition Act and above all the highest courts of the country have jurisdiction to correct the errors made by the magistracy and the executive and keep them in bounds and examine the legality, propriety and correctness of the orders passed by them for the extradition of the fugitive.

The laws of Finland,[1] Italy,[2] and Norway [3] dispensed with judicial inquiry if the person apprehended gives his consent to be extradited and admits that he is the person claimed. But in the absence of such consent and admission, there is full-fledged inquiry as under the Common Law System and the fugitive cannot be extradited if the Court, like Indian Law, decides in his favour, while if the Courts' decision is against him, his extradition rests on the discretion of the executive,[4] as under the Indian Extradition Act.

It seems that under the Indian law even if the fugitive gives his consent and the extradition proceedings are not authorised by some positive law or is against the provisions of the Extradition Act or infringes any provisions of the Constitution, the extradition will be refused, in spite of waiver or consent by the fugitive. No amount of consent can confer jurisdiction if the Court has none. Fundamental Rights cannot be waived,[5] and Article 21 of the Constitution lays down that 'no person shall be deprived of his life or personal liberty except according to

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1) Extradition Law of 1922, Articles 14-16.

2) Cr. P.C. of 1930, Articles 661 and 662.

3) Extradition Law of 1908, Articles 16-20. See also Bedi, op.cit., p.139, notes 212, 213, 214.

4) Bedi, op.cit., p.139.

5) Basheshar Nath v. I.T. Commissioner, A.I.R.1959 S.C.149 para 13.

procedure established by law' and this article is a Lex Scripta and mandate to the State including its executive, legislative judicial wings. If the procedure established by law to extradite a person has not been followed, which would include all the details including substantive and procedural law, he cannot be deprived of his liberty by illegally extraditing him. The superior courts will set him free if there is an infringement of Article 21, whatever amount of consent he may give.

Under Swiss law [1] if the person apprehended consents to extradition or raises no objection based upon the extradition law, a treaty or declaration of reciprocity, the Federal Council deals with the situation, otherwise the case goes before the Federal Tribunal, which decides whether or not there are grounds for examination as in the common law system. It may be mentioned here that there is a difference between an irregularity in procedure and its acquiescence, and a total absence of a procedure established by law. If there is no procedure established by law then the question of consent does not arise. The question of consent would only arise in those cases where the fugitive does not raise certain objections available to him, e.g. he has a right under the Indian law to submit objections or a written statement as provided under Section 7(4) of the 1962 Act or does not raise objections or take the grounds for non-extradition as provided under Sections 29 and 31 of the Indian Extradition Act of 1962 or does not approach the High Court for his discharge under Section 24 of the Act. In such cases, consent or waiver may operate against the fugitive - subject to the right of the

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1. Extradition Law of 1892, Articles 22-24. See Bedi, op.cit., p.139, note 15.

requested State to refuse extradition in spite of consent, provided the Central Government thinks that the extradition should be refused on one or more of the grounds for refusal mentioned in Sections 29 and 31. But if there is no law, no treaty given the force of law, no notification made under Section 3 or 12, as the case may be, the absence of law, and consequently of procedure established by law, would prevent the grant of extradition in spite of the consent of the fugitive. Further questions and complications would arise as to who is to decide whether there was a free consent.[1]

(c) Nature of judicial inquiry

According to well-established practice, an extradition hearing is not a trial. It is an inquiry by the magistracy whether there is a prima facie case of extraditing the fugitive offender. The magistracy has not to go into the niceties of the evidence to see whether the accused will be convicted in trial by the requesting State's courts; the magistrate has not to see whether there could be a case proving the guilt beyond reasonable doubt. He inquires into the fitness of the case having prima facie evidence as a case for extradition. The judicial proceedings, therefore, in cases of extradition cannot be regarded as penal in nature or as a penal measure,[2] process [3] or a trial,[4] since it does not entail all the niceties and

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1. R.C. Hingorani: The Indian Extradition Law, p.58; see also Bedi, op.cit., p.151, n.279.

2. In re Extradition of Carlos Canuto Lavalle (1923) 138 Fallos Sup. Ct. 274 Argentina.

3. In re Extradition of Sali Thalmessiger (1913) 117 Fallos Sup. Ct. 137, Argentina.

4. Charlton v. Kelley (1913) 229 U.S. 447.

technicalities of a criminal trial [1] and decides nothing about the innocence or guilt of the fugitive,[2] whereby any status is created, or which prevents the re-opening of the petition with new documents.[3] Its main purpose is to determine whether there is a prima facie case or reasonable grounds which warrant his being sent to the demanding State, where he is alleged to have committed the crime. Consequently, the jurisdiction of the inquiry by the magistrate while deciding whether extradition should be made or not is limited to the formal part of the request and does not concern itself with the merits of the case. This formal part is understood in the sense that a finding of guilt beyond reasonable doubt for the purposes of conviction of the fugitive offender is not to be the test for extradition. It is to be seen whether there is a prima facie case for extradition and whether other formalities, namely the warrant of arrest, other documents of equal import issued by the competent authority of the requesting State, giving full details of the guilt or the nature of the charge and the applicable articles of law of the requesting State under which it intends to prosecute the person claimed, have been performed or not, which formal requirements are the condition precedent for the lodging of a valid request for extradition. The civil law states generally accept this formal part of requisition for extradition. Some States insist on the

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1. Gluckman v. Henkels (1911) 221 U.S. 508-512; United States ex rel Klein v. Mulligan, 1931-32 A.D. (1931) Case No.173; Re Johnston and Shane, 1959, 27 Int. Law Reports, 1959, p.251.

2. Wright v. Henkel (1903) 190 U.S. 40; Charlton v. Kelly (1913) 229 U.S. 447; Grossberg v. Choquet (Choquette)(1924) 36 Que. K.B. 517; In re Chang (1947) A.D. 1947, Case No.69.

3. In re Carlos P.M. v. Jeanprost (1923) 22 Rev. de Der. Jur. 335 Sup. Ct. Chile; Bedi, op.cit., pp.141, 142, notes 225-230.

identity of the accused as an integral part of the investigation and this clause of identity has been included in numerous bi-partite as well as multi-partite treaties.[1]

(2) Evidence

(a) Standard of proof

The standard and degree of proof to establish a prima facie case against the offender have been laid down differently. Mere suspicion is not enough [2] but the evidence of the guilt beyond reasonable doubt leaving no doubt of guilt is not required for purposes of commitment [3] and must be such in its sufficiency as would justify a committal for trial if the crime has been committed in the State of asylum.[4] The same standrds would apply in cases of India, according to the Supreme Court dictum [5] wherein it was observed that the words 'sufficient grounds' to individual cases should be read in the light of the facts and circumstances disclosed in the case then before the court. The test is laid down by the English Court :[6]

> There should be strong and probable presumption against the fugitive before the court can hold him liable for extradition.

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1. See Bedi, op.cit., p.142, n.231-233.
2. Ex parte Cadby (1886) 26 N.B.R. p.452.
3. Ex parte Feinberg (1901) 4 C.C.C. 270; State of New York v. Wilby (alias Hume) (1944) 3 D.L.R. 693.
4. Re Pennsylvania and Levi (1897) 6 Que Q.B. 151; Ex parte Feimberg (1901) 4 C.C.C. 270; Re Danilhik (alias Stone) (1944) 3 W.W.R. 281.
5. R.G. Ruia v. State of Bombay, A.I.R. 1958 S.C. 106 para.20.
6. In Re Mourat Mehmet (1962) 1 All E.R.463.

The circumstances proved must be sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is probably guilty of the offence with which he is charged. Thus, the duty of the extradition judge is merely to consider whether the evidence is sufficient to warrant the committal of the fugitive. He may not go into the niceties of the evidence because that is the function and duty of the trial judge in the demanding State. But where the evidence is glaringly defective, lacking in proof of the ingredients of the offence which no reasonable person would believe and is insufficient to establish probable cause to believe that the fugitive is guilty of the offence charged, the extradion magistrate is not bound to recommend surrender of the fugitive. The evidence required at an extradition hearing, therefore, need not be the same in its weight as at the trial of the case in the requested State itself, yet it must be strong enough to establish a prima facie case, even when the judge may think that there may be possibilities of the accused being acquitted. The purpose of the inquiry is to acertain whether the fugitive is really involved in the offence he is charged with. If he is, he should recommend his extradition; if not, he should be discharged. This is only possible when the inquiry magistrate weighs the evidence of the prosecution and defence and strikes a reasonable balance to find out if there is any competent legal evidence, according to the law of the country of the requesting State.[1] Any other approach will be a mere empty formality and sham.

The House of Lords [2] has held in a different connection

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1. Collins v. Victor Loisel (1922) 259 U.S. 309 at pp.314-315.

2. In Fernandez v. Government of Singapore and Others (1971) 2 All E.R. 691 (H.L.)

that

> "The test of balance of probabilities is not an appropriate one to apply where..... the court has to determine under Section 4(1)(c) of the Fugitive Offenders Act - 1967 whether a person accused of an offence in a designated commonwealth country might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions. In that instance a lesser degree of likelihood is sufficient for- the court has to bear in mind the relative gravity of the consequences of its expectations being falsified either by permitting or refusing to return the fugitive. The Court might be justified in giving effect to the provisions of Section 4(1)(e) if an applicant has showed that there was 'a reasonable chance', or 'substantial grounds for thinking' or 'serious possibility' that he might be dealt within one of those ways." 1.

A 'balance of probabilities' will not serve when the question is whether the fugitive might be prejudiced in his eventual trial; similarly, it can hardly serve when the question is whether a case has been made out for his extradition.

The House of Lords said that it leads to confusion only to speak of balance of probabilities in the context of Section 4(1)(e) of 1967. It is a convenient and trite phrase to indicate the degree of certitude which the evidence might have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences.

About the 'strong and probable presumption' Lord Parker C.J. [2] observed that the Court (Divisional Bench) would look at the evidence before the magistrate to see whether it was

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1. Fernandez, ibid: Taken from headnote.
1. In Re Mourat Mehmat (1962) 1 All E.R. 463 at p.466, H,I, p.467A.

such as to justify him in finding that a strong and probable presumption that the fugitive has committed the offence (which presumption would give him jurisdiction to commit the fugitive to prison) had been made out; and whether evidence was such that no magistrate could find that a strong or probable presumption of guilt had been made out. Regarding the question whether in habeas corpus the Divisional Court could look into the evidence to see whether any offence was made out for committal, the court held that the matter was not fully argued in the case of Re Arton and it would be wrong to give a final ruling until a case emerges in which the matter is fully argued; but Lord Parker observed, 'that there is some power of review in the Court'. He observed that 'the matter was left open so far as Fugitive Offenders Act, 1881, is concerned,'[1] but that in a recent case,[2]

> "this court has taken on itself the right not only to look at the evidence which was before the magistrate, but also to consider whether any magistrate properly applying his mind to the question could reasonably come to the conclusion that a strong and reasonable presumption has been made out."

The Court further observed:

> "In the present case, I have come clearly to the conclusion that on a proper analysis of this evidence the matter was left in a high degree of doubt, and I do not think that any magistrate applying his mind to the question could come to the conclusion that a strong or probable presumption has been made out."

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1. In R. v. Vyner (1903) 68 J.P. 142; and also in R. v. Governor of Brixton Prison Ex parte Bidwell (1936) 3 All E.R. 1; (1937) 1 K.B. 305.

2. Re James, Q.B.D. (1961) No.4082, Lord Parker C.J., Ashworth and Widgery J J. decided on 28 November, 1961; The Times, 29 November, 1961.

In the case of Re James (supra), Lord Parker C.J. (Ashworth and Widgery JJ. concurring) observed:

> "It is said that at any rate there is some evidence before the Magistrate ... and that it is not for this court to weigh the evidence ... provided that there is evidence which a Magistrate could reasonably say that a strong or probable presumption had been shown, this court would not interfere, but on the evidence before the court in the present case I am quite unable to say that a magistrate should be able to decide that a strong or probable presumption has been raised. According to my judgment, the writ should issue in this case." [1]

Earlier Cave, J. [2] had observed:

> "The Magistrate has a discretion in each case, as to whether the evidence is or is not sufficient to justify committal"

the test being in the words of Lord Hewart C.J. in Perry's case:[3]

> "whether, if the offence has been committed in this country, there would have been evidence justifying the committal for trial."

Lord Russell C.J. [4] observed:

> "We are not a court of appeal on a question of fact from him (the Magistrate). We have only to see that he has such evidence before him as gave him authority and jurisdiction to commit."

Bigham J. again [5] observed:

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1. Re James, Q.B.D. 1961 No.4082 decided on 28 November, 1961; The Times, 29 November, 1961.

2. In Re Mennier (1894) 2 Q.B.D. 415 at p.418.

3. R. v. Governor of Brixton Prison Ex parte Perry, 1923 All E.R. 182.

4. In Re Arton No.(2) (1896) 1 Q.B. 509 at p.518.

5. In R. v. Governor of Holloway Prison, Re Siletti, 87 L.T. 332 at p.334, followed in R. v. Governor of Brixton Prison, Ex parte Perry (1923) All E.R. 182 at p.183, F, I per Lord Hewart C.J.

> "I think the only question that this court can entertain is the question of jurisdiction ... He (the accused) may also say that there was absolutely no evidence upon which the Magistrate could exercise his discretion as to whether he would commit or not."

In case of no evidence, the Magistrate has no jurisdiction to commit and on a writ petition in India the order of committal will certainly be set aside.

Even much earlier,[1] the Court of Exchequer held that (i) it was for the magistrate to decide whether the evidence was sufficient and the court was not a Court of Appeal from the magistrate's decision; (ii) (Kelly C.B. dubitante) the depositions taken before the first magistrate were receivable in evidence by the second magistrate.

As under the Extradition Act, so under the Fugitive Offenders Act the sufficiency of the evidence giving the magistrate jurisdiction to commit may be questioned in habeas corpus.[2]

(b) Evidence on Foreign Law

Expert evidence on the laws of colonies will be taken in England under Section 5 of the Fugitive Offenders Act. Colonial law is regarded as foreign law by English courts, and must be proved by expert evidence.

Regarding expert evidence, it has been held there: Rules which apply to proof of foreign law in England, apply equally to the proof of Colonial statutes which are subject to consideration in English Courts. The court is not bound to

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1. In Ex parte Huguet (1861-73) All E.R. 770 decided on 7, 8 June, 1873; 12 Cox C.C. 551, 29 L.T. 41.

2. Collins v. Smith (1909) C.L.R. 490; Re Mourat Mehmet (1962) 1 All E.R. 463.

accept the affidavit of an expert in law. Its duty is to interpret the relevant statutes itself, with such help as it might obtain from experts' testimony or affidavits.[1]

Therefore, it is a settled practice that an expert on local law should give evidence, either in the form of a deposition accompanying the warrant of arrest from the Dominion concerned or orally before the magistrate.

In the case of Re Shuter [2] it was held that:

> "the practice of receiving a copy of local law, statutes, penal laws and ordinances in evidence (Colonial Statutes Act 1907) was not satisfactory, since no one except an expert could be sure that the document was the latest version of local law."

About the proof of foreign law again Lord Parkers C.J., in Sadri's case [3] observed, following the earlier cases of Percival [4] and Re Shuter,[5] that it would have been a proper case to remit if the matter of defect of affidavit of the Aden Lawyer would have stood alone, but as in that case the documents were missing, the case was not remitted. But the court observed that, although the affidavit of the lawyer of Aden was defective in not saying whether or not the offences were punishable on indictment or information, the consequence would only be that the case could be remitted back to the magistrate for hearing further evidence - or the Divisional Court itself could take further evidence.

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1. R. v. Secretary of State for India in Council and Others, Ex parte Ezekiel (1941) 2 All E.R. 546.

2. (1959) 2 All E.R. 782 at p.786 A,B,C.

3. In R. v. Governor of Brixton Prison, Ex parte Sadri (1962) 3 All E.R. 747 at p. 749,D.

4. R. v. Governor of Brixton Prison, Ex parte Percival (1907) 1 Q.B.696.

5. Re Shuter(1959) 2 All E.R. 782.

Under the Indian Evidence Act, Section 45, foreign law is required to be proved by expert testimony.[1] The expert witness called by the Soviet Union in Tarasov's case admitted that he was no expert on Soviet law, and therefore, the magistrate found the evidence unacceptable.[2]

(c) Depositions, Affidavits and Statements

The magistrate hearing cases under the Act may take depositions, including affidavits and statements upon affirmation or oath under Section 10 of the Act of 1962. This can be done in the absence of the fugitive and this provision is an exception within Section 353 of the Indian Criminal Procedure Code. The depositions when properly authenticated are made admissible in evidence in proceedings under the Act, whether they are taken in respect of the particular charge or not. Copies of official certificates, or juridicial documents, stating facts may, if duly authenticated, be received in evidence in proceedings under the Act, but nothing in the Act is to authorise the reception of such depositions, copies, certificates or documents in evidence against a person upon his trial for an offence.[3] Depositions were not rendered inadmissible by reason of the fact that they did not purport to be taken for the purposes of the Act.[4] These

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1. Section 45, Indian Evidence Act, 1872: "when the Court has to form an opinion upon a point of foreign law, or science, or art, or as to identity of handwriting (or finger impressions) the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting (or finger impressions) are relevant facts. Such persons are called experts."

2. S.K. Agarwala: International Law, Indian Courts and Legislature, p.219.

3. In R. v. Governor of Brixton Prison, Ex parte Bidwell (1937) 1 K.B. 305; case under Section 29 of the Fugitive Offenders Act, 1881.

4. R. v. Secretary of State for Indian in Council & Others Ex parte Ezekiel (1941) 2 All E.R. 546.

English rulings seem appropriate to the scheme set up under the Indian Extradition Act.

The words indicating the procedure in subsections 1 to 3 of Section 7 of the Extradition Act, 1962, indicate that the magistrate will follow the provisions 'as nearly as may be' as if it was an ordinary trial before the magistrate. These words are not defined anywhere. They seem to impose limitation on the power of the magistrate.

Trials in India for offences committed in India are different from a magisterial inquiry in extradition proceedings. The magistrate need not hear or examine witnesses but can take their depositions [1] and admit in evidence statements recorded in foreign countries on oath as evidence. The power of magistrate (as we have seen) to refuse extradition is not limited. A careful adherence to procedural law is, therefore, highly desirable. The rules of procedure and evidence will 'as nearly as may be' be derived from Indian Criminal Procedure Code and Evidence Act respectively. The powers, limitation, and duties in extradition proceedings seem to be the same as those of the magistrate exercising powers under Criminal Procedure Code. His duty is to consider if the case is a fit one for committal according to Indian law, and to this end, he is bound to hear the evidence on behalf of the prisoner.

In different State practices there had been a conflict of judicial opinion regarding the nature and form of depositions and statements admissible in evidence inextradition proceedings.

There are authorities supporting each view and deposition statements were held admissible whether they are

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1. Section 10 of 1962 Act.

depositions or mere affidavits,[1] though in the later case of Re Danilhik, it was held that the admissibility of affidavits was in the discretion of the trial judge; whether or not they were taken in the absence of the accused without opportunity for cross-examination,[2] whether they were taken after or before the institution of the extradition proceedings,[3] whether or not they refer to the charge,[4] whether they take the form of questions and answers or of a re-write sworn to by the deponent,[5] or whether they were taken for the purposes of the proceedings or for some other purpose, such as a civil action,[6] and that depositions and statements should not be rejected on merely technical grounds.

The Court should approach extradition proceedings in a broad spirit, with the intention to suppress crime and for promotion of justice, for betterment of the society,[7] and to promote a good understanding between nations. To this end, the extra-

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1. Re Hoke (1886) 14 R.L.O.S. 92; Re O'Neil (1912) 17 B.C.R. 123; 2 W.W.R. 368; 5 D.L.R. 646; Grossberg v. Choquet (Choquette) (1924) 36 Que K.B. 517.

2. Re Danilhik (alias Stone) (1944) 3 W.W.R. 281; 82 C.C.C. 264; Re Parker (1890) 19 O.R. 612; R. v. Zossenheim (1903) 20 T.L.R. 121; Re Insull (1934) 2 D.L.R. 696.

3. Grossberg v. Choquet, supra; State of Washington v. Fletcher (1926) 3 D.L.R. 423, contra: Re. Ockerman (1898) 2 C.C.C. 262.

4. Re Weir (1887) 14 O.R. 389.

5. Re Kaslov (1950) 97 C.C.C. 150.

6. Re Staggs (No.2) (1912) 22 W.L.R. 853. 8 D.L.R. 284 says they are admissible: Auger v. Dubeau (1952) 21 O.R. 316: 111 C.C.C. 390 hold the contrary: see also R. v. Secretary of State for India, Ex parte Ezekiel (1941) 2 K.B. 169.

7. Bedi, op.cit., p.144.

dition proceedings should not be allowed to be made infructuous by not admitting legal evidence against an offender on technical grounds.[1]

But on the other side, extradition may permit serious inroads upon the liberty of an individual, where a judge is left in real doubt regarding the reliability of a statement, not being tested by cross-examination, taken after the institution of extradition proceedings, taken in another case, re-written, sworn to by the deponent, which may have a flavour of an adulterated version mixed with inaccuracies by default of the person writing not properly appreciating what the deponent meant, or not referring to a charge. In Hugnet's case,[2] the Court of Exchequer before which the question was raised in a case of proceedings under the Extradition Act, 1873, that the magistrate had no jurisdiction to act on a deposition not taken before himself and taken before some other magistrate, it was held that the deposition taken before the first magistrate was receivable by the second magistrate. In this case, Barons Martin and Pollock held that the evidence was admissible according to common law, and that it was not a case of incompetent evidence, particularly when the evidence before Mr. Vaughan was taken in the presence of the accused and the witness, M. de Monchairville was cross-examined by the applicant's counsel. On the other hand, Kelly C.B. observed:[3] 'The receiving of such evidence is certainly almost entirely contrary to practice'. The Magistrate's view seems to be correct as the witness may go away and never return.

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1. Gluckman v. Henkel (1911) 221 U.S. 508-512.
2. Ex parte Hugnet (1861-73) All E.R. 770 at p.772, C,D,E. 12 Cox C.C. 551, 29 L.T. 41 dated 7, 8, June, 1873.
3. Kelly C.B. dubitante dissenting, at p.771,I.

The rule requiring the production of prima facie evidence is first found in the Jay Treaty of 1794,[1] between Great Britain and the United States of America, and then in the Imperial Apprehension of Offenders Act, 1843 (6 & 7 Vic. C.34) which, applying to charges of treason and felony, provided that a prisoner could be remanded only 'upon such evidence of criminality as would justify his committal if the offence had been committed in that part of Her Majesty's dominions in which he was arrested.' In the Fugitive Offenders Act, it is provided by Section 5 in Part I for the rendition of offenders against whom evidence was produced which raised 'a strong or probable presumption that the fugitive committed the offence', whereas in Part II no such requirement was made.

The magistrate's jurisdiction and powers at the hearing of a request for extradition are the same 'as nearly as may be' as if the fugitive had been accused of an indictable offence within the ordinary jurisdiction of magistrate.[2] The phrase 'as nearly as may be' has reference to the sections of the Act which allow the reception of evidence of the authenticated depositions, warrants, certificates and other judicial documents from foreign authorities. These documents and depositions are by Section 10 of the Act of 1962 allowed to be produced and received in evidence even if they do not satisfy the particular rules of the Indian Evidence Act or the strict requirments of the Indian law relating to oaths.

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1. R.C. Hingorani: The Indian Extradition Law, p.62, n.54.

2. Section 7(1) of the Indian Extradition Act, 1962, Sections 9, 10, 14, 15 of the British Extradition Act of 1870 and Section 7(2) of the British Fugitive Offenders Act, 1967.

The law in England is similar.[1] The task of a magistrate and his powers in considering the evidence adduced before him on an application for extradition is precisely the same as that in proceedings leading to committal for trial for an offence committed within his jurisdiction. The magistrate may commit for surrender if the evidence is such that, if uncontradicted at the trial, a reasonably-minded jury might convict on it;[2] within this limit the magistrate has a good deal of discretion, but just as in committal proceedings where, if he has a doubt, that doubt ought to go in favour of committal and not in favour of discharge, so the same rule applies in extradition proceedings.[3] He is in no sense deciding the guilt or innocence in advance of the trial court, only whether there is a case to be answered. The magistrate's decision may be reviewed by a superior court in habeas corpus under Section 491 Criminal Procedure Code or Sections 435 and 439 Criminal Procedure Code, but his decision will be revised only if the courts consider that 'no magistrate, properly directing his mind to the question, could reasonably have felt satisfied that the evidence produced would justify committal.'[4] It is submitted that the formulation of English law is applicable to the Indian situation under Section 7(1) of the Indian Act of 1962.

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1. R. v. Zossenheim (1903) 20 T.L.R. 121, 67 J.P. 616; R. v. Bitterlin (1913) 48 L.J. 371.

2. Re Schtraks (1962) 2 All E.R. 176 at p.186 per Lord Parker C.J. Also Schtraks v. Government of Israel (1962) 3 All E.R. 529 at p.533 per Lord Reid (H.L.).

3. Ex parte Feinberg (1901) 4 Can. Crim. Cas. 270.

4. Re Schtraks, ibid.

The law of France and most other countries of the civil law system looks only to proof of identify of the accused and conformity of the request to the treaty and statutory requirements,[1] and they reject the production of evidence of guilt. The justification for this is, that extradition is a measure of international judicial assistance in restoring the fugitive to a jurisdiction with the best claim to try him, and it is no part of the function of the assisting authorities to enter upon questions which are the prerogatives of that jurisdiction.

Chapter III of the Indian Extradition Act does not require evidence of proof of guilt and the above may be one of the considerations amongst others, for that, viz. 'reciprocity' amongst Commonwealth countries with extradition arrangements having common systems of jurisprudence, neighbourliness and groupings in the past due to their geographical nearness. The argument for the imposition of a requirement of prima facie evidence of guilt on the grounds of distance and relative inconvenience is ruled out for the reason that it would equally apply to foreign States also. The main basis for dispensing with a prima facie case under Chapter III seems to be the sharing of common laws and institutions of like pattern, the same judicial system, similar rules of interpretation of laws, the same parliamentary system, similar procedural methods for enacting laws and a common basic conception of the law. The conception of crime is similar and consequently there is some trust in standards of justice where the rules of evidence and trials are similar. There is an added factor: the 'Principle of Reciprocity' amongst Commonwealth countries with extradition arrangements.

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1. S.D. Bedi: Extradition in International Law and Practice, p.142

Swiss laws like the Fugitive Offenders Act, 1881, require 'reasonable grounds for belief' that the person claimed has committed the offence. Austrian law stresses a mid-course for furnishing promptly or within a reasonable time such proof or presumption of guilt of which the accused is not able to clear himself on the spot. Some Latin American States require 'some degree of proof of facts raising a presumption of guilt' and others insist on evidence of guilt sufficient to commit for trial unless dispensed with by treaty.[1] Shearer suggests that this uniformity of treaty and municipal law among non-common law countries, reflects more generally the inquisitorial nature of criminal proceedings in these countries, as contrasted with the accusatorial approach employed by the common law, rather than any degree of confidence placed by them in the standards of justice applying in other countries.[2]

Therefore, it may be in order to put an end to all these controversies over statements, depositions and affidavits that Section 10 of the Indian Extradition Act of 1962 provided the procedure for receipt in evidence of exhibits, depositions and other documents and authentication thereof. The above conflicting authorities and their applicability have all become a matter of mere academic interest.

The House of Lords [3] had the occasion to consider the provisions of Section 11(1)(a) of the Fugitive Offenders Act, 1967, which are akin in form and substance to Section 10 of the

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1.I.A. Shearer: Extradition in International Law, p.157.

2.Shearer, ibid., p.158.

3.Fernandez v. Government of Singapore and others (1971) 2 All E.R. 691 at p.694 G.

Indian Extradition Act, 1962. Lord Diplock observed:[1]

> "Section 11 of the Act is dealing with the admissibility of documentary evidence on an application for the issue of a warrant for arrest under section 6 or for an order for return of the accused under section 7. Documents which fall within the descriptions in this section are admissible for these purposes, whether or not they would be admissible in proceedings on committal for trial for an indictable offence in England. Under section 11(1)(a) the evidence set out in the document must have been given on oath. In English Law there are two ways in which this may be done. It may be given in writing in the form of an affidavit by a witness. Here the affidavit itself constitutes the document in which that evidence is set out. Or it may be given orally by the witness in proceedings in a court or tribunal and what he said or the substance of it recorded in writing. Here the written record or deposition constitutes the document in which the evidence so given is set out.
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> "Even if para(a) of Section 11(1) stood alone, I should see no warrant for construing it so as to exclude affidavit evidence. But the matter is, in my opinion, put beyond any possibility of doubt by the express reference in sub-section 2(a) to the 'document containing or recording that evidence'. An affidavit is a document 'containing' evidence; a deposition is a document 'recording' evidence. Both are admissible under the Section. In this respect the Act of 1967 does not differ from the Fugitive Offenders Act, 1881, which it repeals and replaces. The admissibility of affidavit evidence was achieved in the earlier Act by the extended definition of 'deposition' so as to include 'any affidavit, affirmation or statement made upon oath'." It was also observed[2] that 'in order to render an affidavit admissible under sub-section (1)(a) it is unnecessary to identify any proceedings in the designated country in which the affidavit was sworn, provided that

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1. Fernandez, ibid., at p.694, j and p.695, a,b,c.

2. Fernandez, ibid., p.695, e, per Lord Diplock.

> it is duly certified and authenticated under sub-section 2(a)."

In other words, the House of Lords held that on the true construction of Section 11(1)(a) of the Fugitive Offenders Act, 1967, which provides that a document duly authenticated, which purports to set out evidence given on oath in specified countries, shall be admissible as evidence, in the United Kingdom, of matters stated therein and the word document embraces not only a deposition, as a document recording evidenve given on oath, but also an affidavit as a document containing evidence given on oath. Whereas Section 11(1)(b) provides for the admission in evidence of a duly authenticated document purporting to have been received in evidence, or to be a copy of such document in any proceedings in a designated country, no reference is made to proceedings in Section 11(1)(a). Accordingly to render an affidavit admissible under Section 11(1)(a) it is unnecessary to identify any proceedings in the designated country in which the affidavit was sworn, provided it has been duly certified and authenticated under Section 11(2)(a).

But regarding alleged falsified documents in the case of Ex parte Sadri,[1] Lord Parker C.J. (Gorman and Salmon J.J. agreeing with him) held (according to the headnote) that:

> "although when requsitioning countries are putting the machinery of the Fugitive Offenders Act, 1881, into force, it is not necessary for every exhibit to depositions taken in the foreign country, or authenticated copies of every exhibit, to be brought to this country, yet when the exhibit in question is the document which e.g. it is alleged was falsified, the dcoument itself or an authenticated copy of it or of the relevant extracts should be provided",

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1. R. v. Governor of Brixton Prison, Ex parte Sadri (1962) 3 All E.R. 747.

and,

> "... in the absence of the cash book itself or of authenticated copies of it, there was no admissible evidence which could satisfy the magistrate that the strong or probable presumption of guilt predicated by section 5 of the Act of 1881 was raised and, therefore, the case could not be sent back to the magistrate."

Lord Parker C.J., in a case of non-cross-examination of prosecution witnesses, Caldough's case,[1] held that it was not possible, in the case where on behalf of the accused, a Canadian citizen, on a charge of four counts in Vancouver, witnesses were not allowed to be cross-examined for the purposes of extradition proceedings, saying that they were ex parte proceedings, in the absence of evidence of Canadian law, to embark on a consideration whether what was done in Canada was proper under Canadian Law. It was also held that the provisions of the first sentence of Section 29 of the Fugitive Offenders Act, 1881,[2]

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1. R. v. Governor of Brixton Prison, ex parte Caldough (1961) 1 All E.R. 606. See headnote.

2. Section 2 of the Fugitive Offenders Act, 1881:
"A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such persons were present and accused of the offence before him. Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts may, if duly authenticated, be received in evidence in proceedings under this Act.
"Provided that nothing in this Act shall authorise the reception of any depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence."
Section 39:- "In this context, unless otherwise requires ... the expression 'deposition' includes any affidavit, affirmation, or statement made upon oath as above defined ..."

were independent of the Second sentence, and as the depositions were duly authenticated and were within the definition of depositions in Section 39 of the Act of 1881, they were admissible in evidence before the magistrate, who did not have to be satisfied that they were taken in accordance with a procedure normal in English magistrates' courts. This view was based upon Ezekiel's case, supra.[1] In Caldough's case, a New Zealand judgment [2] was cited as an authority for the proposition in which a similar proposition as in Caldough's case arose in connection with depositions taken in New South Wales, and in which the Chief Justice of New Zealand held that the proceedings in New South Wales were ex parte and that the fugitive had no right by his counsel to cross-examine the witnesses. The Court agreed with the Campbell judgment and the views expressed in it. The judgment of the Court turned on the question whether the first part of Section 29 of the Fugitive Offenders Act, 1881, was 'a part of Law of Canada' or not and unless and until it was shown that it is, it was not possible to embark on a consideration whether what was done in Canada was proper. The court then leaving this matter open, in this sense, held that sentences one and two of Section 29 of the 1881 Act were independent and the word 'such' before the word 'depositions' in the second sentence, having been significantly omitted, and therefore, as held in Ezekiel's case the first two sentences are wholly independent provisions. Sentence one permits the evidence or depositions to be taken in the absence of a person accused of an offence in like manner as he (Magistrate) might take the same if such person were present and

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1. R. v. Secretary of State for India, ex parte Ezekiel (1941) 2 All E.R. 546.

2. In Re Campbell (1935) N.Z.L.R. 352. See Page 168 above.

accused of the offence before him. It creates a sort of fiction. It may be pointed out that Section 10 of the Fugitive Offenders Act is an exception within Section 353 of the Indian Criminal Procedure Code, so that the taking of evidence otherwise than in the presence of the accused is (in the circumstances) conformable to Indian municipal law, and the Canadian problem would be answered unhesitatingly in India, where depositions taken in the absence of the accused in the requesting State are shown by Section 10 to be admissible in the Indian magistrate's court in proceedings for the extradition of the accused. Lord Parker in Caldough's case further held that it is impossible to say that the proceedings in Canada was contrary to natural justice' once one sees that affidavits are included in the definition of 'depositions', it is further to be remembered that by the proviso to Section 29 it is provided that none of this evidence shall be evidence against a person on his trial for the offence and the magistrate is only concerned to see that what is tendered in evidence consists of depositions as defined, and that they are duly authenticated.

In this connection, a very important question arises. Before 1950, the cases cited above (p. 219-223) were good law, but after the coming into force of the Constitution, Section 10 of the present 1962 India Act might be ultra vires because of the violation of principles of natural justice. May depositions taken against the person and behind his back, be used against him without cross-examination; can they be the basis of the deprivation of his liberty in extradition proceedings in infringement of Article 21, and will not all those English authorities be inapplicable? The answer seems to be in the negative, as extradition proceedings are not a trial of the

accused.

A situation is similar where a warrant is issued behind the back of the applicant after recording statements under Section 202 of the Criminal Procedure Code. Later on he appears, and in the trial, the prosecution witnesses are examined in his presence and he is given the opportunity to cross-examine them. But here, so far as Indian Courts are concerned, if they extradite him on such evidence taken ex parte and do not allow him to cross-examine either in the court of the requesting State or in India, this procedure would not be contrary to law and principles of natural justice and Article 21 would not be offended, as extradition proceedings are not his trial, and the English and Indian authorities would be applicable while interpreting Section 10 of the present Act. Further evidence may be produced before the magistrate.

(d) Fresh evidence

In Re Shalom Schtrak,[1] after the order of the Divisional Bench rejecting his application for a writ of habeas corpus was upheld by the House of Lords, he made a second application to the Division Bench for habeas corpus on the ground that there was fresh evidence, and that such new evidence was directed not merely to discredit the evidence of witnesses whose evidence was before the magistrate, but to show that the magistrate was imposed on, by the alleged fraudulent conduct of the Israeli Government. In this case, the fresh evidence put forward had been available at the time of the hearing before the House of

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1. Re Shalom Sctraks (No.2) (1962) 3 All E.R. 849, per Lord Parker C.J. at p.851 (Gorman and Salmon, J.J. agreeing with him).

Lords, but had not been looked into. The court held that assuming, without deciding, that fresh evidence could be adduced to show that the committal order had been obtained from the magistrate by fraud or collusion, the evidence sought to be adduced fell short of what was necessary for the interference of the Court, and the writ was refused again. Lord Parker C.J. observed at p.851:

> "It may be that the practice of the prosecution in Israel differs from ours; it may be that we would not promise that evidence would not be used against the person who was giving it and matters of that sort. But for my part, I am quite satisfied that no sufficient evidence is to be found here of fraud which would justify this court in interfering. I confess that I am influenced to some extent by the fact that, as I have said, all this evidence was available before the House of Lords, and the applicant by his advisers deliberately and for good reason refrained from suggesting that this evidence disclosed any fraud which would justify the Court in interfering."

It is plain that Re Shalom Schtraks (No.2) is not an authority for the proposition that fresh evidence will not be admitted in revision of the magistrate's order. It supports the position, which will certainly be followed in India, that in order to sustain an application for a writ of habeas corpus any evidence not before the magistrate, or tending to show that the magistrate was deceived must be of an unambiguously satisfactory character.

In Perry's case,[1] the High Court in habeas corpus refused to take fresh evidence regarding disproving the identity

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1. R. v. Governor of Brixton Prison, ex parte Perry (1924) 1 K.B. 455 at pp. 459, 460 per Lord Hewart C.J.

of the accused, and the argument was that the magistrate had the necessary jurisdiction to record this evidence. The court refused the application on the ground that it had no power to review the magistrate's decision and that it was only the Secretary of State who could do so. It seems it is hardly a proper view, for when a supervisory court in habeas corpus can look into the evidence to see if there is a prima facie case it can also take fresh evidence. If by doing so, the court comes to the conclusion that it was established that the evidence on which the committal was based was wrong, the accused should be released.

To say that the court is not entitled to hear new evidence, and that if it ought to be considered at all, it should be done by the Secretary of the State [1] or corresponding officer of the Executive, is with all the respect to the Court, an abdication of responsibility. The Court has adopted the practice that, when it considers that there was no evidence before the magistrate then it will interfere and release the prisoner in habeas corpus; it may treat an unwarranted remand as a nullity and adjudicate on the case; but where the magistrate's order for remand is to enable further evidence to be made available for his consideration, the court, it has been held, cannot treat such remand as a nullity.[2]

But in India under the New Act of 1962 no such difficulties are likely to arise because the Supreme Court has held that the scope of the writ under Articles 226 and 32 is much wider than the writs issued in England, also the powers of the

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1. R. v. Governor of Holloway Prison, ex parte Siletti (1902) 71 L.J.K.B. 935; 18 T.L.R. 771; L.R. 87 L.T. 332: (1900-3) All E.R. Rep. 609.
2. United States of America v. Gaynor (1905) A.C. 128 at p.138 (P.C.).

High Court for revision under Sections 435 and 439 of the Criminal Procedure Code are much wider. The court may examine the legality, propiety, correctness and regularity of the order and in such circumstances new evidence may be taken because the man, if he says he is a different person, or that the offence is not extraditable, his extradition is against the procedure established by law and the matter can be examined with new evidence, affidavits, sworn testimonies, etc. as his Fundamental Right of liberty is involved.

It may be noted that in the case of Ross Munro [1] it was held in England that Section 19 of the Extradition Act, 1870,[2] was not directed to procedure or evidence but to jurisdiction; accordingly provided the crimes with which the applicant was charged were the offences for which he was surrendered and returned, he could be committed for trial in accordance with the ordinary procedure and laws of England, and an order for prohibition to exclude further evidence tendered would be refused. This case is relevant when an accused is surrendered from a foreign country to England,as was done in this case by France for six offences of forgery. This is a case of additional evidence from a Banker in Zurich to the effect that the alleged

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1. R. v. Aubrey-Fletcher, Ex parte Ross Munro (1968) 1 All E.R. 99.

2. Section 19 of the Extradition Act, 1870:-
"where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in Sch.1 to this Act is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be provided by the facts on which the surrender is grounded."

forged documents had led to a large sum of money being handed to the prisoner. It was observed [1] that Section 19 of the 1870 Act does not seek to limit or prescribe the evidence which may be called at a criminal trial. The clear object of the section is to prevent, for example, a man who has been surrendered on a warrant charging him with forgery being tried in this country for a murder that he is alleged to have committed before his surrender. Lord Parker C.J. interpreting the words 'for such of the said crimes as may be provided by the facts on which the surrender is grounded', observed: 'the words are capable of being read and should be read as meaning such of the crimes as may be disclosed by the facts alleged in the extradition proceedings' and the additional evidence was sought to be produced in that connection.

It may be mentioned that both Lord Alverstone C.J. and Darling J. in Percival's case,[2] clearly took the view that it was possible to remit the case, or alternatively to receive further evidence in the High Court. It was true that they did not do so there but that was for particular reasons, one of which was that the alleged offence had occurred some five or six years earlier, and further the prisoner had endeavoured to make reparation and was now carrying an honest life. Thus in all the circumstances of that case, they did not exercise what they undoubtedly considered to be their inherent powers to remit. Lord Parker C.J. [3] observed in connection with evidence on law:

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1. Lord Salmon L.J. agreeing with Lord Parker, C.J.

2. R. v. Brixton Prison,(Governor) Ex parte Percival (1907) 1 K.B. 696.

3. In Re Shuter(1959) 2 All E.R. 782 at p.786B. (See above, p.210 on evidence on foreign law).

> "... but as counsel for the Governor of Brixton Prison quite rightly pointed out, no one except an expert can be sure that the statute or other document of which the printer's copy is tendered is the latest version of the local law. For all one knows, it may have been recently amended, and, as I am very anxious that there should be a settled practice in the matter, and a safe practice, it seems to me that in this and all cases there should be evidence from an expert on local law. Accordingly, in this case I would remit the matter to the chief magistrate for him to receive evidence as to that local law."

It was further laid down that this evidence may be either in the form of deposition which comes to England with the warrant, or by giving evidence before the magistrate in England.

Lord Alverston C.J.'s observations [1] on the subject may be usefully quoted:

> "In my opinion every person who comes and asks for an order for the delivery of the fugitive offender must be prepared with evidence that that condition of the statute has been fulfilled. That is a very important matter, and having regard to the fact that we are dealing with criminal law, we must apply the general principles of criminal law, and the prosecutor must make out his case. We are also dealing with a branch of criminal law which affects the liberty of the subject, and that condition should under the ordinary circumstances be fulfilled."

Regarding taking fresh evidence, Lord Parker C.J.[2] drew a distinction between remittal of cases on the question of jurisdiction of the magistrate based on the nature of the offences as in the cases of Percival and Re Shuter where the court had jurisdiction to remand the case in those circumstances; and the

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1. In Percival's case, supra, at p.706.

2. In Sadri's case - R. v. Governor Brixton Prison Ex parte Sadri (1962) 3 All E.R. 747.

case for sending back to the magistrate to hear evidence of guilt when no evidence of guilt had yet been tendered. In the latter category, the court had no jurisdiction to remit the case in habeas corpus and there was no precedent for it. Lord Parker seems to be of the view in cases of pure technicalities that fresh evidence may be allowed (for example, production of authenticated documents, copies already being there) but where there is no evidence to prove the fugitive's guilt, no remittance of the case back should be allowed for fresh evidence. Lord Hodson in the judgment of the House of Lords in Schtraks' case [1] observed:

> "I am of opinion that fresh evidence as to the guilt of the accused cannot properly be received."

The reason for this, apart from the reasoning given by the House of Lords in Schtraks case seems appropriately to have been put earlier by Lord Hewart C.J.:[2] that the court had no power to review the magistrate's decision on the ground put forward, the matter being one which could be dealt with by the Secretary of State under the Extradition Act, 1870, Section 11. This was a case where the order of committal of the accused by the magistrate for extradition to France on the charge of absconding in Paris with a diamond broach which had been entrusted to him for a prospective purchaser, there being evidence on which the magistrate was entitled to make an order of extradition. The argument was that the habeas corpus could be accepted on the ground that since the committal, fresh evidence, showing that he

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1. Schtraks v. Government of Israel (1962) 3 All E.R. 529, 550I (H.L.).

2. In R. v. Governor Brixton Prison Ex parte Perry (1923) All E.R. 182.

was not the man who had absconded with the brooch had been discovered. In this case, Sankey J.[1] held that 'if the facts are in accordance with the contention of the counsel in support of the rule, the applicant has his remedy with the Home Secretary, who will decide as to the fugitive's ultimate surrender'. In making such observations, he agreed with the statement of Hawkins J.[2] in his judgment that:

> "what follows afterwards shows that it is not the Magistrate who is to determine these matters, but it is the Home Secretary who is to determine whether or not ultimately the prisoner is to be sent abroad."

This was also observed in the Indian Supreme Court case of Hans Muller and was actually done in the case of Zacharia by the Home Secretary, who refused his extradition in spite of the habeas corpus application having been unsuccessful up to the House of Lords stage.

This is why in the Indian Extradition Act provisions have been made that in spite of the magistrate's judgment the representation can be sent through the magistrate to the Central Government and obviously to say, amongst other things, that new evidence has become available since the order of the magistrate recommending the extradition. Even otherwise courts would, under Articles 226 and 32, hear it as it is a question of the breach of Fundamental Rights where the High Courts and Supreme Court[3] can take fresh evidence.

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1. Ex parte Perry, ibid. at p.184.

2. In Re Castioni (1891) 1 Q.B. 149 at p.163.

3. Kachuni V. States of Madras & Kerala A.I.R. 1960 Sc 1080, Para 14.

(3) The Prima Facie Case

Insistence on production by the requesting State of a prima facie case against the fugitive goes back as far as 1564 in England, when the Spanish Ambassador asked for the surrender of Fleming charged with murder. The Privy Council examined the man and when he flatly denied the charge, the Lords thought good that he should remain in prison until some authentic matter be sent of his fault, and then the Queen is contended 'he shall be delivered'.[1] A proof of a prima facie case under Sections 8 and 9 of the 1962 Act is a condition precedent before an accused is extradited. The depositions and documents and affidavits and other evidence received from the foreign requesting State taken in the absence of the accused are admissible in evidence though they are an exception to the procedure laid down under Section 353 of the Criminal Procedure Code, which provides that evidence shall be taken in the presence of an accused. These are to form part of the evidence the magistrate has to consider, and he can only consider such evidence as put before him.[2] It has been explained that such depositions or statements made on oath and forming a part of extradition proceedings, need not have been taken in the presence of the accused.

There is no duty imposed on the magistrate to consider whether the depositions were taken according to the municipal rules of evidence;[3] it was observed:

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1. Paul O'Higgins: 'The History of Extradition in British Practice, 1174-1794', I.Y.B.I.A., vol.13, Part II, 1964, at pp. 78-115 at p.98.

2. In the matter of Elise Counhave, L.R.(1873) 8 Q.B.D. 410.

3. R. v. Governor of Brixton Prison Ex parte Thomson (1911) 2 K.B. 382.

> "It was not essential to the validity of the requsition or of the subsequent proceedings founded therein that the procedure before the French Magistrate should have been regular, and the absence of sworn depositions taken before the Magistrate did not entitle the accused person to be discharged."

In Jugal Kishore More's case [1] (supra) the Supreme Court of India also held that the Indian Courts would not examine the validity or regularity of foreign laws. The depositions, however, must prove that the prisoner committed the offence charged within the territorial jurisdiction of the State demanding his extradition.

The magistrate is bound to hear evidence on behalf of the accused especially such as to show that the offence is of a political nature or that the ulterior motive for the demand of his extradition is to prosecute him for an offence of a political nature or that the prosecution is barred by time, and allied matters, whether the prosecution amounts to persecution, for offences based in race, caste, colour, creed, freedom of speech and the press, political opinions and the like.

In the case of Zossenheim [2] it was observed:

> "A Magistrate has to consider all the defence evidence before he decides the question of committal. The prisoner can therefore call such evidence as will help him to show that the offence charged is not an extradition offence or even to establish his alibi in addition to the other charges mentioned above but not to challenge the substance of the charge, otherwise the extradition proceedings will take the place of a trial itself."

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171.

2. R. v. Zossenheim (1903) 20 T.L.R. 121.

It has been established by the Privy Council[1] (but not in a case from India) that the order for committal to await surrender should be made by the magistrate who actually heard the evidence in the case, and decides that the prisoner should be surrendered or should be discharged, as he has seen the demeanour of the witnesses produced before him, which advantage the Central Government or the other magistrate would not have.

It is not enough to prove vague and general charges against the prisoner, and the warrant of committal must state the date of the offence or offences charged; the warrant of committal should make clear the crime in respect of which the prisoner is committed,[2] and all these must comply with the term of the offences used in the extraditing State [3] under English Law or Indian Law as the case may be. A prima facie case will be considered with the reservations provided under Sections 29, 31, and 32 of the 1962 Act.

There is much to be said for the view that these reservations should be used sparingly and that the executive should not enter upon the role of the prophet without evidence - once the prima facie case is established, it must be sure of the balance of probabilities before refusing extradition. In the House of Lords, in the case of Fernandez,[4] interpreting Section 4(1) para.(c) of the Fugitive Offenders Act, 1967, Lord Diplock observed:

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1. Kossekechatko v. Attorney-General for Trinidad, L.R. (1932) A.C. 78 (P.C.).
2. In Re Arton (1896) 1 Q.B. 509.
3. R. v. Ashforth (1892) 8 T.L.R. 283: 36 Sol.jo 234.
4. Fernandez v. Government of Singapore and others (1971) 2 All E.R. 691 at p.697 B,C (H.L.)

> "The general policy of the Act, i.e. that persons against whom a prima facie case is established that they have committed a crime in a Commonwealth country should be returned to stand their trial there, is departed from if the return of a person who will not be detained or restricted for any of the reasons specified in para (c) is refused. But it is departed from only in one individual case. On the other hand, detention or restriction in his personal liberty, the consequence which the relevant words of that paragraph are intended to avert, is grave indeed to the individual fugitive concerned."

On a careful consideration of the transcript of the evidence including depositions and affidavits and of the preliminary inquiries held before the judicial authority of the requested State, the Central Government also should, if,the magistrate recommends the committal of the accused, determine if a prima facie case has been made out justifying the issuance of a warrant of surrender for the extradition of the accused because the surrender of the fugitive from justice is a political act [1] to be performed by the Executive.

In the case of Zacharia, even after the judgment of the House of Lords the extradition was refused by the Home Secretary. The Home Secretary's duty to consider a requisition for extradition is an administrative and not a judicial act or duty under the Extradition Act. The administrative discretion vested in him by the section of the Act, to order or not to order an apprehension of a fugitive, 'if he thinks fit' is exercised subjectively and his decision is not subject to judicial review.[2] In other words, the ultimate decision to

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1. State of West Bengal v. Jugal Kishore More, (supra) A.I.R. 1969 S.C. 1171.
2. R. v. Commissioner of Metropolitan Police Ex parte Savundranayagan - The Times, 22 March, 1955, p.7; 1955 Cr. L.R. 309.

surrender a delinquent is a political or administrative one and the courts have nothing to do with that as it belongs exclusively to the National Government.[1] Section 8 in trials under Chapter II of the Indian Extradition Act and Section 18 in cases of trials under Chapter III gives this discretion to the Central Government. The executive or the Central Government in India or other common law countries seldom disregard the recommendation made by the magistrate in extradition proceedings but it may do so whenever it finds reasons for a different interpretation of the law.[2]

The Supreme Court of India in the case of Alamohan Das[3] held that the order of commitment passed under Section 207A of the Criminal Procedure Code can only be interfered with where a substantial question of law arises on which the correctness of the commitment order may be effectively challenged. Where, for example, there is no evidence on which the order or commitment could be made, where there has been denial of a right to a fair trial, where there is reason to think because of failure to comply with the rules of procedure or conditions precedent to initiation of criminal proceedings, thereby ignoring the substantive law which constitutes the offence or misconception of evidence on matters of importance, grave injustice has resulted. The principles surely apply to warrants for committal and surrender in extradition proceedings, and more strongly where the responsibility rests finally with the executive than

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1. United States v. Rauscher 119 U.S. 407 at pp.412-414. See also Bedi, op.cit., p.148, f.n.263.

2. In Re Kilburz and Buchser, 19 Int. Law Reports, 1952, Case No.77.

3. Alamohan Das v. State of West Bengal, A.I.R. 1970, S.C. 863.

in jurisdictions where it rests with the judiciary.

The words used in section 9(1) of the India Extradition Act, 1962, are substantially the same as those used in Section 10 of the British Extradition Act, 1870, and the same words find place in the predecessor of the Fugitive Offenders Act, 1881, and the Apprehension of Offenders Act, 1943.

The words 'strong and probable presumption' find a place in Section 5 of the Act of 1881.[1]

The words 'strong and probable presumption' for the purposes of committal, it seems, in turn, were imported in the Act of 1881 from Section 25 of the British Indictable Offences Act, 1848, which provides: 'If the evidence given raises a strong or probable presumption of guilt of such accused party, then such justice or justices shall by his or their warrant commit him.' The Section was referred to in Bidwell's case [2] to explain how magistrates were to arrive at the decision whether or not there was a prima facie case on which they should commit for trial in cases heard in their ordinary jurisdiction.[3] The English Court has taken the same view more recently,[4] where the Chief Justice in the Schtraks case was prepared to accept that there was no real difference between the Extradition and the Fugitive Offenders Acts in this respect.[5]

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1. 44 and 45 Vic. C-69, Section 5.

2. Bidwell (1937) 1 K.B. 305 per Swift J. at p.314.

3. R.G. Ruia v. State of Bombay, A.I.R. 1958 S.C.106.

4. In Ex parte Frentlee (The Times, 19 March, 1952); In Ex parte Smith (1955) Crim. L.R. 375, and In Re Schtraks (1962) 2 All E.R. 176 per Lord Parker C.J.

5. In Re Schtraks (1962) 2 All E.R. 176 at p.186.

The analogy with ordinary criminal proceedings can be taken further. A magistrate holding an inquiry, either under Section 207A or 209 of the Indian Criminal Procedure Code, preparatory to commitment is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, to see whether there is sufficient evidence for commitment. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused; if there is some evidence on which a conviction may reasonably be based, he must commit him. The magistrate at that stage has no power to evaluate the evidence to satisfy himself of the guilt of the accused. The question before the magistrate at that stage is whether there is some credible evidence which would sustain a conviction.[1]

Under Section 7(3), (4) of the Indian Extradition Act, 1962, the language used is 'prima facie' case for committal. If a magistrate is satisfied that there is a prima facie case, he may commit him.[2] The Act does not define a "prima facie case." The Supreme Court has held that whether the committal is under Section 207A or 209 of the Indian Criminal Procedure Code, where there is a prima facie case for commitment the magistrate is not bound to enter into nice questions of probabilities of the case and discharge the accused if, in his opinion, on an appreciation of the whole evidence, and other material in the case, the charge against him was not proved.[3]

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1. Alamohan Das v. State of West Bengal, A.I.R. 1970 S.C. 863 at p.866 (supra).

2. Venkayya v. S.H.O. Ongole, 1972 Cr.L.J. 439 at p.443.

3. Tara Singh v. State, A.I.R. 1951 S.C. 441 at p.444: Bipat Gope v. State of Bihar, A.I.R. 1962 S.C. 1195.

But if the magistrate finds that the evidence against the accused is totally unworthy and that there are not sufficient grounds for commitment, he is bound to discharge the accused under Section 209 of the Criminal Procedure Code.[1] The test is not whether a conviction is probable but whether it is possible.[2] The test laid down is when there is no reasonable possibility of the witnesses being believed by any court, the accused must be discharged.[3] The analogy with Section 7 of the Act of 1962 is clear.

In Vyner,[4] it was held that a magistrate hearing a case under the Act must act only when there is a strong probable presumption that the person charged has committed the offence alleged against him.

In requiring as a condition under the Act, that the evidence against a fugitive offender should be such evidence as raises a strong probable presumption that the fugitive committed the offence charged, the Act means such evidence if it remained uncontroverted, at the trial, would entitle a reasonable jury to convict the alleged fugitive upon it.[5]

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1. Madho v. Satya Narain, A.I.R. 1953 All 36; Poosala v. Venkate-Swarlu Batchu, A.I.R. 1957 A.P. 972; Yashwant Hari v. State A.I.R. 1956 Bom. 500.

2. Krishnaji Babacharya v. State of Bombay, A.I.R. 1953 Bom. 33; Arunchalam Swami v. State of Bombay, A.I.R. 1956 Bom. 695; In re Arungha Mudaliar, A.I.R. 1948 Mad. 357.

3. Ganesh Das Maha Singh v. Kishan Chand and others, A.I.R. 1970 Punjab & Haryana 272.

4. R. v. Vyner (1904) 68 J.P. 142.

5. R. v. Governor of Brixton Prison, Ex parte Bidwell, (1937) 1 K.B. 305.

From the plethora of the case law the following propositions are established:-

(a) The magistrate holding the preliminary inquiry has to be satisfied that a prima facie case is made out against the accused.[1]

(b) He does not act while holding the inquiry merely as a post office or recording machine but he is entitled to sift and weigh the material on record for the purpose of ascertaining whether there is sufficient evidence for commitment, not for the purpose of ascertaining whether there is sufficient evidence for conviction.[2]

(c) Where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged, in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not.[3]

(d) In such cases, it would be legitimate for the High Court under its inherent powers to declare that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person.[4]

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1. Bipat Gope v. State of Bihar, A.I.R. 1962 S.C. 1195.
2. Venkayya v. S.H.O. Ongole, 1972 Cr. L.J. 439.
3. R.P. Kapur v. State of Punjab, A.I.R. 1960, S.C. 866.
4. R.P. Kapur, supra.

(e) Where allegations made against the accused person do constitute an offence alleged, but there is either no legal evidence adduced in support of the case, or evidence adduced clearly or manifestly fails to prove the charge, the magistrate would not commit the accused.[1]

(f) A distinction has to be borne in mind while committing by the magistrate between a case where there is no legal evidence or where there is evidence which is clearly or manifestly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question.[2]

(g) The distinction must always be drawn between absence of legal evidence and absence of reliable evidence. If it could be said with justification that there was no legal evidence at all in support of the prosecution's case, it may lead to the inference that the commitment was bad in that it was not based on any legal evidence at all. But on the other hand, where circumstances are relied upon to show that the evidence may perhaps not be believed, they do not lead to this inference that there is no legal evidence on record.[3]

In a case under Section 209 of the Indian Criminal Procedure Code the magistrate holding the preliminary inquiry has to be satisfied that a prima facie case is made out against the accused by evidence of witnesses entitled to a reasonable degree of credit and if he is not so satisfied, he is not to commit. Where, however, much can be said on both the sides, it would not

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1. R.P. Kapur, supra.

2. R.P. Kapur, supra.

3. Kushi Ram v. Hashim, A.I.R. 1959 S.C. 542.

be for the magistrate to decide which of the conflicting versions will find acceptance. If there is some evidence on which a conviction may reasonably be based, he must commit the case. Though the language of section 209 differs from that in section 207A Criminal Procedure Code, the magistrate has no jurisdiction to assess and evaluate the evidence before him for the purpose of seeing whether there is sufficient evidence for conviction, as he is not trying the case himself. Section 209 is an elaborate procedure in certain cases, whereas section 207A relates to action taken on private complaint. Section 207(6) lays down that the committing magistrate shall discharge an accused person if he is of opinion that the evidence and documents before him disclose 'no grounds for committing him for trial', whereas section 209 uses the words 'no sufficient grounds for committing the accused person for trial'. The language in the sections is different, but it is well settled that under neither of them has the magistrate jurisdiction to assess and evaluate the evidence before him for the purposes of seeing whether there is sufficient evidence for a conviction.[1]

(4) Discharge of a Fugitive under Section 29 of the 1962 Act

This Section confers very wide and overall powers in matter of extradition on the Central Government. The Central Government will use such powers where it appears that the contemplated proceedings will be conducted in a manner contrary to the rules of natural justice or where the good faith of the requesting Government is doubted, the offence is of a trivial nature, etc.

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1. Bipat Gope v. State of Bihar, A.I.R. 1962 S.C. 1195, supra.

It will cover cases on the grounds of mala fides in which a disproprionate sentence will be imposed on the accused.

In Savarkar's case,[1] it was held that where a person committed to prison to await his return under the Fugitive Offenders Act, 1881, applies unsuccessfully for a writ of habeas corpus and the grounds for his habeas corpus application contain matters material as grounds for the exercise of the power given by the Fugitive Offenders Act, 1881, Section 10, the Court of Appeal has original jurisdiction to entertain the application under Section 10 of the Act. In Savarkar's case [2] Vaughan Williams L.J. observed:

> "Section 10 is obviously futile and useless unless the superior court is to review the conclusions of the executive."

About 'triviality' of the offence, he observed:

> "A charge of collecting arms and conspiracy to murder is not trivial, and in my opinion, inasmuch as the seditious speeches incited, or are said to incite Indians of British India to make war on the King and violent resistance to authority and such speeches are alleged to have been followed by a conspiracy to murder, which is not an immaterial or improbable consequence of such speeches, I cannot say that the case against the prisoner even in respect of the speeches made so long ago, is trivial."

Fletcher Moulton J. also observed (at p.610,I):

> "To my mind it is impossible to suggest that this is a trivial case. We have nothing to do with the truth of the charges that have been put forward, but to say that what the applicant is accused of is a trivial offence is impossible. It is, in my judgment, a serious one."

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1. R. v. Governor of Brixton Prison, Ex parte Savarkar (1910) 2 K.B. 1056 C.A.: 1908-10 All E.R.603.

2. R. v. Governor of Brixton Prison, Ex parte Savarkar 1908-10 All E.R. 603 at p.609,I; 1910 2 K.B. 1056, supra.

Now times are changed and under Section 29 or 31(a) as the offences are of a political character, the extradition would be refused on this ground. A nationalist would like to liberate his country. Savarkar's was also an attempt to liberate his country, and could have been construed as a political offence.

In Savarkar's case, a question of the venue of the trial arose. Prima facie a fugitive should be tried in that part of Her Majesty's Dominions where the crime charged against him is alleged to have been committed and where Her Majesty's witnesses for the prosecution are, but where a person has resided in England for years before a charge is brought against him prima facie he should be tried in England.

It is submitted that the latter situation does not seem to be different from the first one, because the residence of the accused will be immaterial, it is the availability of the witnesses or the place of commission of the crime that is more important. Further suppose at the time of the Savarkar case, if India would have been a free foreign State, Section 31(a) of the Indian Act of 1962, and conversely Section 3(1) of the Extradition Act prohibiting the surrender of political offenders, would afford a ground for refusal from either side.

Section 10 of the Fugitive Offenders Act, 1881, is akin and similar, with some addition of grounds, to Section 29 of the Indian Extradition Act, 1962. The High Court under Article 226 of the Constitution, Sections 491, 435 or 439 of the Indian Criminal Procedure Code, and the Supreme Court under Article 32, or by special leave under Article 136, may review the order of the Central Government. This would amount to a final determination. If habeas corpus has been dismissed, the court might

in a special leave application still see whether there was a violation of Sections 29 and 31, and if there was any, the prisoner will be released because his extradition would be an infringement of Article 21.

The words 'or otherwise' occurring in this Section, i.e. 29 of the 1962 Act, corresponding to Section 10 of the Fugitive Offenders Act, 1881, leave it to the discretion of the Central Government to discharge the fugitive and to make the order in any case where, having regard to the distance and the facilities for communication and to all the circumstances of the case, it appears to the Central Government that too oppressive, or too severe a punishment will be inflicted on the return of the fugitive immediately.[1] The Waite's case was under Section 10 of the Fugitive Offenders Act, 1881, wherein the Court while interpreting punctuation and the words 'or otherwise' gave the dictum that the words 'or otherwise' give a very wide discretion to the court (under that Act) to refuse extradition if it appeared to the court to be oppressive or would result in infliction of greater punishment. In Henderson's case,[2] though the English court dismissed habeas corpus it observed:

> "An order under Section 10 of the Act would be made for the release of the fugitive only where it appeared that the contemplated proceedings although, perhaps, lawful by the law of the country concerned, would be conducted in a way contrary to natural justice, or if it appeared that the charges were trivial and that the punishment entailed in being returned was out of proportion to the gravity of the alleged offence. The difficulties which the

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1. R. v. Governor of Brixton Prison, Ex parte Waite, 1921, The Times, 22 February, quoted by Ohene-Djan, supra at p.183, and in Re Naranjan Singh (1961) 2 All E.R. 565 at p.567,H.

2. Henderson v. Secretary of State for Home Affairs (1950) 1 All E.R. 283, headnote (i) and at p.287 G, H.

> applicant would experience in presenting his defence, due to delay involved in the case, were matters for the consideration of the tribunal dealing with the case, and were factors which would be considered by the tribunal of any civilized country when dealing with a criminal matter."

This case clearly demonstrates the reluctance of the court to exercise its discretionary power under Section 10 of the Fugitive Offenders Act, 1881, to order release of Henderson, wanted in India for the offence of cheating committed under Section 420 (I.P.C.) in 1944, and during pendency of the inquiry having been repatriated to England in February, 1948, he was requisitioned. It was a case of delay in bringing the prosecution or asking for his return. Where delay in instituting proceedings results in the fugitive being prejudiced in his defence, this is a good ground for discharge.[1]

In Mubarak Ali's case,[2] he had been detained awaiting his return to India, on charges of forgery and fraud in accordance with the Fugitive Offenders Act, 1881, and in habeas corpus he invoked Section 10 of the Act on the ground that the charges were without substance, and the proceedings were based on political considerations only, and he would not get a fair and unbiased trial and it would be unjust and oppressive to order his return to India to face the charges. The court, rejecting the argument held that:[3]

> "it would be an impossible position for this Court to take up to say that they would not return a person for trial to a country which is a member of the

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1. R. v. Governor of Brixton Prison, Ex parte Campbell, 1956, The Times, 12 July, cited by Ohenedjan. 1.Lawrence, supra, p.185.

2. R. v. Governor of Brixton Prison, Ex parte Mubarak Ali Ahmed (1952) 1 All E.R. 1060.

3. Mubarak Ali Ahmed, ibid. at p.1063, E.f.

> Commonwealth and where it is known that courts of justice have been presided over by Indian judges for very many years, because we thought that the Court would not give him a fair trial. That would be an insult to the courts in India. It seems to me that the words of Section 10 of the Act of 1881, wide as they may be, we cannot say that it would be unjust or oppressive to return this man to India to take his trial."

In the case of Cheyne,[1] habeas corpus was applied for. The fugitive invoked Section 10 of the Fugitive Offenders Act, 1881. He was awaiting return to South Africa under that Act on offences of embezzlement of the employer's money; on his express promise to return the money, the employer had assisted him to come to the United Kingdom where he took a subsidiary job. Accepting the petition, the court said:

> "As his employers had made their intention known not to proceed against him criminally, and as he has consequently been allowed to leave South Africa openly and travel to England with his dependents, and as his being returned to South Africa would leave his dependents destitute with consequent recourse to public assistance, the case was one of the exceptional ones in which the Court might properly exercise its jurisdiction under Section 10 of the Fugitive Offenders Act, 1881, and order the offender to be discharged."[2]

Several grounds were indicated for the release of the offender in that case, viz.

a) willingness or convenience of the employer not to take criminal action against the accused, allowing him to leave the country openly; and

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1. R. v. Governor of Brixton Prison, Ex parte McCheyne (1951) T.L.R. 1155. referred in Re Naranjan Singh (1961) 2 All E.R. 565.

2. Ex parte McCheyne, ibid. (emphasis supplied)

b) leaving the dependents destitute in case of surrender;

c) consequent recourse to public assistance.

The Court, it seems, while interpreting the words 'or otherwise' under Section 10 (which principle would apply equally while interpreting the same words under Section 29 of the Indian Extradition Act, 1962) in this and following cases took a number of circumstances-extraneous matters-into consideration.

In Naranjan Singh's case,[1] the accused committed the offence of cheating under Section 420 of the Indian Penal Code in India about 10 years before; he came to England a year after the commission of the offence, where he lived openly in his true name, known to the police. He was arrested on 12 February, 1961, and committed to prison to await his return to India to face the charge. He applied for habeas corpus praying for relief under Section 10 of the Fugitive Offenders Act, 1881. The court held (according to the headnote),[2] that on the true construction of Section 10 of the Fugitive Offenders Act, 1881, which confers on a superior court a discretion where

> "by reason of the trivial nature of the case or by reason of the application for the return of the fugitive not being made in good faith in the interest of justice or otherwise, it would ... be unjust or oppressive or too severe a punishment to return the fugitive"

a wide discretion should be given to the words 'or otherwise' and accordingly apart from cases of a trivial nature, the court's discretion to discharge a fugitive can be exercised in any case where the return of the fugitive will be unjust, etc. and is not confined to cases where the application appears not to have been

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1. Re Naranjan Singh (1961) 2 All E.R. 565: (1962) 1 Q.B. 211.

2. Re Naranjan Singh, ibid. headnote.

'made in good faith'. In this case, a delay of 10 years was the special circumstance and this gap between the commission of offence and prosecution was regarded by the Court as undue delay which would prejudice the fugitive in his defence at the trial and the Court ordered his discharge under Section 10.

In Zacharia's case,[1] the accused applied under Section 10 of the Fugitive Offenders Act, 1881, whereunder he was committed to prison to await return to Cyprus for charges of murder and abduction. He contended that the requisition by the Cyprus Government was made for the purpose of revenge due to certain acts mentioned in the application for relief, and was not in good faith or in the interest of justice. Rejecting the application, the Court held the fact of the alleged offence being of a political nature is not a ground for discharge of the fugitive under Section 10 of the Act, though the Court could take into consideration that an application was made from motives of revenge, whether political or not. The House of Lords held that it would not be 'unjust or oppressive' to return Zacharia to Cyprus as it would be assumed in the absence of sufficient evidence to the contrary that proper precautions would be taken against his assassination and the Cyprus Court would be competent to discriminate between fabricated and true evidence. Moreover,[2] the gravity of the charges could be put in the balance against the danger to the appellant; accordingly, in the circumstances, the discretion exercised by the Divisional Bench in withholding relief under Section 10 was upheld. The grave allegation that the extradition claimed was not made in good faith and in the interest

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1. Zacharia v. Republic of Cyprus and another (1962) 2 All E.R. 438, headnote (i).

2. Lord Hodson at p.456, ibid.

of justice was held not to have been made out.

Lord Goddard C.J. had observed in Mubarak Ali:[1]

> "I am quite sure that in a proper case the court would apply the same rule with regard to applicants under the Fugitive Offenders Act, 1881, as it does under Section 3(1) of the Extradition Act of 1870. If it appeared that the offence with which the prisoner was charged was in effect, a political offence, no doubt this Court would refuse to return him."

But the House of Lords [2] dissented from the dictum of Lord Goddard in Mubarak Ali's case, and felt that 'political offences' could not be covered under Section 10 of the Fugitive Offenders Act.

Professor R.Y. Jennings had pointed out that it might be doubted whether that dictum is good law; it was in any case inconsistent with the inclusion of treason as an offence to which the Fugitive Offenders Act applies in accordance with Section 9.[3]

The Indian Extradition Act, therefore, not only adopted the provisions of the British Extradition Act, 1870, and of Fugitive Offenders Act, 1881, but enacted Sections 29 and 31 and made them applicable to trials both under Chapter II and III by virtue of Section 32. The controversy regarding Section 10 of the Fugitive Offenders Act now became academic so far as India was concerned. Under the new Act, Sections 29 and 31 apply

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1. In Re Government of India and Mubarak Ali Ahmed, supra (1952) 1 All E.R. 1060 at p.1063 B, C.

2. In Zacharia v. Republic of Cyprus & another (1962) 2 All E.R. 438, per Viscount Simonds at p.444, G-H. Lord Radcliffe at p.446-447, Lord Hodson at p.456F and Lord Devlin at p.460, Zacharia, ibid.

3. R.Y. Jennings, "The Commonwealth and International Law", B.Y.I.L., vol.30 (1953) 320-351 at p.326.

equally to trials under both Chapters. Chapter III has not yet been applied to any Commonwealth country, but it is available for application at any time.

In the case of Enahoro,[1] charged with treason, felony, conspiracy, etc. the fugitive applied under Section 10 of the Fugitive Offenders Act, 1881, saying that on an examination of all the circumstances of the case it would appear that the application of his return was not being made in good faith or in the interest of justice, because the application for his return was an attempt to exterminate a political party, The Action Group of Nigeria. The Court said that on the evidence it could not be said that the application was not made in good faith or it might result in the extermination of a political party; and that at the material time, no conditions existed in Nigeria, which would justify the Court in saying that it would be unjust or oppressive to return the applicant to Nigeria to stand trial. This decision was overturned by the House of Lords, on other grounds, but it demonstrates clearly that even though an application for the return of a fugitive to a Commonwealth country might be made in good faith, if conditions for the administration of impartial justice do not exist in the country, then the courts would refuse to return the fugitive.

Instances of such conditions may be existence of a state of emergency in the requesting country or Preventive Detention legislation as in India, which make it probable that the fugitive when returned might be detained without trial.

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1. R. v. Governor of Brixton Prison, Ex parte Enahoro, supra (1963) 2 All E.R. 477.

There are strong prospects of success of grounds mentioned in Section 29 of the Indian Extradition Act, 1962 (Section 10 of the Fugitive Offenders Act, 1881) if there are strong extraneous circumstances which militate against the impartial administration of justice in the requesting country. The accused has to raise all these extraordinary circumstances to bring his case within the purview of Section 29 of the 1962 Act and should also bear the burden of establishing this to the satisfaction of the Court; perhaps on the balance of probabilities. It is difficult to see how it could be otherwise.

The House of Lords [1] no doubt has recently held that the test of balance of probabilities is not an appropriate one to apply where the court is called upon to prophesy what will happen in future, for example, where the court has to determine under Section 4(1)(c) of the Fugitive Offenders Act, 1967, whether a person accused of an offence in a designated Commonwealth country might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions. In that instance, a lesser degree of likelihood is sufficient, for the court to bear in mind the relative gravity of the consequences of its expectation being falsified either by permitting or refusing to return the fugitive. The court would be justified in giving effect to the provisions of Section 4(1)(c) if the applicant showed that there was a 'reasonable chance' or 'substantial grounds for thinking' or 'a serious possibility' that he might be dealt with in one of those ways. (See p. 207 above).

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1. In Fernandez v. Government of Singapore and others (1971) 2 All E.R. 691 at p.697 and headnote F,G.

As for the actual allegation in that case (as we have seen) regarding 'political opinions', 'trivial nature of the offence' and the 'passage of time', the House of Lords observed that there were no merits in these contentions.[1]

In the judgment of the High Court,[2] which was affirmed by the House of Lords,[3] Lord Parker, C.J. had while considering the word 'might' in para.(c) of Section 4 of the Fugitive Offenders Act, 1967, observed that 'might' does not mean might as a matter of mere possibility but the applicant must satisfy the court that there are substantial grounds for thinking that he might be treated in one of those ways, viz. 'that he might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion,nationality or political opinions'. Under Section 29 such cases will be covered by the words 'or otherwise' read with Article 21 and the Fundamental Rights Chapter in the Constitution.

In the recent case of Teja,[4] regarding the argument about 'lapse of time', it was held by the Queen's Bench Division that he (Teja) could not invoke Section 8(3) of the 1967 Act,[5] because the passage of time since

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1. Fernandez v. Government of Singapore (1971) 2 All E.R. 691 at p.697, F.

2. In R. v. Governor of Pentonville Prison, Ex parte Fernandez (1971) 2 All E.R. 24.

3. In Fernandez v. Government of Singapore & Others (1971) 2 All E.R. 691.

4. In R. v. Governor of Pentonville Prison, Ex parte Teja (1971) 2 All E.R. 11, Headnote (vi) at p.13,b.

5. See also Section 31(b) of The Extradition Act, 1962: Appendix.

the alleged offences was not the result of any neglect on the part of the Indian Government but was mainly caused by Teja's conduct; also that there was no evidence that the judiciary was going to be prejudiced adversely to the applicant by reason of press comment and debates in Parliament there and, in any event, it was very doubtful whether the Court, in deciding whether it would be 'unjust or oppressive' to return him on that ground, was entitled to take into account as a part of the circumstances anything which did not flow from or was unconnected with the passage of time. The court further observed,[1] regarding the allegation of prosecution for a 'political opinion' that although Teja had been the centre of acute political controversy in India and attacks had been made on him in Parliament and elsewhere in complete disregard of the subjudice principle, there was no evidence that Teja had at any time entered the political arena; and accordingly, it could not be said that Teja was liable to prosecution for his political views. Giving the words 'political opinion' in Section 4(1)(b) and (c) of the 1967 Act, the widest possible interpretation those paragraphs had no application to the present case. About justice in Indian Courts, Lord Parker C.J. observed [2] that in England, occasions must be rare and extreme when comments in the press, however strong, could affect the mind of a judge sitting without a jury; something which in this country in a criminal case would only arise with the judges in the criminal division of Court of Appeal. That Court has said on more than one occasion that comment prior to the appeal,however

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1. R. v. Governor of Pentonville Prison, Ex parte Teja (1971) 2 All E.R. 11, headnote (v), at pp.12, 13.

2. R. v. Governor of Pentonville Prison, Ex parte Teja (1971) 2 All E.R. 11, headnote (v), at p.23.

adverse, unless it is an attack on the Court itself, does not constitute a contempt; for a judge, by his training, is uninfluenced by those matters. The Court strongly indicated that it did not think the High Court Judges sitting in Delhi or the Supreme Court if the case went on appeal to them, were going to be prejudiced against the applicant by reason of such publicity.

The further argument of the accused that he was a diplomatic accredited agent of a Costa Rican Government in London was repelled on the ground that he was not a member of the diplomatic staff, and it is impossible to say that, even if he was duly accredited in El Salvador, he was at the time of his arrest in England while proceeding to take up or return to his post in El Salvador. Immunity depended on mutual agreement between the countries concerned, and could not be claimed unilaterally by a representative of a foreign country who had not been accepted or received by the host country. Referring to Articles of the Vienna Convention of Diplomatic Relations, 1961, set out in Schedule I to the Act, the convention applied only to present missions and not to ad hoc missions such as that on which Teja was employed; and that in any event, Teja could not be said to be on a diplomatic mission since he was merely a commercial agent of the Costa Rican Government for the purpose of concluding a commercial contract and was not representing that Government in dealings with other States.

In Atkinson's case,[1] Lord Parker distinguished the case of Connelly [2] (see below f.n.2) fully accepting what was

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1. R. v. Brixton Prison Governor Ex parte Atkinson (1969) 2 All E.R. 1146.

2. Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401 (H.L.).

said in Connelly he was not satisfied that making those charges and that requisition for extradition was oppressive within the principle of Connelly. He also observed that it was no part of the function of the Court in extradition proceedings to concern itself with the question whether the charges laid were oppressive as having been founded on the same facts as a charge on which the applicant had previously been tried. Matters of 'oppression' are specifically dealt with by the provisions of the Fugitive Offenders Acts, 1881 and 1967. The superior courts in habeas corpus case do it, but the magistrate will only see if a prima facie case has been proved and he is not concerned to investigate whether the superior court might view the matter as oppressive.

IN Connelly's case,[1] it has been emphasised that the Courts have an inherent jurisdiction to protect defendants against oppression and against any abuse of their functions by the prosecuting authorities.[2] Lord Devlin summarised his views as follows:

> "The result of this will, I think, be as follows:- As a general rule a judge should stay an indictment (that is, order that it remain on the file not be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of the series of offences of the same or similar character as the offences charged in the previous indictment."

Lord Devlin[3] again went on:

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1. Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401: L.R. (1964) A.C. 1254.

2. Lord Devlin at p.446, C, in Connelly, ibid.

3. Lord Devlin at p.446, D, in Connelly, ibid.

> "He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 where it can properly be used, but a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule."

Section 29 of the Indian Act of 1962 took the idea of staying the proceedings on those various grounds from the Fugitive Offenders Act. Section 8(2) of the Fugitive Offenders Act, 1967, was based on the dictum of Connelly's case and Connelly case enunciates those principles regarding the prosecution being oppressive.

Connelly [1] lays down that the Court has discretion (outside the limits of a plea of autrefois acquit or autrefois convict or on issue estoppel) to stay, and in general should stay, a subsequent indictment containing charges founded on the same facts as those on which a previous indictment was based or forming or being part of a series of offences based on one incident. A plea of autrefois acquit was rejected, as the essential ingredients of offences (murder and robbery - he was formerly charged with one and then later charged with another) - were not the same, nor would the evidence necessary to sustain a charge of robbery suffice to prove a charge of which the appellant might have been found guilty on the first indictment, viz. murder or man-slaughter.

Under Section 10 of the British Extradition Act, 1870,

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1. Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401 (H.L.).

cases may emerge wherein during times of war there may be danger of the ships or planes being attacked by the enemy, or the travelling may be difficult and inconvenient for an old man - from troubles and disease - or who may not be able to bear the burden of journey in case of acquittal - it seems the application can be considered under the phrase 'oppressive', 'unjust' and 'or otherwise' but whether the offender should be extradited or not would depend upon the circumstances of each case.

Before the British Courts in Ezekiel's case, the question came for consideration in the extradition of the fugitive alleged to be guilty of offences under Sections 120-B and 420 of the Indian Penal Code whether he should inter alia be discharged or his return to India should be postponed on the grounds that the voyage to India would be dangerous. It was held that the circumstances of this case, including the existence of a State of War did not justify the Court in the exercise of its discretion under Section 10 of the 1870 Act in refusing to send the applicant back to India.[1]

Humphrey J.[2] observed:

> "It is said and it is said truly, that conditions at the present time are such that there is considerable danger and risk to be apprehended by any person who has to go to India from England. That is perfectly true. It applies to all such persons as in fact are, and to be in the ordinary course of their duties, whether military or civil, travelling between India and England at the present time. It will not apply to the applicant in any greater degree than it will apply to those other persons."

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1. R. v. Secretary of State for India in Council and Others Ex parte Ezekiel (1941) 2 All E.R. 546, headnote (v).

2. Humphrey J. at p.554,H, 555,A, in Ex parte Ezekiel, ibid.

It seems the argument overlooked the fact that military or civil duties are different matters with due protection given to those ships. So under Section 29 of the Indian Act such could well be a case of oppressive nature. Singleton J. regarding the plea based on danger to the health of the accused due to heat between May and November, without further reasoning passed this judgment on the report of Sir William Willcox, who said that it would not be dangerous to health provided the prisoner takes the usual precautions of a resident in India against the hot climate. The learned judge was not informed of conditions in gaol. Singleton J. also observed:[1]

> "The risk of going to India, as far as we know, are no greater than those of going to Canada, Australia or anywhere else. It is inconvenient and it is difficult. Both sides must be considered. For myself, I am satisfied that there is no reason why we should make an order either discharging the fugitive or ordering that he be not returned to India until after the expiration of some period."

If one voluntarily takes a risk, it is a different matter, but extradition demands not only custody but safe custody. Can a man lawfully be taken through a dacoit-infested area at the cost of his life? Tucker J. did not express any opinion on the above point. An Indian court in similar circumstances might well be more humane.

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1. Ex parte Ezekiel, ibid. at p.558, C,D.

(5) Discharge of the Fugitive if not Surrendered After Expiry of 2 Months under Section 24 of the Indian Extradition Act, 1962

This Section ('two months') is akin to Section 7 of the Fugitive Offenders Act, 1881 ('one month'). The question relevantly arises what is meant by the words 'sufficient cause' and 'may' occurring in both the Acts, as the Acts are in pari materia and the words therein will convey the same meaning.

In Re Shuter [1] the words came up for consideration. The circumstances were that on 15 July, 1959, the applicant was committed to prison to await his return to Kenya, charged with serious offences, and he was to be taken to Kenya by two police officers then on leave to return, one on the 12th and the other on the 16th August. An air passage for the two Kenyan officers was booked by B.O.A.C. on 21st July, but were cancelled by B.O.A.C. on 16th August and the applicant filed the application for discharge under Section 7 of 1881 Act (corresponding to Section 24 of the Indian Extradition Act, 1962) on the ground that he was not conveyed out of the United Kingdom within the time mentioned in the Section and the Court held (according to the headnote) that:- (i) on the true construction of Section 7 of the Fugitive Offenders Act, 1881, the word 'may' in its context should be read as 'shall', and therefore, Section 7 prohibited a fugitive being detained for more than a month unless 'sufficient cause' was shown to the contrary; and (ii) in considering whether 'sufficient cause' within the meaning of Section 7 was shown the Court was entitled to consider the reasonableness of what was being done; in the circumstances, the applicant was held not to have been detained unreasonably, particularly having regard to the

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1. Re Shuter(No.2) (1959) 3 All E.R. 480.

provisions of Section 6 of the Act of 1881 relating to escort of the accused; and the application for discharge was rejected.[1]

Interpreting the word 'may', Lord Parker C.J. observed:

> "... If the discretion is completely at large and 'may' means 'may', then it would be quite unnecessary to have the words 'unless sufficient cause is shown to the contrary'. Secondly, it is a case where what is sufficient cause in any particular case may well depend upon opinion and discretion. I think that the natural meaning is 'shall', unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody."

While interpreting the words 'sufficient cause shown to its contrary' under Section 7 of the 1881 Act, Lord Parker observed:[2]

> "For my part, I think that that interpretation of 'sufficient cause to the contrary' is too narrow. It seems to me that within those words can be brought matters of reasonableness ... one is entitled to take into account questions such as reasonableness in all the circumstances."

In this case, offences were serious and the delay was of a day or two which took time in making escort arrangements. Cases of illness of the accused, of the escort officers' illness, their death, or non-availability of trains, etc., for the destination, delay in signing the warrant by the Home Secretary, riots in the requested State making it impossible for the escort to take the accused, suspension of services so that the accused may not be taken to the port of embarkation for a few days; all these may cause a delay which may be 'reasonable'.

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1. Re Shuter (No.2), supra, p.483, I.

2. Ibid., at p.484C, F.

The departure of ship in the territorial waters of the requested State may be delayed for incomplete handling of the cargo or repairs. These may be instances of reasonable delay which may be 'sufficient causes to the contrary' within the meaning of Section 10 of the British Act, Section 3(1) of the 1903 Act, or Section 24 of the 1962 Act.

Again the matter came for consideration in the Enahoro case.[1] While reiterating the principles laid down in Shuter's case,[2] Lord Parker C.J. speaking for the court said:[3]

> "So far as is known, there has only been one other case under Section 7 of the Act, that is Re Shuter (No.2). The only materiality for this purpose of that decision [Shuter's case] is as to the meaning of those words 'may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody.' In the first place, the court came to a decision that the word 'may' should be interpreted as mandatory, so that, in the absence of sufficient cause being shown to the contrary, there was no further discretion; the fugitive had to be discharged. The second matter which is important is that it had been argued in that case that sufficient cause to the contrary must relate to something outside the control of the relevant authorities, or some strong or serious compelling reasons such as the serious illness of the fugitive. The Court, however, took the view that that interpretation was too narrow, and that the words 'unless sufficient cause is shown to the contrary' brought matters of reaaonableness under consideration."

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1. R. v. Brixton Prison (Governor) & Another Ex parte Enahoro (1963) 2 All E.R. 477 at p.479D.

2. Re Shuter(No.2) (1959) 3 All E.R. 481; (1960) 1 Q.B. 142.

3. R. v. Brixton Prison (Governor) ex parte Enahoro (1963) 2 All 477 at p.479D.

Lord Parker, after quoting more from his earlier judgment,[1] observed:[2]

> "Approaching the matter in that way, it would seem that the true effect of Section 7 is that, when a fugitive is found to have been detained for more than thirty days from the time of his committal, it is for the Secretary of State to account for the delay and that, unless he satisfies the Court that the detention in all the circumstances for the period exceeding thirty days is reasonable, then this Court should discharge the fugitive."

It was further observed:[3]

> "Section 7, as I have already said, is dealing with the liberty of the subject, and the prevention of his being detained for an unduly long period. After thirty days he must be discharged unless sufficient cause is shown. Section 6, on the other hand, so far as time is concerned, is not saying that some thing must happen after a certain time, but is saying that something shall not happen before a certain time has expired, namely, the person is to be allowed 15 days from a committal or the termination of habeas corpus proceedings before the Secretary of State can take any steps, and, for my part, I can see no reason for giving 'may' a mandatory meaning in that connection."

Thus in Section 7, the word 'may' was given mandatory meaning and under Section 6 only a directory meaning.

Section 24 of the 1962 Act makes provisions for the discharge of the person apprehended if not surrendered or returned within two months by the High Court, upon application made to it by or on behalf of the fugitive criminal, unless

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1. In Re Shuter (No.2), supra.

2. R. v. Brixton Prison Governor, Ex parte Enahoro (1963) 2 All E.R. 477 at p. 479,H,I.

3. R. v. Brixton Prison Governor, Ex parte Enahoro (1963) 2 All E.R. 477 at p. 481,F.

sufficient cause is shown to the contrary by the Central Government. If sufficient cause is not shown by the Central Government, the word 'may' will be interpreted as mandatory and the fugitive will be ordered to be discharged, and principles in the English cases mentioned above would apply.

(6) Fugitive Convicts

In regard to the procedure for extradition of suspects and convicted persons, whether convicted after hearing them or in their absence, foreign countries, whether civil-law countries or common-law countries generally make some distinctions. The laws of the civil law countries do not make any distinction between a suspected or convicted fugitive and so the courts of those requested States surrender the fugitive on the mere production of the original or an authenticated copy of the sentence or writ of condemnation issued by the competent court or judge of the requesting State without complaint.

On the contrary, the laws of common-law countries normally define 'fugitive' and 'fugitive criminal' as a convicted person, e.g. Section 2(f) and also 'conviction' and 'convicted' inSection 2(b) of the Indian Extraditinn Act,1962, corresponding to Section 26 of the British Extradition Act,1870, and the pattern in India seems to have been based on the British Act.[1]

A 'fugitive offender' has been defined in Section 26 of the British Extradition Act of 1870 similarly to Section

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1. See also Extradition Act of Canada of 1952, Section 2(a); Israel Extradition Act of 1952, Section 3; Tanzania Extradition Act of 1965, section 2(3); Iraq Extradition Act, 1923, Section 2.

2(1)(f) of the Indian Act, 1962, which reads:

> "(f) 'fugitive criminal' means an individual who is accused or convicted of an extradition offence committed within the jurisdiction of a foreign State or a Commonwealth country and is, or is suspected to be, in some part of India".

Who is a fugitive offender had been a subject matter of certain decisions before 1870.

The Jacobi & Hiller case,[1] was one of obtaining goods by false pretence, made in letters from Amsterdam, from a Mayence firm. On extradition being demanded by Germany for the goods received by the prisoners at Amsterdam, and sent by them to England, whither they went, it was argued in habeas corpus on behalf of the petitioners that the offence, if any, was committed in Holland and not in Germany. Repelling the argument, the Court held that even though the accused was not present in Germany at the time of the commission of the offence, they were held to have been there constructively; and the grounds for the decision can only be called "constructive presence".

The case of Jacobi & Hiller was followed by Nillins,[2] a case in which letters containing alleged false pretences were sent from Southampton to certain persons carrying on business in Germany, and consequently the goods were delivered, some in Germany to the prisoner's orders and some in England, and the prisoner sent to such persons, by post from Southampton, certain forged Bills of Exchange in payment for such goods. It was held that the offence was committed in Germany and the case fell

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1. R. v. Jacobi & Hiller (1881) 46 L.T. 595.

2. In R. v. Nillins (1884) 53 L.J. M.C. 157.

within Section 26 of the 1870 Act. Sir Edward Clarke has very severely criticised R. v. Nillins in his work,[1] where he says that the case was wrongly decided; how could the prisoner be held to be guilty of committing an offence in a place where he never had been physically present? But Clarke was wrong, because in the modern world, due to the complexity of business transactions, the vast extension of credit, the general widespread of paper currency, and other improvements in communications, it is all too easy for one to commit a crime in a foreign country where he was not physically present; and it would be idle to argue that when such criminals are apprehended, they should not be extradited to stand their trial in the country where the offence took its major effect.[2]

To the contrary is an American decision,[3] wherein in the absence of statutory definition of a 'fugitive offender', it was observed that:

> "a person cannot in any sense be deemed to have fled from the justice of a State in the dominion of whose territorial jurisdiction he has never been corporeally present since the commission of a crime therein. One who has never fled cannot be a fugitive from justice of a State in which he is only constructively present at the time he commits a crime."

This American decision can no longer be authority on the point as the British and the Indian Extradition Acts contain the definition of a 'fugitive offender' whereas no such statutory definition had been given in the American Law of Extradition. Lord Hewart C.J.[4] in Godfrey's case (at p.24) reiterated the

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1. E. Clarke upon Extradition, 3rd ed., p.225, quoted by Sankey, J. in R. v. Godfrey (1923) 1 K.B. 24 at pp.30, 31.

2. Ohene-Djan, supra, p.58.

3. In State v. Hall, 1884, 44 Am. State Reports, p.501.

4. In R. v. Godfrey (1923) 1 K.B. 24 at pp.27, 28.

principles mentioned above in the two English cases and while interpreting Section 26 of the British Extraditon Act, 1870, held that physical presence in the country at the time of the commission of the offence was not necessary, and escapement and fleeing from the penal consequences was the crux of the matter. He observed (at p.28) that the words are 'who is in' this country, not 'who has fled to this country'. On the lines of these English decision, in Mubarak Ali's case where the man was never physically present in India, he obtained goods in Karachi by telephone and letters, the Supreme Court of India held he was guilty of committing the offence in India.[1]

A 'fugitive' within the Fugitive Offenders Act, 1881, Section 2, is a person who is accused of committing an offence to which that part of the Act applies and who has left the territory in which the crime was committed. It is not necessary that he left to avoid arrest.[2] Humphrey J.[3] observed:

> "the two decisions of this court [4] decided upon the very familiar definition of the 'fugitive criminal' to be found in the Extradition Act 1870, are in point and support the view I have expressed."

The argument was that the applicant was not a fugitive within the meaning of the Fugitive Offenders Act, 1870, as it was not shown

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1. Mubarak Ali Ahmed v. State of Bombay, A.I.R. 1957 S.C. 857.

2. R. v. Secretary of State for India in Council and Others, Ex parte Ezekiel (1941) 2 All E.R. 546; so will be the case under 1962 Act of a fugitive who leaves India for a foreign country or Commonwealth country.

3. Humphrey J. in Ezekiel's case, ibid. at p.550,B.

4. R. v. Nillins (1884) 53 L.J.M.C. 157 and R. v. Godfrey (1923) 1 K.B. 24.

that he fled from India in order to avoid arrest. With the above reasoning, his argument was repelled by Humphrey J..

On such an objection, the same interpretation will be put on Section 2(f) of the 1962 Act. However, in cases of suspects and convicted fugitives, difference in the procedure arise and India is not an exception. In international practice in the cases of a suspect fugitive, such evidence must be produced before the magistrate in the extradition hearing, as would according to the law of the State of asylum, justify the committal of the fugitive for trial, if the crime had been committed in that State, i.e. a prima facie case must be established at the extradition hearing that the fugitive has committed the act charged in the foreign country.

In international practice the procedure followed in the proceedings relating to convicts are considerably simpler. In that case it is not necessary to go into the facts, nor would it appear necessary in the ordinary case of a criminal nature to show that the act charged is a crime in the State of asylum.[1] The judge must commit the fugitive for extradition if such evidence is produced as would, according to the law of the requested State, prove that he was so convicted.[2]

A convicted fugitive includes a person who has merely been sentenced,[3] one who has served a part of punishment,[4] and

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1. Re Pennsylvania and Levi (1897) 6 Que Q.B. 151.

2. British Extradition Act, 1870, Section 26. In Re. Caborn-Waterfield (1960) 2 All E.R. 178, affirmed in Athnassiadis v. Government of Greece (1969) 3 All E.R. 293.

3. Re Warner (1864) I C.L.J. 16.

4. R. v. Governor of Brixton Prison, Ex parte Van der Auwera (1907) 2 K.B. 157; R. v. Governor of Brixton Prison, Ex parte Calberla (1907) 2 K.B. 861.

one who has been paroled,[1] but does not include a person sentenced par contumace ('for contumacy' see Section 2(b) of the Act of 1962), i.e. in default of appearance, in cases of Britain or India.[2]

In the case of Caborn-Waterfield (see above, p. 269), the Court only considered Section 26 of the Extradition Act, discharged the accused on the ground that in the warrant of arrest and warrant of committal he was wrongly described as accused at the time of larceny whereas by 'judgment of the French Court Iteratif Defaut' he was a convicted person which was final sentence as after a judgment in his absence called 'jugement par defaut', i.e. judgment par contumace, which are the same - he applied for setting aside the judgment and for fresh trial, and he again absented himself, was tried and was sentenced, and according to French Law the judgment became final. The argument was considered that this judgment itself, 'par defaut' is in violation of principles of natural justice according to English law.

The judgment was based on a clause, Article VII(C) of a treaty between England and France in 1876 providing 'persons convicted by judgment in default or arrêt de contumace shall be in the matter of extradition considered as persons accused and, as such, surrendered.' It was argued that one under a 'jugement iteratif defaut' was not a person accused but convicted, and the person surrendered would go straight to prison to suffer sentence on him, which since such judgments would be a nullity,

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1. U.S. v. Allison (1914) 42 D.L.R. 595.

2. Re Coppin (1866) L.R. 2 Ch. App. 47; Re Caborn-Waterfield (1960) 2 All E.R. 178, affirmed in Athnassiadis v. Government of Greece (1969) 3 All E.R. 293 (H.L.) per Lord Delhorne

being in violation of the principles of natural justice, would not be in accordance with the criminal laws. The principle behind the Caborn-Waterfield decision (see above, p.269,279) that a warrant wrongly describing a fugitive as accused whereas in effect he was convicted could not found his extradition is certainly a principle which will commend itself to the Indian courts.

The question remains whether the English (and so Indian) courts are bound to commit the fugitive offender under Section 10 of the Extradition Act, 1870, on proof of a conviction or whether they can inquire into the question whether or not the conviction was secured by means which offended against English (and so Indian) notions of natural or substantive justice. In India, the answer will be in the negative. Apart from treaty agreement, the validity of the surrender can be challenged in English Courts also on the basis of natural and substantial justice as according to English law, an accused cannot be sentenced. Even the treaties would not make the surrender valid if they provide for such an eventuality, because

> "The treaty may be prayed in aid to limit the scope of the Extradition Act (see R. v. Wilson)[1] but not to extend it. Where there is any ambiguity in the Act it may be possible to look at the treaty in order to resolve the ambiguity."[2]

So the treaty cannot extend the scope of the Act and cannot legalise a surrender on the simple basis of an ex parte judgment merely because French law provides such a procedure and

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1. (1877) 3 Q.B.D. 42.

2. Re Caborn-Waterfield (1960) 2 All E.R. 178 at 183,C, per Salmon, J.

it has been agreed to in the treaty. If the treaty proposes to extend the provisions of the Act,that clause is void. In India any such unlikely eventuality will offend against Article 21 of the Constitution, and a judgment in violation of the principles of natural justice could not form the basis of a surrender. This helped to explain the definitions under Section 2(f) (see above) and that in Section 2(b), which runs:

> "(b) 'conviction and convicted' do not include or refer to a conviction which under foreign law is a conviction for contumacy but the term 'person accused' includes a person so convicted for contumacy."

As a result, it could scarcely happen that extradition would be sought in India of a fugitive who had been convicted par contumace without the full procedure applicable to fugitive suspects.

In cases falling within Chapter II of the Extradition Act, 1962, a prima facie case has to be established, but it is not so required in cases of falling within Chapter III, as there only the extradibility of the offence, the authenticity of the warrant and identity of the accused are to be proved. In any case, by virtue of the provisions of Section 32 of the Act, the provisions of Sections 29 and 31 have been made applicable to every foreign or Commonwealth country without any modification, notwithstanding anything contained to the contrary in Section 3 or Section 12 of the Act. Thus, the Central Government while notifying under those two sections or entering into treaties with foreign or Commonwealth countries cannot curtail its powers and duties under Sections 29 and 31 which apply equally to inquiries under both Chapters.

Thus, in trials under Chapter II in addition to the

prima facie case the inquiring magistrate, or the superior courts, have to see if the case falls within the reservations set out in Section 31, for if so, extradition must be refused. The Central Government has power to refuse extradition on any of the grounds mentioned in Sections 29 and 31 of the 1962 Act. In our present connection, it will be noted that accused persons, entitled to have a prima facie case established in front of the magistrate, may contend that the prosecution is no longer feasible (under Section 31(b)), a matter to which we shall return below. As the powers of the High Court and Supreme Court in India are wider under writ petitions under Articles 226, 227 and 32 and Article 136 respectively, these courts can interfere if fundamental rights are infringed. The Government may in cases militating against the Fundamental Rights of the fugitive, refuse extradition in its complete discretion, as discussed above.

(7) Evidence on Behalf of the Accused

Though the doctrine of prima facie case is a requirement over and above the proof of identity of the accused, extraditable nature of the offence, political character of the offence, place of committal of the offence, and acquisition of immunity for prosecution through lapse of time, or the rule of speciality, or doctrine of double criminality or non bis in idem; yet Section 31, before the magistrate and Sections 31 and 29 before the Central Government, and Section 31 positively and perhaps Section 29 in appropriate cases before the High Court and Supreme Court, give the accused a right to adduce evidence about his identity, the extraditable nature of the offence whether in the Second Schedule, or in a treaty or agreement. The court is bound to consider the evidence on these matters adduced by the

accused, as also the Central Government while exercising its discretion. On the same grounds, the accused is entitled to produce evidence of his nationality, where this is relevant, according to the treaty, as for example, Indo-Nepalese Treaty, Article 2 wherein it is provided that neither Government shall be bound in any case to surrender any person who is not a national of the country by whom the requisition has been made, except where such person is accused of having committed the offence specified in Clause (10) of Article 3 of the Treaty, i.e. desertion from the Armed Forces. The accused will also have a right to produce evidence,not to contradict the statements made by the prosecution, for that would be appropriate before the trial-judge in the requesting State, but to explain the statements of the witnesses of the requesting State.[1] The accused may produce evidence to establish that the crime is of a 'political nature' or 'to prove to the satisfaction of the magistrate or superior court or the Central Government that the requistion has in fact, been made with a view to try or punish him for an offence of a political character.'[2] The accused can take advantage, in his defence, of any statutory or treaty provisions or any constitutional provisions provided in the Indian Constitution, fundamental or otherwise, or of any rules having the force of law which place a limitation upon the right of the requested State to surrender him to a foreign State, e.g. if the offence is against freedom of press, speech, religion and the like, or that he has acquired exemption by lapse of time either in accordance with the Indian

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1. The Extradition of Mertz, 1931-1932 A.D., Case No.174, decided on 8 August, 1931.

2. Ramos v. Ziaz; Ramos v. Cruzata, 28 Int. Law Reports, p.351, decided on 18 December, 1959. See also The Indian Extradition Act, 1962, Section 31(a), Appendix 1½

Limitation Act or the law of limitation of the requesting State or that he has already been tried and acquitted for the same offence by the Courts of the requesting State, requested State or any other third State or States. The courts in extradition proceedings do not go into the merits of the demand, but must and will confine themselves to consideration of its formal parts as provided in the Act or the treaty and see that the formalities are complied with.[1] They cannot extend their inquiry into the existence of the crime, if such existence appears sufficiently from documents, nor examine whether the accused committed the crime for which his surrender is sought,[2] nor into the investigation of an alibi,[3] or the probabilities of justification of the act. Evidence, therefore, may not be led on behalf of the fugitive, such as would form part of any defence case based on these considerations.

In prima facie cases, the accused is not given an opportunity for defence. However should it be, e.g. the cases of a man in India at the time, is alleged to have committed murder in Pakistan, or where he is able to prove that an article allegedly stolen by him was, in fact, lawfully received by him as a gift, he should (in my submission) be allowed to prove this in addition to any relevant factors arising in Sections 29 and 31, on the lines of the Austrian Law of 1873 which requires that such evidence or grounds for suspicion be provided by the requesting State as cannot immediately be shown by the accused to be false,

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1. Hans Muller's case, supra, A.I.R. 1957 S.C. 367.

2. Wright v. Henkel (1903) 190 U.S. 40; Charlton v. Kelley (1913) 229 U.S. 447; Grossberg v. Choquet (Choquette) (1924) 36 Que K.B. 517; In Re Chang (1947) A.D. 1947, Case No.69.

3. Desmond, Sheriff et al. v. Eggers (1927) 18 F (2d) 503, 506.

i.e. the accused should be allowed to adduce exculpatory evidence that would manifestly result in his acquittal, if he were returned to the locus delicti for trial. To the same effect are Swedish laws, as indicated above (pp.199,202). This pattern of Austrian and Swedish law which is a compromise solution, may be taken as a pattern and applied by India in any treaties she may enter into.

Indeed, in the effective working of extradition there, are hindrances such as the want of sufficient extradition treaties; the rigidity of treaties in not allowing a sufficiently wide range of offences and excessive procedural requirements.

But, treaties apart, common sense would allow a fugitive to submit, when the prima facie case is established against him, that either there is no case to answer or that an obvious misunderstanding or error vitiates the case, and it is hard to suppose that the principle of disallowing the fugitive to present a defence before the magistrate would be extended in India so far as to impose extradition on a person who could easily prove an incontestable alibi, for example. In my submission, the point is somewhat analogous to the admitted requirement that the fugitive's identity must be established and the sufficiency of the warrant. The fugitive can contest both, and it seems reasonable that he should be allowed to challenge at least the fundamentals of the charge against him. This, in my submission, is an area of law remaining to be developed.

(8) Conditions to be Imposed upon the Requesting State

(i) Rule of Speciality

International law allows a requested State to impose conditions upon the requesting State, in conformity with its treaty, national municipal laws and usages, before a fugitive can be handed over to it. We have already (pp.108,186 above) discussed the rule of speciality in reference to Section 31(c) of the Indian Extradition Act, 1962. The rule, having a strongly mandatory character in that context, may figure more widely in the law relating to extradition from India. Under the Act of 1962 by virtue of Section 3(3)(c), the Central Government has been authorised and empowered to lay down conditions, qualifications and modifications and insert exceptions for implementing a treaty. These conditions may be inserted in the treaty or by a subsequent order, and thus, the above-mentioned principle of international law for imposition of conditions upon the requesting State has been given the sanction of municipal law by Section 3(3)(c).

Apart from this, the Central Government in consequence and pursuance of territorial supremacy is entitled to place certain conditions on the requesting State before it determines to comply with the request to surrender a fugitive found within the territory of India. The Central Government of any requested State, even where no mandatory rule of speciality incorporated in its own municipal law, may, before ordering the extradition of the fugitive offender, specifically ask the requesting State not to prosecute or punish such person for any act committed prior to his surrender other than that which motivated his extradition and a limitation like this (as seen earlier) is

known as the rule of speciality. In India, Section 31(c) has incorporated the rule in the municipal law. The reason for this incorporation may be that in some cases, the ad hoc undertaking given by the requesting State amounts to a mere pious obligation. The House of Lords in regard to an assurance pertaining to the rule of speciality, recently observed as under:[1]

> "An assurance such as that contained in an affidavit of the Attorney-General of the Republic [of Ireland] that the applicant would not be put on trial for charges other than those referred to in the warrant is properly admissible and can properly be taken into account under Section 2(2)(b) of the 1965 Act,[2] although in view of the uncertainty of future developments and the possibility of new political situations and exigencies arising, it should not be regarded as conclusive."

The House of Lords were not much exercised about the undertakings in regard to the rule of speciality. India, therefore, having special regard to Section 31(a) (Offences of a Political character) inserted in 1962, the rule of speciality in Section 31(c), and also conversely, enacted Section 21 to bind itself to all requesting States in this regard, and this was all in order to anticipate uncertainties on the scope of speciality. On the basis of reciprocity, India thus has every right to insist on speciality being a rule of the law of every requesting State before extradition is ordered in any case.

In Terasov's case,[3] the court enquired whether in the

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1. In Keane v. Governor of Brixton Prison (1971) 1 All E.R. 1163, 1168 (H.L.), headnote (ii)d, see p.1164 J to p.1165 e, per Lord Pearson.
2. The Backing of Warrants (Republic of Ireland) Act, 1965.
3. R.C. Hingorani, op.cit., p.56, n.41; S.K. Agarwala, op.cit., p.219; see also 57 I.J.I.L. (1963) vol.3, p.323; Bedi, op. cit., p.150, n.273.

and
requesting State's municipal laws such a clause existed,/as the reply was in the negative refused extradition; the necessity of the existence of this clause in the municipal laws of the requesting State is to remove the doubts. In case of changed political circumstances, that State will be taken to observe the rule of speciality without room for speculation as to its non-observance due to any political upheavals.

Explaining the meaning of the words 'another offence' the House of Lords in Keane's case,[1] observed that 'another offence means an offence which has been, or was alleged to have been already committed, and not an offence or alleged offence likely to arise from the appellant's future conduct'. In India, there is no difficulty about exacting the rule from other States, India herself being bound by this rule under Section 21. But, we may add, the principle or rule is generally adopted as implied when it is not stated in municipal law,[2] and may be strictly observed even in the absence of treaty.[3]

(ii) Re. -Extradition to a Third State

Another condition which the surrendering State may impose upon the requesting State before surrendering the fugitive is that, having obtained the extradition of the person sought, the requesting State will not re-extradite him to a third State without the consent of the surrendering State, or unless the accused has freely and voluntarily consented to being delivered to a

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1. Keane v. Governor, Brixton Prison (1971) 1 All E.R. 1163, headnote (ii) b.

2. United States v. Rauschur (1889) 119 U.S. 407.

3. In Re Dillaser 18 Int. Law Reports, 1952, Case No.83, decided on 30 July, 1952; Extradition (Germany-Czechoslovakia) Case, (1921) A.D., 1919-22, Case No.182, decided on 4 April, 1921.

third State, having been at liberty to leave the country after acquittal (within the fixed period) of the offence for which he was extradited, or after fully serving the sentence imposed upon him or having obtained a pardon.[1] Many treaties and municipal laws do not contain this condition. By implication (it might be argued) Section 31(c) provides it for India. The tendency towards such an inclusion is seen to be growing.[2]

However, these two limitations under international practice do not apply if there is an opportunity for the extradited person to quit the country to which he has been surrendered, and he fails to avail himself of it within the prescribed period, or has returned voluntarily to that territory after leaving it, and thus his trial for another offence or his re-extradition to a third State is allowed.

The length of this period depends either on the provisions of national codes or on the treaties. It varies from 48 hours to four months. A few treaties do not specify any limit while others have no such provision at all, but generally the period of 30 days or one month is incorporated in the various national statutes, treaties and draft comments.[4]

But so far as India is concerned, it faces no difficulties in view of Section 31(c) which makes it a condition precedent for the return of the fugitive by using the words 'shall not, until he has been restored or has had an opportunity of

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1. Bedi, op.cit., p.152.

2. Bedi, op.cit., p.153, n.285.

3. Bedi, op.cit., p.153, n.286.

4. Bedi, op.cit., p.153, n.287, 288, 290,291.

returning to India, be detained ...' This avoids all speculation. But the above-mentioned international practice would apply in the case of India if the fugitive 'has had an opportunity of returning to India' and yet he refuses to do so or does not want to avail himself of it.

(iii) Prohibition of Extraordinary or Specially Constituted Tribunals

In order to prevent the subjection of an extradited person to a trial before an extraordinary or specially constituted tribunal made for that purpose only or before a court having special powers in internal practice, the surrendering State may ask the requesting State to restrict prosecution of the extradited person to the courts and its procedure which normally have jurisdiction over the crime for which the extradition was granted, and also not to inflict any inhumane punishment,[1] (see below, p. 282).

In the Indian Extradition Act, there is as yet no mandatory provision to this effect, but if there are two procedures available, to prosecute and punish under a special law, or to proceed under the ordinary criminal procedure code, the first would (in the sense we have pursued here) be ultra vires of Articles 13, 14 of the Constitution read with Article 21 and the prospect of such a procedure before a special tribunal would be barred (as it would by Article 21 - an article giving a Fundamental right of trial by ordinary courts). So an extradition opposed to the spirit of these Articles could not be allowed and the Indian Courts or Central Government (as the case may be) will refuse extradition, or (as appropriate) lay down prospectively a condition in the treaty or by another order under Section 3(3)(c) to the effect that no extradited person may be subjected to

1. Bedi, op.cit., p.154.

trial by a specially constituted extraordinary tribunal. The Central Government may also impose a duty on the requesting State not to submit the extradited person to trial by such a court.

Likewise, as in India, no inhumane punishment can be inflicted - even flogging has been abolished (even forced labour is abolished by the Constitution), the Central Government can impose a condition on the requesting State not to inflict an inhumane punishment, which brings us to our next section.

(9) The death penalty, mutilation or inhumane punishments

In India, death penalties are inflicted in case of murders within Section 302 of the Indian Penal Code. India, in cases where the death penalty is imposed abroad for lesser crimes would surrender the criminal to the requesting State only subject to the general condition that if the offence for which his extradition is requested is punishable by any corporal punishment under the laws of the demanding State, while such punishment is not provided for in the law of the surrendering State or is not normally carried out, that penalty, if imposed, in the relevant case will be changed into fine or imprisonment, or both.

The reason for this is that under Article 21 no person can be deprived of his life and liberty except by the procedure established by law. The procedure established by law is the Extradition Act of 1962. The Second Schedule provides the offences mentioned in it, referring to the original sections. In none of the sections is the death penalty provided except Section 302. Likewise, in all the sections maximum penalty is provided with alternative penalties of a fine. No mutilation or corporal punishment is provided - only simple and rigorous imprisonment. Thus, the Second Schedule recognises not

only the doctrine of double criminality, but also that aspect which relates to the details of punishments for the crimes. In other words, no person can be liable to infliction for the same offence in a foreign country for a more severe punishment than he would suffer in the surrendering country, and if he is extradited without observing this limitation, that extradition is outside the procedure established by law.

Further, there will be cases wherein as between the death penalty for murder and for other offences, there is a discretion permitting the infliction of penalties which may be rigorous, or simple imprisonment or fine, with some flexibility ranging from until the rising of the court up to life imprisonment. If there is no such provision in the requesting State, the question will arise whether an undertaking should be taken that no more severe punishment will be inflicted than would be applicable in India, and the answer must be in the affirmative. If mutilation is possible, or other corporal punishments are mandatory there, no extradition will be granted to a foreign State, unless they undertake not to inflict a more severe punishment than is liable to be inflicted in India.

Difficulties may arise in cases of treaties where the offences have been mentioned by name, but the punishments differ as between the jurisdictions or territories. A treaty (as we have seen) can only limit the provisions of the Act. As observed in Waterfield's case,[1] the treaty may be prayed in aid to limit the scope of the Extradition Act, but not to extend it. So in treaties even though the offences may be identified upon

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1. Re Caborn-Waterfield (1960) 2 All E.R. 178, 183; see above, p. 271.

the basis of the facts proved, with an eye to the possible punishment the particular section of the Indian Penal Code, and the corresponding section in the individual State's law will be looked into, so that the requested State may know in advance if for that offence there is more severe punishment and if so, then it may require an undertaking not to inflict a more severe punishment; in case the requesting State refuses, extradition should be refused. This may also happen where mere discretion to inflict punishment between a maximum and minimum is provided.

Countries which have abolished death penalties and corporal punishments have often enacted their municipal laws prohibiting the surrender of fugitives to those countries in which death penalties or more severe, corporal and inhumane punishments are awarded. Extradition should never be granted unless they give an undertaking not to inflict more severe inhumane or corporal punishment on the fugitive. The requesting State shall agree to commute all those sentences (if applicable) to lesser sentences, not more severe than can be inflicted in India.

In my submission, Parliament should insert this provision as soon as possible in the Indian Extradition Act. The Indian Government, on the lines of the Argentine criminal law (Code of Criminal Procedure of Argentine, Article 667), should make a rule for the refusal of extradition if there is no discretion to commute a death sentence to imprisonment, or if the penalty is more severe than that laid down in the Indian Penal Code. The specific provision in the Indian Extradition Act, should (in my submission), be similar to Article 667 of the

Argentine Criminal Code,[1] and would read:

> "When, for the offence which prompts the demand of extradition there is a lighter punishment in the Republic of India, the accused shall not be extradited, save on condition that the Courts of the country which claims him shall impose on him the lighter punishment."

As suggested above, there may be offences for which the death penalty is provided under foreign laws, whereas it is not provided under Indian law. In such a case, the Central Government and the Courts of India in compliance with the national law, may decline to surrender the person demanded when the penalty that might be imposed on the accused may be death though the offence is an extraditable offence, or make extradition subject to the undertaking that the death penalty shall not be inflicted.

In internationnal practice, this has received further support from various treaties, arrangements and conventions which provide that if the offence in respect of which surrender of any person is requested may be punished by death under the the law of the requesting State, but may not be so punished under the law of the requested State, the surrender of that person in respect of that offence may be refused unless the requesting State gives as assurance that the death penalty shall not be inflicted upon the person extradited.[2] The matter is raised specifically in the next section.

Under Section 29, powers have been given to the Central Government in India by the act of 1962 that the words

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1. Bedi, op.cit., p.155, n.293.

2. Bedi, op.cit., p.155, n.294.

'oppressive', 'unjust','&not in interest of justice' or 'otherwise' may cover all possible cases, and the same result may be achieved and the Central Government can refuse the extradition in its discretion. Again Section 3(3)(c) of the Act generally clothes the Central Government, apart from the powers conferred on it in specific cases under Sections 31 and 29, and 32 of the Act with an overall power of refusal to surrender, even if the cases are not covered by the Section 29, 30 and 31, as has been held by the Supreme Court in Hans Muller's case. We have repeatedly referred to an instance where even after the judgment of the House of Lords upholding the rejection of the habeas corpus, on appeal the British Government declined to surrender Zacharia. But these conditions, whether applied generally under Section 3(3)(c), or arising in individual cases under Sections 29, 31 and 32, would not apply to crimes committed subsequently to the extradition,and if some offence is committed by the accused thereafter in the territory of the demanding State, the latter is entitled to deal with him as any violator of its laws, and this prospect does not figure in the judgment of the courts of the surrendering territory.

(10) The Death Penalty in Particular

We have seen that a requested State may place restrictions upon the requesting State with regard to the non-infliction of the death penalty on the fugitive before granting his extradition, if such penalty is contrary to the policy of the requested State in matters of penal law.

The national laws of the various countries which have abolished capital punishment usually provide that extradition shall not be granted when the offence forming the subject matter

of the request is punishable by the death penalty in the requesting State, unless such penalty shall not be inflicted or shall be commuted to a prison sentence by the requesting State.[1]

In compliance with their national statutes, the courts of the State of asylum may recommend to reject the application of the demanding State to surrender a fugitive if he is charged with a crime that carries a penalty of capital punishment under the legal system of that State. Relying thereon, the Supreme Federal Tribunal of Brazil granted extradition to Bolivia of one Cuellar in 1942,[2] subject to the condition that the death penalty would not be inflicted on the person extradited. Similarly, the Supreme Court of Argentine in 1956,[3] affirming the decision of the Lower Court to grant extradition of Rosa Candino de Pepe to Italy on the charge of felonious homicide, stipulated that extradition would be granted only on condition that in the event of her conviction she would not be subjected to capital punishment.[4]

So jealous are some States in the application of this principle that they refuse to grant permission for the transit of the alleged accused or convict through their territory if the action with which he is charged carries the death penalty in the State of request. Thus, Rumania rejected the application of the United States for the transit of one Nalbandian who was indicted in 1910 for murder in Massachusetts, and who was surrendered by Bulgaria, his native State, on the ground that the

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1. Bedi, op.cit., p.155, 194.
2. In re Cuellar, A.D. 1943-1945, Case No.72.
3. Re Candino de Pepe, 23 Int. Law Reports, 1956, pp.412-414.
4. Bedi, op.cit., p.194.

penalty for murder in the United States was death, and that Rumania would have been obliged to require that the United States should not impose the death penalty.[1]

Section 3(3)(c) of the Indian Extradition Act of 1962 empowers the Central Government to impose exceptions, conditions and qualifications by notification upon requesting States for implementation of their treaties as it may deem expedient. Under these powers, the Central Government may place restrictions upon the requesting State with regard to non-infliction of death penalty on the fugitive before granting the extradition. When a friendly State has entered into a treaty there is a presumption that there will be no breach of that treaty.[2] If so, the Central Government may, before any extradition, in a treaty made and given effect to as a municipal legislation, follow the procedure laid down in Section 3 of the Act, impose the conditions that the death penalty would not be inflicted in case of surrender, where according to Indian Penal Code or any other law in force in India, there is no death penalty for a particular offence, whereas it is in the requesting State. In India, seven years rigorous imprisonment is provided for rape, whereas in some countries, the punishment may be death. In some countries, there may still be the punishment of mutilation, e.g. in Saudi Arabia and Afghanistan (there, it is in abeyance), or penalty which is in some unpredictable cases, akin to death. The argument is that for the purpose of extradition, an offence should not only be 'extraditable' and punishable according to law in

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1. Bedi, op.cit., p.194, quoting Stowell and Munro, International Cases, Peace , Vol.1, London, 1916, pp.403-408.

2. Athanassiadis v. Government of Greece, 3 All E.R. 293 at p.298 G, per Lord Dilhorne.

force on the date of its commission, but the punishment also should not be more severe in the requesting State, as we saw in the last section of this thesis.

Converse cases can well arise when countries who have abolished death penalties and receive requisitions, say from India, for offence of murder committed there, those States would refuse extradition as, for the offence of murder, the death penalty can be imposed in India, unless India undertakes that no such penalty shall be inflicted or such penalty shall be commuted to prison sentence. Since to promise in advance that no higher penalty or no lower penalty than normally awarded by the local courts will be inflicted, i.e. in a given case or classes of case, is an anomalous interference with equality before the law, any such promise shall be given in general terms in a treaty, which, in turn, must be given effect in the municipal law by whatever method is permissible; otherwise, it would not be recognised as in the case of Oberbichler, 1938,[1] where the Court of criminal cassation in Italy refused to take notice of the condition of obligation taken by the executive of the State that no death penalty would be inflicted, on the ground that the condition was not made part of the municipal law.[2]

The same idea has received expression in certain bi-partite treaties as well as in some multipartite draft conventions, which definitely provide that, if the offence for which extradition is sought is punishable with death under the law of the applicant party, the requested party may make extradition contingent upon an undertaking that the death penalty will be

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1. In Re Oberbichler, 1933-1934, A.D. Case No.150, See below, p.290.

2. Bedi, op.cit., p.195.

commuted to another penalty.[1]

Under certain legal systems, the executive has power to conclude a treaty or make informal agreements with another State or States in its international relations which can bind that State internationally, but does not necessarily change the internal or domestic law of that State.[2] This would hardly be consonent with the Indian legal system. To make a treaty or convention effective internally, it is essential under those laws that it should be implemented into the statutory law of the country, otherwise the judicial authorities are not expected to give effect to the obligations arising from that treaty. Such a problem, with special reference to extradition, arose in the case of Oberbichler,[3] (referred to above) who was extradited from Austria on a charge of being implicated in the killing of two customs-officers, who caught him smuggling on the Austro-Italian frontier. The extradition was granted with the condition that the death penalty should in no case be inflicted. But the court of Criminal Cassation in Italy refused to take ny notice of this obligation undertaken by the executive and held that:

> "No limitation upon the application of the rule of law, even if derived from international relationship can be taken into consideration by the Judge unless it has been transmitted into a rule of municipal law."[4]

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1. Bedi, op.cit., p.195, notes 136, 137.

2. Bedi, op.cit., p.195.

3. In re Oberbichler, 1933-1934 A.D. Case No.150, decided on 9 August, 1934.

4. Bedi, op.cit., p.195.

But this difficulty would not arise in those cases where the treaty is entered into by the executive so that it binds that State internationally, and the entering of such a treaty is treated in the requesting State as binding on it without having been transmitted into a rule of municipal law. Such is the case in the United States,as we have already seen.

Hence, the requested State has every right either to deny extradition of the fugitive, if he is charged with an action punishable with the death penalty under the laws of the requesting State, but not under its own legal system, or to grant extradition upon the receipt of satisfactory assurances from the requesting State that it shall not pronounce the death penalty, and where a sentence of death has already been pronounced that it shall not be executed, but shall be commuted to imprisonment.[1] Such an undertaking was given in the extradition of the Greek National (Germany) Case,[2] where the Greek Government gave an undertaking to Germany not to carry out the death sentence pronounced by the Greek Court against one Mr. S., passed in his absence, but S. was to be tried as if the previous sentence has not been passed.

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1. Bedi, op.cit., p.195.

2. 22 Int. Law Reports, 1955, p.520.

CHAPTER IV

GROUNDS FOR UNCONDITIONAL REFUSAL OF EXTRADITION

(1) A. Political Offences and Extradition

(a) Extradition of 'political' criminals

Non-extradition for political offences is a fairly recent development in international law. Before the French Revolution, the term 'political offence' was known in both the theory and practice of the Law of Nations.[1] Stipulations were generally found in treaties for the extradition of political offenders. This practice was, furthermore, approved by writers, who did not recognise the right of subjects to revolt against authority.[2] The modern practice started with the French Revolution, which turned the European Continent against dynastic despotism; equality, liberty and fraternity were the ruling slogans and Article 120 of the French Constitution, 1793, provided asylum to political exiles from foreign countries. But this did not stop the extradition of political offenders immediately because, prior to that, it was he who was extradited and not the ordinary criminal, a practice quite contrary to that now generally accepted. In 1815, the Governor of Gibraltar surrendered a number of political fugitives to Spain,[3] and this created a storm of indignation in Parliament, where Sir James Mackintosh proclaimed the then

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1. Oppenheim: International Law, Vol.1, p.704.

2. Oppenheim: International Law, Vol.1, p.704; Garcia Mora: International Law and Asylum as a Human Right, Washington, D.C. 1968, pp.73-75.

3. R.C. Hingorani; The Indian Extradition Law, p.47.

radical principle that no nation ought to refuse asylum to political fugitives. In 1816, Lord Castlereagh declared that there could be no greater abuse of law than to allow it to be the instrument of inflicting punishment on foreigners committing political crimes.

However, with the development of liberal ideas in the 19th century, the right of the individual to revolt against despotism came to be recognised in the political thought of Western Europe.[1] A necessary corollary to this principle was that, if the individual had a right to revolt against tyranny, those who were unsuccessful in attempts to liberate people from tyranny should be granted asylum in the countries to which they had fled. It was in recognition of this principle that Napoleon in 1801 condemned the Senate of Hamburg for having surrendered to the British Government three Irishmen accused of political offences. 'Virtue and courage are the support of a State; servility and lowness are their ruin. You have violated the laws of hospitality in such a way that even the wandering tribes of the deserts would blush with shame.'[2] In 1833, Austria, Prussia and Russia made treaties, which remained in force for a generation, providing for extraditing or surrendering individuals who had committed the offences of high treason and lese majeste or had conspired against the safety of the throne and the legitimate Government or had taken part in revolt. In 1833 on the other hand, Belgium enacted an extradition law, prohibiting the surrender of political fugitives and in 1834, a treaty with France

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1. S.D. Bedi: Extradition in International Law and Practice, p.180, n.67.

2. Garcia Mora, op.cit., p.74.

recognised the principle of granting asylum to political offenders,[1] France, which until 1927, had no extradition law has, since 1831, in her extradition treaties with other powers, always included the principle of non-extradition of political criminals. The other powers followed gradually; even Russia gave way and since 1867, this principle is to be found in nearly all extradition treaties. It is due to the firm attitude of Great Britain, Switzerland, Belgium, France and United States that the principle has, as it were, conquered the world.

Non-extradition for political offences is in conformity with the writing of scholars and the practice of states, manifested in their treaties, The majority of bilateral treaties and all multilateral conventions and drafts, whether in mandatory or permissive form, exempt political offences from their operations, though the treaties concluded between the Eastern European countries among themselves do not make any specific provision regarding political offences - probably because of their identical ideology.[2] A great number of municipal laws also confirm that persons accused of political offences shall not be extradited.[3] Section 3 of the British Extradition Act, 1870, was made applicable to India by Order in Council until repealed by the Indian Act of 1962. In sub-section 1 it provided that, 'A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is of a political character'. This clause seems to have been deliberately omitted in the Fugitive Offenders Act, 1881, for the obvious

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1. R.C. Hingorani, op.cit., p.48; see also, Oppenheim: International Law, 8th ed., pp.704-707.

2. Extradition in International Law and Practice, Bedi, p.180, n.61, 62; p.181.

3. Bedi, op.cit., p.180.

reason that the law pertained to the rendition of fugitives from one Commonwealth country, colony, dependency or possession of Her Majesty to another and there could be no question of non-extradition of a political offender. In fact, Enahora was extradited, logically, to Nigeria under the Fugitive Offenders Act, 1881, notwithstanding the plea of the opposition party in the British Parliament that he was charged with a political crime, because that Act was still applicable to Nigeria after it became independent of the Colonial Office rule.

Strictly, the territorial state does not commit any international delinquency if it extradites a political offender. Therefore, unless there is a specific ban on the extradition of political offenders under municipal legislation, the State may extradite a political offender. In practice, however, political offenders are not extradited. As far back as 1851, even before the Extradition Act of 1870 was enacted, the British Prime Minister Palmerston, said that non-extradition of political offenders was the one rule which has been uniformly recognised and observed by all States, whether big or small.[1] The late Judge Lauterpacht has also said that: 'we are confronted with the impressive fact that in legislation of modern States, there are no principles so universally accepted and adopted as that of non-extradition of political offenders.'[2] A great number of municipal laws also confirm the proposition that persons accused of political offences shall not be extradited.

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1. The Indian Extradition Law; R.C. Hingorani, p.47, as cited by Neumann, "Neutral States and the Extradition of War Criminals" (1951) 45 A.J.I.L. 495 at p.505.

2. Lauterpacht:"The Law of Nations and Punishment of War Criminals 1944 B.Y.I.L. 58 at p.88.

Section 31(a) of the Indian Extradition Act, 1962, prohibits the surrender of a fugitive, if his custody is sought on a charge of an offence of a political character. Section 32 makes the provisions of Section 31 also applicable to the Commonwealth countries, and so what was not provided under the Fugitive Offenders Act, 1881 (cf. Enahoro's case, supra), has been provided by section 32.

However, some conventions specifically permit the extradition of fugitives in respect of political offences. The Convention for the Prevention and Punishment of Terrorism, 1937 (obviously to stop anarchy, terrorism and anarchism which was supposed not to be a political offence), the Genocide Convention of 1948 (to give a deterrent effect) and four Geneva Conventions of 1949 (to all of which India was a party) permit extradition for political offences. Extradition with respect to political offences is also made permissible by the convention for the amelioration of the condition of wounded or sick shipwrecked members of the armed forces, 1949 (Article 50). The convention of the amelioration of the condition of the wounded and sick in the armed forces in the field, 1949 (Article 49), the prisoners of war convention, 1949 (Article 129), and the convention for the protection of civilians during war, 1949 (Article 146), and their purpose is obvious, otherwise during war [1] or otherwise, people who commit crimes of these categories, would claim exemption from extradition on the ground of the offence being a political one.

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1. R.C. Hingorani, op.cit., at p.48, n.18.

(b) 'Political offences' in general

In the absence of the definition of a political offence, the decision as to whether the charge against a fugitive relates to a political offence or not rests with the courts. The leading case is Re Castioni.[1] It arose out of a murder committed during an attack on the Municipal Palace of the Swiss Canton of Ticino in the course of anti-government disturbances. Castioni claimed a writ of habeas corpus in reply to the Swiss request for his extradition; claiming that he was a political offender and protected by Section 3 of the Extradition Act of 1870. During a debate in the House of Commons,[2] John Stuart Mill had defined a political offence as 'any offence committed in the course of furthering of civil war, insurrection, or political commotion', but Denman J. in the judgment in Re Castioni, which has become a classic, said that this definition would be wrong if it:

> "really means, which takes place in the course of uprising without reference to the object and the intention of it, and other circumstances connected with it ... In order to bring the case within the words of the Act ... 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 manner, a political rising, or a dispute between two parties in the State, as to which is to have the Government in its hands. 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 object, and part of the

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1. (1891) 1 Q.B. 149.

2. 6 August, 1866, 184 Parliamentary Debates, 3rd Ser. Col.12-15.

> political movement and rising in which he was taking part ..."

The decision in Re Castioni reflects the liberal philosophy of the late nineteenth century and is a product of the two-party system. The significance of this organised party approach to the issue enunciated by Denman J. was made clear only three years after Castioni in Re Meunier,[1] wherein the accused was a confessed anarchist and Cave J. upheld the extradition, holding that:

> "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 present case, there are not two other 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 Government."

The tendency to regard anarchists as something apart from other political offences is sometimes found in national legislation and not uncommon in treaty practice, particularly in Latin American countries.[2] The Pan-American treaty of 1902, Article 2, known as the Treaty for the Extradition of Criminals and for Protection against Anarchism, expressly states that 'there shall not be considered as political offences acts which may be classified as pertaining to anarchism by the legislation of both the countries.'[3]

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1. (1894) 2 Q.B. 415.

2. Bedi, op.cit., pp.186, 187.

3. 29 A.J.I.L. at p.280 (1935 Supp. Part I Extradition).

A similar provision appears in the Central American Convention on Extradition, 1934.[1] In some jurisdictions the refusal to admit anarchists as political offenders is expressed so broadly as to permit the inclusion of Communists and other partisans of totalitarian views. In the Swiss case of Malatesta, 1891, the court pointed out that the association with which the accused was connected had as its aim,

> "the overthrow of the established political and social order, and its replacement by another political, and economic system, namely, anarchism. While it is true that there was a clearly political end, the means by which it was sought was not so much peaceful propaganda as by the use of violence, directed to overthrowing the existing political system and redistributing the political wealth. Such an aim involves offences against persons and property. Such an association is in reality not a political organisation, but a band of thieves or brigands."

It will not be embarrassing to predict that the Indian Supreme Court, should this question come before it, will be as much influenced by the political climate of the time in India as other courts and authorities have been in the past; and it is quite impossible dogmatically to predict that active members of subversive movements in, e.g., Malaysia, Singapore, Vietnam or Northern Ireland will be unable to show that the offences alleged or proved against them are 'political offences', merely because the movements to which they belong or belonged are or were 'anarchist' in type.

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1. Hudson: International Legislation, Art.3 at 835. See L.C. Green, 'Political Offences', J.I.L.I. (1965) 1, 14.

(c) What are political offences?

Although extradition in international law actually originated for the purpose of punishing political offenders, those accused of political crimes are today exempted from extradition. This principle has been incorporated in Section 31(a) of the Indian Extradition Act, 1962, which is similar to Section 3(1) of the British Extradition Act, 1870. In the Irish Extradition Act, of 1965, Section 11, the terminology is different from that which has been used in the British and Indian Acts. Under the Irish Act of 1965, exemptions from surrender are as follows: the crime charged must not be 'a political offence'. There is no definition in the Irish Act as to what constitutes a 'political offence' - a fact which was much criticised during the discussion of the Bill in the Irish Senate - other than the provision in Section 3(1) that a 'political offence' does not include the taking of the life of a Head of State or a member of his family, (an attentat clause). This represents a departure from the approach to political offenders under the Extradition Act, 1870, under which exemption from surrender is granted where the crime charged is an offence of a 'political character'[1]. It is fairly clear that a 'political offence' is different from 'an offence of a political character' and therefore, the Irish Courts, in interpreting this provision, will not be able to rely upon Anglo-American decisions (and Indian decisions) involving an application of this concept. Irish cases on the point will be no guidance as to the meaning of the words 'offence of political character' used in the Indian Extradition Act, Section 31(a).[2]

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1. Section 3(1) of the British Extradition Act, 1870.

2. Paul O'Higgins, I.C.L.Q. Vol.15 at 382.

The British tradition of protection of the individual accused of political offences, written into the British Extradition Act of 1870 is the prototype for references to this aspect of extradition to non-Commonwealth States. It is found in the laws of Canada,[1] and is reflected in the prohibition of extradition of poliitical offenders found in the principal treaties of the United States of America with Canada and New Zealand of 1889, and with the United Kingdom of 1931. In United States practice, an equivalent protection is provided, as extradition can be granted only in pursuance of a treaty and all United States treaties contain a clause exempting the political offender. Specific reference is made to the 'political offender' in only one section of the American extradition law concerning the surrender of a fugitive from a foreign country or territory under United States occupation or control.[2]

When it comes to defining 'political offence' however, the treaty or statutory provisions seldom offer any guidance. Political activism appears to be the distinguishing characteristic of the political offence in judicial and administrative treatment of the matter in the United States.[3] In British practice, the term may comprehend a political activist involved in an uprising against an incumbent government or a political dissident who seeks to escape from the control of an oppressive

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1. Sec.21, 22; Ghana 2(a), 7(1), 9(1), 23; India, Sec.7(2) 31(a) of Indian Extradition Act, 1962; New Zealand, Sec.5(1)(b), 6, 9, 9(1)(a), and Sierra Leone, Sec. 16(b).

2. 18 U.S.C. Section 3185.

3. United States ex rel. Karadzole v. Artukovic 170 F. Supp. 383 on remand from Supreme Court 355 U.S. 393 (1958). In Re. Gonzales 217 F. Supp. 717.

regime; it does not comprehend the situation in which the common crime element is dominant.[1]

Although the determination of whether an extradition request is political in character is at the discretion of the asylum state, the decision does involve some sensitivity as to relations with the requesting State, which courts do not undertake to assume lightly.[2] But in India, because of the Fundamental Rights guaranteed under the Constitution, courts would certainly protect the accused, if any of his Rights are violated or if the formalities contained in the extradition laws have not been complied with. They would not sacrifice the freedom of the offender to political relations between the requesting State and the Indian Government.

Australian practice and the importance of executive discretion in regard to the non-extradition of poliitical offender was strongly emphasised by the Australian Prime Minister in 1956, with regard to extradition to Eastern European countries:

> "Australia will exercise its discretion under the Extradition Acts and will not grant extradition unless it is thoroughly satisfied that such a move is not being sought for political purposes. The Australian Government has to be convinced, before agreeing to extradition, that the application from Eastern European countries is bona fide and not a pretext to obtain custody of an individual for other purposes."[3]

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1. Re Castioni (1891) 1 Q.B. 149; Ex parte Kolczynski (1955) 1 Q.B. 540; R. v. Governor of Brixton Prison, ex Parte Schtraks (1962) 3 All E.R. 529; Tzu-Tsai Cheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204 (H.L.); R. v. Governor of Brixton Prison, Ex parte Schtraks L.R. (1964) A.C. 556.

2. Re Government of India and Mubarak Ali Ahmed (1952) 1 All E.R. 1060.

3. Shearer: Extradition in International Law, p.583.

This is in line with Section 31(a) and 29 of the Indian Extradition Act, 1962.

Rendition under the British Fugitive Offenders Act, 1881, falls somewhere between extradition in international law and inter-state rendition, as practices in the United States. Chapter III of the Indian Extradition Act, 1962, is akin to the procedure for rendition of offenders to Commonwealth countries which was adopted under the British Fugitives Offenders Act, 1881. In certain of the independent Commonwealth countries, the 1881 Act has been superseded by the extradition laws, which reflect its terms but attempt to remedy its deficiencies, particularly with regard to protection of the political offender.

In regard to Section 31(a) of the Indian Extradition Act, 1962, which is similar to Section 3(1) of the British Extradition Act, 1870, two points arise for consideration. First, when can it be said that an offence is of a political character? Secondly, since the provisions about 'political offenders' in the Indian Extradition Act, 1962, are divided into two parts, a dual question emerges.

Under the first part, 'a fugitive criminal shall not be surrendered' ... 'if the offence in respect of which his surrender is sought is of a political character ...' Under the second part, the surrender is prohibited if the fugitive criminal 'proves to the satisfaction of the magistrate or court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character'.

So far as the second question is concerned (which it is desirable to take up first), the two parts are meant

to deal with different sets of circumstances. Under the first part, it may appear from the evidence given in support of the requisition by the requesting State, that the offence has a political character, and even if the evidence tendered by the requesting State indicates that one of the extraditable offences has been committed, the offender may show that 'in fact the offence is of a political character'. Thus, if State A requests the extradition of X on a charge of murder, it may appear at the hearing in the asylum State from the evidence adduced by the requesting State, that the crime was committed in the course of a rebellion. The matter may fall under the first part. Likewise, if the evidence merely shows that X killed another person by shooting him on a particular day, the fugitive criminal may still give evidence to show that the shooting took place during a rebellion . It is easy to distinguish this from cases envisaged in the second part where, even if the evidence tendered by the requesting State suffices to obtain his extradition for trial or punishment for an extraditable offence, the fugitive may prove on his own initiative that the real motive is to try or punish him for another offence (whether or not connected with or incident to the extraditable offence) which has a political character. It is desirable to keep these two contingencies apart, for the clear application of each rule. Lord Goddard C.J. in Kolczynski and others,[1] while interpreting the provisions of Section 3(1) of the British Extradition Act, 1870, observed:

> "If in proving the facts necessary to obtain extradition, the evidence adduced in support shows that the offence has a 'political character' the application

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1. (1955) 1 All E.R. 31 at pp.35-36.

> must be refused, although the evidence in support appears to disclose merely one of the scheduled offences, the prisoner may show that, in fact, the offence is of a political character. — In other words, the political character of the offence may emerge either from the evidence in support of the requisition or from the evidence adduced in answer."

Regarding the first question emerging from Section 31(a) of the Indian Extradition Act, 1962, whether an offence is of a political character, this appears to be the most controversial issue in the law of extradition under international law as well as under the municipal statutes in India, Britain, United States of America, and the other Commonwealth countries. No definition of a 'political offence' has yet been formulated to satisfy all States. The Indian Supreme Court, while interpreting Section 5 of the Indian Extradition Act of 1903 in Hans Muller's case,[1] without defining an 'offence of a political character simply observed: "The Central Government has been given an unfettered right to refuse extradition, if the offence is of a political character or even otherwise." The House of Lords in the recent case did not indicate finally the exact scope of offences of political character.[2]

(d) International law and practice on political offences or offences of political character and practice of British and American courts

Though the terms 'political offence' and 'offence of a political character' have been widely used in the conventions, national constitutions and legislation, no definition has ever been given because of lack of agreement among States, on the

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1. A.I.R. 1955 S.C. 367.

2. Tzu-Tsai Cheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204 (H.L.).

element which constitute a 'political offence'. Generally speaking, the term has received a broad interpretation by courts - Lord Goddard C.J. in Kolczynski's case [1] observed:

> "It is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the expression"

In the same case, it was also observed that:

> "The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have been considered. The present time is very different from 1891, when Castioni's case [2] was decided. It was not then treason for a citizen to leave his country and start a fresh life in another. Countries were not regarded as enemy countries when no war was in progress. Now a state of totalitarianism prevails in some parts of the world and it is a crime for citizens in such places to take steps to leave. In this case, the members of the crew of a small trawler, Polish neutrals engaged in fishing, were under political supervision and they revolted by the only means open to them. They committed an offence of a political character and if they were surrendered there could be no doubt that they would be punished for a political crime."[3]

Whether or not a particular act is a political offence is pre-eminently circumstantial.[4] The political character of an offence may emerge (as we have seen) from the evidence in support of the requisition or from the evidence adduced in answer.[5]

1.(1955) 1 Q.B. 540 at p.551.

2. (1891) 1 Q.B. 149.

3. Per Cassels J., (1955) 1 Q.B. 540 at p.549.

4. J.B. Moore: Extradition, Vol.1, p.308.

5. Ex parte Kolczynski;(1955) 1 Q.B. 540 at p.550, per Lord Goddard C.J.

The general classification of what are usually called purely political offences, that is, offences, directed against the political organisation or Government of a State, contains no element of common crime whatsoever. Relative political offences, or delit s complexes, are offences of a common character closely connected with political acts or events that are regarded as political.[1]

The concept of a purely political offence is generally agreed upon and causes no problem. They are offences against the security of the State. These are political simply because they lack the essential element of the ordinary crime; they are directed against the constitution or sovereignty of a political régime.[2] In such cases, the perpetrator of the alleged offence acts merely as an instrument or an agent of a political movement or party and he bears no personal ill will, spite or malice against any individual.[3] It was observed:

> "although the killing of Rossi might have been a crime and unnecessary act, yet inasmuch as the prisoner had no private spite against Rossi ... he only affects the political organisation of the State."

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1. Oppenheim: International Law, Vol.1, p.707; Garcia Mora: International Law and Asylum as a Human Right, p.76; Fenwick: International Law, 3rd ed., New York, 1948, p.335; Deere,L.L: "Political Offences in the Law and Practice of Extradition", 27 A.J.I.L., 1933, pp.247-270 at p.248.

2. In Re Barratini decided by the Court of Appeal of Belgium on 28 May, 1936, A.D. 1938-1940, Case No.159, and In Re Giovanni Gatti decided by the Court of Appeal of Grenoble (France) on 13 January, 1947, case No.70, 1947 A.D. p.146, cited by S.D. Bedi in Extradition in International Law and Practice at p. 181, n.72.

3. In Re Castioni (1891) 1 Q.B.D. 149.

Publicists, jurists, writers on international law, judges and national decision-makers have failed to define 'political offence' or 'offence of a political character'. All attempts to define 'political offender' or 'offences of a political character' have been doomed to failure.[1] Oppenheim says that 'in view of the complexity and variety of the circumstances in which the political offences can be committed, no attempt could be made to give a precise definition of these offences'.[2] 'Extradition shall not be granted for political offences. The requested State shall determine whether the offence is political.'[3]

J. Menalco Solis R. has remarked that, as historically there was no generally accepted definition of a political offence, extradition treaties left the task of determining what offences fell within that category to the asylum State.[4] Some say political motive is important; others consider political purpose as more important. Some stress both political motive and purpose. Yet others consider crimes against the State as political, e.g. treason, espionage, subversion and sabotage.[5] Thomas and Thomas [6] tries to define vaguely a political offence as one

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1. F.M.Some Problems of the Law of Extradition (1959) 109 L.J.198.

2. Oppenheim: International Law, Vol.1, p.707, 8th ed.; see also (1935) 29 A.J.I.L. supp.113.

3. Art.3 of the Draft on "Extradition" proposed at the Third Conference, 1960, of the Asian-African Legal Consultative Committee.

4. J. Menalco Solis R: Private International Law. Extradition-Political Offences (1959-60) 34 Tulane Law Review, p.847 at p.848; R.C. Hingorani, op.cit., p.46, n.13.

5. Oppenheim: International Law, Vol.1, 8th ed., pp.707-708.

6. Thomas and Thomas: Non-Intervention (1956) at p.392. Cited by Hingorani, op.cit., at p.48, n.29.

'against the political organisation or Government of a State, injuring only public rights and containing no element of a common crime whatsoever'. Professor Manheim quotes Article 13(1) of the Italian Penal Code defining political crime as 'any crime, which injures a political interest of the State or political right of a national, is a political crime. An ordinary crime determined wholly or in part by political motives, is likewise considered to be a political crime'.[1]

Article 5(b) of the Harvard Research Draft does not define political offences, but enumerates some offences as political,

> "The term 'political offence' includes treason, sedition, espionage, whether committed by one or more persons; it includes any offence connected with the activities of an organised group directed against the security of the governmental system of the requesting State and it does not exclude other offences, having a political objective."[2]

Difficulty arises only with regard to crimes which are ostensibly common crimes, but are political offences. They are neither wholly political nor wholly criminal. They are offences against the ordinary law connected with political acts or events. Much clarity is needed on the elements which affect the whole course of events and thus convert an ordinary crime into delit complex or 'relative political offence'. Sometimes even an ordinary offence assumes the character of a political offence, when the aim of the author of the offence is to injure the political regime, e.g. the assassination of a public offical in

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1. Manheim (1935) Proceedings of the Grotius Society, 109 at p.110.

2. R.C. Hingorani, op.cit., p.49, n.20.

the course of political offence.[1] In Castioni's case[2] (supra) the British courts while rejecting the application for extradition observed:

> "Crimes otherwise extraditable, become political offences, if they were incidental to and formed part of a political disturbance."[3]

Difficulties arise before the courts in ascertaining the degree of connection existing between the common crime and the political act and there is a marked difference in opinion between courts of different countries. The British courts take a very liberal view in ascertaining criminality of those charged with relative offences. In Kolczynski's case, Cassels J.[4] observed:

> "The words 'offences of a political character' must always be considered according to the circumstances existing at the time when they have to be considered."

Lord Goddard C.J. at p.36 observed:-

> "It is necessary ... to give a wider and more generous meaning to the words [i.e. to 'offences of a political character'] which we are now considering, which we can do without in any way encouraging the idea that ordinary crimes which have no political character will be thereby excused."

Lord Reid in the House of Lords in Schtrak's case,[5]

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1. S.D. Bedi, op.cit., p.182.

2. (1891) 1 Q.B.D. 149.

3. For practices of other countries, see S.D. Bedi, op.cit., p.182, n.75, where the same view has been upheld by the courts of other States.

4. (1955) 1 All E.R. 31 at p.35.

5. Schtraks v. Government of Israel (1962) 3 All E.R. 529 (H.L.).

tried to give instances of political offences and offences of the political character interpreting Section 3(1) of the British Extradition Act, 1870, which may be usefully summarised as under:-

> "[1] A fugitive member of a gang, who committed an offence in the case of an unsuccessful putsch is as much within the act as the follower of a Garibaldi; but not every person who commits an offence in the course of a political struggle is entitled to protection.
>
> "[2] If a person takes advantage of his position as an insurgent to murder a man against whom he has a grudge, I would not think that that could be called a political offence ... the motive and purpose of the accused in committing the offence must be relevant, and may be decisive.
>
> "[3] It is one thing to commit an offence for the purpose of promoting a political cause, and quite a different thing to commit the same offence for an ordinary general purpose.
>
> "[4] Moreover I do not think that the application of the section can be limited to cases of open insurrection. An underground resistance movement may be attempting to overthrow a government, and it could hardly be that an offence, committed the day before open disturbances broke out, would be treated as non-political, while a precisely similar offence committed two days later would be of a political character.[1] The use of force, or it may be other means, to compel a sovereign to change his advisers, or to compel a government to change its policy, may be just as political in character as the use of force to achieve a revolution. And I do not see why it should be necessary that the refugee's party should have been trying to achieve power in the state. It would be enough if they were trying to make the government concede some measure of freedom, but not attempting to supplant it."

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1. Schtraks, ibid. cit. at p.535 C-F.

Referring to border-line cases, Lord Reid observed:[1]

> "With an expression so vague as 'an offence of a political character' there must be many border-line cases, for example:
>
> [a] actions against a turbulent group - trying to seize power which the government is too weak to suppress."

Lord Reid further observed:[2]

> "It was and is still thought that some governments treat as political offences, and punish more severely, acts which we would regard as ordinary crimes, if the guilty person is a political opponent of the government, or it may for other reasons."

Quoting the last part of Section 3(1) of the British Extradition Act, 1870, Lord Reid observed:[3]

> "... The requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character - [that] may refer to cases of that kind."

The case of Re Arton (supra) was not followed by Lord Reid and Viscount Radcliffe. Viscount Radcliffe in his separate judgment at p.538E observed:

> "In my mind sub-section (1) envisages two alternative ways of identifying a political offence - one, a charge that on the face of it smacks of the political, say, caricaturing the head of the state or distributing subversive pamphlets, and the other, a charge which, ostensibly criminal in the ordinary sense, is nevertheless shown to be political in the context in which the actual offence occurred."

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1. Schtraks, ibid. cit. at p.536A.

2. Schtraks, ibid. cit. at p.536C.

3. Schtraks, ibid. cit. at p.536D.

An earlier case in British practice is the decision of theEnglish court in Re Castioni,[1] where it was held that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to, or formed part of political disturbances. Three years later in Re Meunier,[2] the court held that crimes committed by anarchists were not regarded as political offences, on the ground that to constitute a political offence, there must be two or more parties in the State, each seeking to impose a government of their own choice on the other, and the act done must be committed, not for a personal or private reason, but in pursuances of , that object. The two-party theory was the test in this case to show whether the offence was of a political character or not. After three decades, the British courts in Kolezenski's case (supra) proposed a more liberal test in ascertaining the political criminality of those charged with 'relative political offences'. Lord Goddard C.J. went to the extent of giving a more generous meaning to the words 'offences of political character', and Cassels J. held that those words should be interpreted according to the circumstances existing at the time when they have to be considered.

The matter of extradition is (as we saw at the outset) linked with asylum of political refugees. The history of the law of extradition bristles with cases where the question was whether the requisition of the foreigner by his home government was on genuine grounds or on a criminal charge used as a camouflage for political motives.[3] Treaties and statutes disclose

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1. (1891) 1 Q.B. 149.

2. (1894) 2 Q.B. 415. See also for political offences, Tzu-Tsai Cheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204 (H.L.).

3. Oppenheim: International Law, 8th ed., Vol.1, pp.676,693.

an almost universal practice among the States to refuse extradition of persons to be tried for political or military offences.[1] The problem, as mentioned above, came before the English courts and it was held that, to constitute an offence of a political character there must be two or more parties in the State, etc.[2] Despite the change in judicial opinion related above, the mere assertion by the accused that he is a political refugee, unsupported by evidence, is insufficient to entitle the court to make absolute a habeas corpus writ.[3] It is likely that in Re Kolczynski and Schtraks we find a point of view agreeable to India's needs, since India herself is fully capable of comprehending the difference between (possibly illegal) politicial activity and ordinary crimes, which are none the less criminal being connected, more or less fortuitously, with the criminals' political activities. Had the murderer of Mahatama Gandhi been an alien, India would have treated him, had he been successfully extradited, exactly as he was in fact, treated. This must have an influence on the minds of judges in foreign countries, and the principle will apply vice-versa. However, it is desirable to compare other possible approaches.

The Swiss courts, on the other hand, apply the concept of 'relative political offence' in a more restricted way. Thus, in the case of V.P. Wassilief in 1908,[4] the Federal Tribunal

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1. Oppenheim: International Law, Vol.1, pp.704-10; J.B. Moore: Extradition, Vol.1, pp.303-26; L.L. Deere: Political Offences in the Law and Practice of Extradition in A.J.I.L. (1933), Vol.27, pp.274-6; Moore, Digest, Vol.IV, pp.332-54; Hackworth Digest, vol.IV, pp.45-52.

2. Re. Meunier (1894) 2 Q.B. 415.

3. R. v. Governor of Brixton Prison, ex parte Sarno (1961) 2 K.B. 742.

4. Decided on 10 July, 1908; mentioned by Bedi, supra, at p.182, n.77.

unambiguously stated three general principles, which it considered as determining the predominantly political chracter of an offence. Firstly, the offence must have been committed for the purpose of helping or ensuring the success of a purely political offence, i.e. the crimes must be directed against the political or social organisation of the State. With respect to this first condition, Bedi has noted and reproduced observations of the Federal Tribunal of Switzerland in Re Ockert, decided on 20 October, 1933,[1] wherein it was held that:

> "acts which are not related to a general movement directed towards the realisation of a particular political object in such a way that they themselves appear as an essential part or incident ... thereof, but which serve merely terroristic ends, so as to facilitate ... a future political struggle, can raise no claim to asylum."[2]

Secondly, there must be a direct connection between the crime committed and the purpose pursued by a party to modify the political or social organisation of the State. The Federal Court in Re Ragni,[3] decided on 14 July, 1923, refused a request for extradition on the ground that "The events in Kagli were not of a purely local or personal character. They were an episode in a political movement aiming at seizing power within the State."[3]

Thirdly, the political element must predominate over the ordinary criminal element. In Pavan's case,[4] the Swiss

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1. A.D. 1933-34, Case No.157, pp.369-371.

2. S. Bedi: Extradition in International Law and Practice, p.183, n.78.

3. A.D. 1923-24, Case No.166, p.286; Bedi, op.cit., p.183, n.79.

4. A.D. 1927-28, Case No.239, pp.347-349, decided on 15 June, 1928, cited by Bedi, op.cit., p.183, n.80.

Federal Court held that the crime

> "is invested with a predominantly political character only when the criminal action is immediately connected with its political object. Such a connection can only be predicated where the act is in itself an effective means of attaining this object ... or where it is an incident in a general political struggle in which similar means are used by each side."

Relying on these principles, the Swiss Courts surrendered only those fugitives whose acts were out of proportion to the political end sought or whose acts were not closely connected with purely political ends. It is precisely on these grounds that the court in the Wassilief case found that the murder of the Chief of Police of Penza gave the act a predominantly common criminal character, as it did not prepare the way for popular representation and guarantee of individual liberties.[1]

Likewise, when in 1928 the French Government requested the extradition from Switzerland of an anti-fascist journalist, who shot and killed an Italian Fascist in Paris, the Swiss Federal Court held that the crime was not a political one. It further characterised the prisoner's act as being 'a single act of personal terrorism, performed in a foreign country and directed only towards its immediate result', was not a crime of a political character.[2]

German and Belgian courts have made a similar approach to that of the Swiss Courts, and their decisions in Re Fabijan[3]

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1. Bedi, op.cit., p.183. V.P. Wassilief, pp.314,317, supra.

2. Bedi, op.cit., p.183, n.81. In re Pavan (1928), A.D.1927-1928, Case No. 239, pp. 347 -349.

3. A.D. 1933-34, Case No.136, pp.360-369, decided on 9 March,1933,

and in Re Barratini [1] respectively illustrate the same reasoning.[2]

Between these two extrems, Art.5(2) of the French Law dated 10 March, 1927, adopted a mid-course.

> "As to acts committed in the course of insurrection or a civil war by one of the other parties engaged in the conflict and in the furtherance of its purpose, they may not be grounds for extradition, unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended."

Thus, Art.5(2) makes it clear that there can be no extradition for acts committed in the course of a revolution or civil war, though they may have the characteristics of common crimes, unless they are prohibited by the laws of war. The French Courts have taken a more narrow and restrictive view. Thus, the Court of Appeal of Grenoble rejecting the application of one Giovanni Gatti in 1947,[3] held, questionably, that:

> "The offence does not derive its political character from the motive of the offender but from the nature of the rights it injures."

The Federal Court in the United States has held that: 'to bring an offence within meaning of the words of a "political character" it must be incidental to, and form part of a political disturbance.'[4] This seems too narrow.

The Chilian Supreme Court in Hector Jose Campore and

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1. A.D. 1938-1940, Case No.159, decided by Court of Appeal of Belgium, on 28 May, 1936.

2. See Bedi, op.cit., p.184, n.82, 83.

3. A.D. 1947, Case No.70, decided on 13 January, 1947. Cited by Bedi, op.cit., p.181, note 72.

4. Re Ezeta (1894) 62 F.972 at p.999.

others in the matter of extradition,[1] defined 'political offence':

> "Generally accepted principles are in agreement that a political offence is that which is directed against the political organisation of theState or against the civil rights of its citizens and that the legally protected right which the offence damages is the constitutional normality of the country affected. Also included in the concept are acts which have as their end the alteration of the established political or social order in the State."

Indian Courts have not so far defined the scope of political offence. They did have some opportunity in the cases of Ram Babu Saksena,[2] and C.G. Menon,[3] but the cases were disposed of on other points.

As in English law and American law the words used are 'offences of a political character', the decisions of the British and American courts will supply guidance to interpret those words, especially because similar rights and principles are recognised in the United States and English practice. The decisions mentioned above are clearly influenced by the policies of the relevant government but in the case of Indian extradition, the law, the treaties and the procedure have to be tested by the Constitution of India, particularly Articles 14, 19, 20, 21 and 22, and 254 and List 1, entries No. 14, 18. No single definition can be laid down as good and exhaustive for all situations.

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1. (1959) 53 A.J.I.L. p.693, decided on 24 September, 1957; R.C. Hingorani, op.cit., p.50, 51, n.28.

2. A.I.R. 1950 S.C. 155.

3. A.I.R. 1954 S.C. 517.

In the words of Cassels J. the words 'must always be considered according to the circumstances existing at the time when they have to be considered'.[1] Moore also says: 'The question whether a particular act comes within the category is predominantly circumstantial.'[2]

Offences of a political nature may also emerge from the following:-

1. If any offence is committed in a series of attempts to overthrow or influence the government.
2. Any common crime may be treated as political if it was a means of expression of disappointment of dissatisfaction with the policy of the policies of the present government.[3]
3. It may include terrorist activities in watertight countries where freedom of expression is frozen and open opposition is not tolerated.
4. Predominance of a political motive may make a crime political in some cases, although there may have been some personal motivation of vengeance also during the course of commission of the crime.
5. An abettor may be a political offender, as by hiring the main participant to execute his plans, who may be guilty of a common crime, and in these circumstances, the hireling may not be a political offender, even though he was the main participant in the commission of the crime.

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1. Ex parte Kolczynski (1955) 1 All E.R. 31 at p.35, supra,

2. Moore: Extradition, 1891, Vol.1, p.308.

3. Schtrak's case (1962) 2 W.L.R. 976 at p.997.

B. LIMITATIONS ON 'POLITICAL OFFENCES'

(a) The Attentat clause.

(b) Anarchist or terrrorist offences.

(c) War crimes and crimes against peace and humanity.

(d) Acts of collaboration with the enemy during wartime.

(a) The Attentat Clause

Though in the case of Schtraks,[1] their Lordships of the House of Lords reached the same conclusion, they expressed different grounds for their opinion; they reached the same destination but by different roads. Even so, what is a 'political offence' or 'offence of a political character' could not be defined. Lord Reid observed:[2] '... I do not think that it is possible, or that the Act evinces any intention, to define the circumstances in which an offence can properly be held to be of a political character'. The Supreme Court of India in C.G. Menon's case and Ram Babu Saksena's case had opportunity to consider the question as we have seen did not use it. English Courts, from the cases of Re Castioni and Re Meunier to Kolczynski and Schtraks at times gave verdicts with different interpretations and ultimately the House of Lords in Schtrak's case, attempted to lay down certain tests, also gave a few instances but could not lay down in precise terms what the words 'offences of a Political character' mean. Viscount Radcliffe went so far, in Schtrak's case(at p. 538I-539A), as to say:

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1. (1962) 3 W.L.R. 1013; (1962) 3 All E.R. 529.

2. (1962) 3 All E.R. 529, at 535I.

> "... no definition has yet emerged or by now is ever likely to. Indeed it has come to be regarded as something of an advantage that there is to be no definition. I am ready to agree in the advantage so long as it is recognised that the meaning of such words as a 'political offence' ... does ... represent an idea which is capable of description and needs description if it is to form part of the apparatus of a judicial decision."

This ambivalent difficulty was felt from the beginning and in view of these difficulties in determining what a political offence means, attempts have been made to limit the scope of the delits complexes or 'relative offences' from time to time.

The first attempt was made in the form of the enactment of the so-called attentat clause by Belgium in 1856, following the case of Jacquiline in 1854. A French manufacturer named Jules Jacquiline, domiciled in Belgium, and a foreman of his factory, who was also a Frenchman, tried to cause an explosion on the railway line between Lille and Calais with the intention of murdering the Emperor Napoleon III. France requested the extradition of the two criminals, but the Belgian Court of Appeal had to refuse the surrender because the Belgian Extradition Law interdicted the surrender of political criminals. To provide for such a case in future, Belgium enacted in 1856 a law amending her extradition law and stipulating that the murder of the Head of the Foreign Government or a member of his family should not be considered a 'political crime' for this purpose. Many European States, not including Great Britain, have adopted that clause.[1]

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1. Oppenheim: International Law, Vol.1, Art.335, p.709; see also Bedi, op.cit., p.185; R.C. Hingorani, p.9.

The Indian courts so far had no occasion to consider a case of this nature. But the Second Schedule to the Indian Extradition Act, 1962, mentions culpable homicide, and attempt to murder specifically as extraditable offences; whether the murder or attempt to murder would be of an ordinary person or of a Head of the State or members of his family, it seems, would make no difference; and the contention before an Indian court on behalf of the prisoner that murder of an ordinary person is an extraditable offence, but murder of a Head of the State is not, would be rejected. As will be presently shown, India is a party to several conventions to prevent terrorist activities and anarchism; and as such, no extradition will be refused on this ground. Further, in some of the treaties, e.g. the Indo-American Extradition Treaty published in the Gazette of India, Part III, section 3, sub-section (i), dated 1 February, 1966, which was originally entered into in 1931, and 1942, mentions assassination as being included in murder and the basis is reciprocity. Also the Second Schedule lists extraditable offences committed in India and punishable under any section of the Indian Penal Code or any other law. A citizen committing murder or guilty of an attempt to murder in a foreign land any person (including of course, a Head of a State or member of his family), if found in India, could be tried in India according to the Indian Penal Code and convicted, if the offence is proved. So the adoption of a clause like that is redundant and no occasion for invoking it need arise.

The reasonableness of that clause can not be overemphasised or seriously questioned in countries like India, Britain, United States of America, and other countries with similar systems of law. There, various avenues, forms and methods

in approaching a court of law or the executive or other authority are available to individuals for redress of their complaints and grievances. But it is argued by some that it loses all its ethical and legal force when it is applied to those States which refuse to recognise the most elementary rights of their citizens or which commit such acts of atrocity and barbarity upon their subjects as to arouse the indignation of their people and of the civilised world at large. There may be extreme cases in which only the murder of the Head of the State can lead the people, suffering from perpetual tyranny and persecution, to happiness and change the entire political pattern. This point of view occurred, as a historical fact, in Imperial Russia and the Austro-Hungarian Empire. This argument, in such extreme cases, deserves consideration and, even in a country like India, if such a situation arises, the mere deposition and exceptionally, murder, of the Head of the State or (still more exceptionally) members of his family might well be held to be an offence of a political character. But it may be further submitted that no breach with the general legal position is involved in this respect.

It is relevant to repeat here that the British government did not adopt this clause. The British court in the case of Re Castioni[1] observed: 'Crimes otherwise extraditable, become political offences if they were incidental and formed part of a political disturbance'. The same view has been upheld by courts of other countries.[2] These considerations might

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1. (1891) 1 Q.B.D. 149.

2. U.S.A. Hyde, op.cit., p.573, n.1. Italian practice: In Re Pavelic Kwaternik, A.D. 1933-1-34, Case No.158; Latin American practice: Re Peyre, 22 Int. Law Reports (1955) pp.525-527 (Argentine); In re Brenoville, 22 Int. Law Reports (1955) pp. 527-528 (Supreme Court of Brazil); Re Campora et al, 24 Int. Law Reports, 1957 pp.518-524 (Supreme Court of Chile).

have influenced the reasoning of the Court of Appeal of Turin in 1934; when applying Article 8 of the Italian Criminal Code, it interpreted the contents of that article very liberally and finally rejected the application of France for the extradition of two persons charged with the assassination of King Alexander of Yugoslavia.[1]

It is also argued that it would be a mockery of law, if persons holding banners and revolting against tyrants or dictators to liberate people were surrendered, others being defeated, under treaty obligations, to be imprisoned by the victor; while overthrown dictators are granted political asylum in foreign States, in spite of their atrocities. Be that as it may, it seems from British practice in the House of Lords in Schtrak's case that the idea that an ordinary crime becomes a political offence because it has been committed with a political objective or motive, has been rejected. In any case, as laid down in Kolczynski's case, each case will be judged on its own merits and circumstances at the time when the offence was committed. In an extreme case, India may hold an assassination of a Head of State as a political offence.

In any event, one cannot but agree with Hingorani [2] in remarking that any exception in favour of Heads of State or their families is quite anachronistic now that Prime Ministers and other ministers are much more important than Heads of State (what to speak of their families?), and if there should be an exception it must be extended to every high member of the

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1. In Re Pavelic and Kwaternik, Case No.158, decided by Court of Appeal of Turin on 4 September, 1933; 1933-34 A.D. Case No. 158.

2. R.C. Hingorani, op.cit., 9-10.

Executive, which would appear to suggest an impossible breach with the 'political offence' exception.

(b) Anarchist or terrorist offences

The second limitation is with regard to anarchist or terrorist offences. In certain bilateral and multilateral conventions and treaties provisions have been inserted, by which anarchist and terrorist offences have been excluded from the category of political offences,[1] and these have been the subject matter of decision by courts in different States.

After the assassination of King Alexander of Yugoslavia in France in 1934, the Council of the League of Nations, in pursuance of a proposal made by France, took steps to establish an international convention for the prevention and punishment of crimes of a political character described as acts of political terrorism. In the convention signed at Geneva on 16 November, 1937, twenty-three States undertook to treat as criminal offences acts of terrorism, including conspiracy, incitement, and participation in such offences. In a supplementary convention, signed on the same day, ten of the signatories of the principal convention agreed to the creation of an International Court, to which the parties would be entitled to hand over the accused, if they decided not to extradite them or to try them before their own courts.[2] Apart from India, no member of the British Commonwealth of Nations signed either convention.[3]

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1. Bedi, op.cit., p.186, n.90, 91.

2. R.C. Hingorani, op.cit., p.10; Oppenheim: International Law, p.710.

3. Oppenheim: International Law, Vol.1 , 338-340A.

This step taken by India was in consonance with and on the same lines as the principle laid down by Lord Russell, C.J. in Re Arton.[1] He said:

> "The law of extradition is without doubt founded upon the broad principle that it is to the interest of civilised communities that crime acknowledged to be such should not go unpunished, and it is a part of comity of nations that one State should afford every assistance to another, towards bringing persons guilty of such crimes to justice. But in the application of this principle, certain matters such as the conditions upon which, and the class of crimes in respect of which extradition is to be granted, and the formalities to be observed upon application for extradition are primary matters for the two political powers concerned to arrange in the first instance by treaty, the next step is by legislative enactment to give them the force of law, and to express in an Act of Parliament the conditions or limitations imposed upon the grant of extradition and the class of crimes to which extradition applies. It is to the expression of the legislature in Acts of Parliament and to that alone that judicial tribunals can refer."

The same limitations for observing extradition formalities were emphasised by the Supreme Court of India in Hans Muller's case.[2] It was observed:

> "But a citizen who has committed certain kinds of offences abroad can be extradited, if the formalities prescribed by the extradition Act are observed."

Emphasising the unfettered power of the government to refuse extradition, it was observed further:

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1. (1891) 1 Q.B. 108 at p.111.

2. Hans Muller's case, supra, A.I.R. 1957 S.C. 367.

> "The law of extradition is quite different [from the Foreigners Act]. Because of treaty obligations it confers a right on certain countries (not all) to ask that persons who are alleged to have committed certain specified offences in their territories or who have already been convicted of those offences by their courts, be handed over to them in custody for prosecution and punishment. But, despite that, the government of India is not bound to comply with the request and has an absolute and unfettered discretion to refuse ... if the order is one of expulsion, then the person expelled leaves India a free man."

Section 29 and 31 of the 1962 Extradition Act gives powers to the courts and to the executive to refuse extradition in cases of offences of a political nature. Those offences not having been enumerated, India signed several conventions recognising anarchist and terrorist activities as 'offences not of political nature', and further that the offender must not escape punishment. In the words of Lord Russell, it was the duty of nations, to bring offenders to justice and India, therefore, rightly suggested the establishment of an international criminal court for the trial of offenders who either could not ordinarily be extradited and could not be tried by the municipal courts and such an institution should cover all situations for the trial of offenders, giving them no escape. The convention, if acted upon, would curtail the liberty of the citizen or alien and would have to be enacted as a municipal law, otherwise Articles 14 and 21 of the Constitution would hit it and the High Court or Supreme Court of India would declare such a law ultra vires and consequently, would restrain the Central Government from handing over such person for trial before such an international criminal court.

Oppenheim, while arguing against such a convention and establishment of a court, observes:

> "It is doubtful whether States, wedded by their law and tradition to the principle of non-extradition of political offenders, will acquiesce in any conventional regulation impairing the asylum hitherto granted to political offenders. Such acquiescence on their part is unlikely at a time when the suppression of individual freedom and the ruthless prosecution of opponents in many countries tend to provoke violent reaction of a criminal character against the government concerned."

He may be correct when he thinks in the terms of the Eastern bloc, and at the present time these observations may apply to the situations between India and Pakistan regarding such offences the hijacking of an Indian plane by the so-called Azad Kashmiris and blowing it up at Lahore Airport. Even though it was an act of terrorism and anarchism, the Pakistan Government allowed the plane to be blown and subsequently refused to extradite the offender. Similar situations may be visualised in connection with events in the present Bangla Desh.

Instances of this limitation on 'offences of a political character' are, however, recognised in the following conventions, wherein extradition with respect to political offences is made permissible by:

i) The Convention for the Prevention and Punishment of Terrorism, 1937;

ii) The Convention on the Prevention and Punishment of the Crime of Genocide, 1948,

iii) The Convention for Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 1949, (Art.49);

iv) The Convention for the Amelioration of the Condition of the Wounded, Sick, Shipwrecked Members of Armed Forces, 1949, (Art.50);

v) The Prisoners of War Convention, 1949 (Art. 129);

vi) The Convention for the Protection of Civilians during War, 1949, (Art. 146).[1]

The question remains whether a signatory of these Conventions is entitled to extradite political offenders when the municipal laws do not give effect to them. There is no provision in Section 31(a) or any other part of the Act of 1962 engrafting such an exception upon what read as mandatory provisions.

The leading and first authority is the decision of the English court in the case of Re Meunier,[2] involving this problem, where Meunier, an avowed anarchist, after causing two explosions in Paris, sought asylum in England. It was pleaded by him, inter alia, that the offence for which he was charged was of a political character. Repelling the argument, the court observed: 'In order to constitute a political offence, there must be two or more parties in the State, etc.' (see above, p. 313). Having gone that far, the court further observed:

> "The accused was in fact identified with the party of anarchy and inimical to all governments, and his efforts, even though incidentally directed against a particular government, were primarily directed against the general body of citizens."

A similar observation of the Swiss Federal Court in the Ockert case decided in 1933,[3] runs as follows:

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1. R.C. Hingorani, op.cit., p.48, n.18.

2. (1894) 2 Q.B. 415.

3. In re Ockert A.D. 1933-1934, Case No.157, pp.369-371 decided on 20 October, 1933, noted by Bedi, op.cit., p.186.

> "Acts which are note related to a general movement directed to the realisation of a particular political object in such a way that they themselves appear as an essential part or incident ... thereof, but which serve merely terroristic ends ... so as to facilitate ... a future political struggle, can raise no claim for asylum."

These two decisions virtually agree that 'political offence' does not include acts of terrorism. Would India take a similar route in the interpretation of the words 'of a political character' in Section 31(2) by judicial legislation - a question raised above at p. 329 .

A decision of the Supreme Court of Guatemala in 1929[1] repeated the same principle, as noted by Bedi.[2] The court said:

> "Universal law qualifies as political crimes sedition, rebellion and other offences which tend to change the form of the government or the persons who compose it: but it cannot be admitted that ordering a man (to be) killed with treachery, unexpectedly and in an uninhabited place, without form of trial or authority to do so constitutes a political crime."

Exclusion of anarchist and terroristic offences from the categories of political offences has been stated in the following treaties, showing different State practices in addition to the above-mentioned conventions:-

i) Treaty of 25 February, 1938, between Brazil and Bolivia;

> "Criminal acts which constitute an open manifestation of anarchy or are designed to overthrow the bases of all social organisation shall not be considered as political offences."

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1. In Re Eckermann, A.D. 1929-30, Case No.189, pp.293-295 at p. 295, decided on 28 May, 1929.

2. Bedi, op.cit., p.187, n.97.

ii) Treaties entered into between Columbia, Panama and Nicaragua provide:

> "Acts defined as anarchical under the laws of both States shall not be deemed to be political offences."

Bilateral and multilateral conventions and these two treaties have been noted by S. Bedi.[1]

Anarchist and terrorist offences of a violent nature are offences under the Indian Penal Code, 1860. Under item 18 of the Second Schedule to the Indian Extradition Act, 1962, it has been provided that any offence which, if committed in India, would be punishable under any other section of the Indian Penal Code or any other law, would be an extraditable offence. If a wide interpretation is given to item 18, terrorist and anarchist offences would be excluded from the category of political offences apart from convention; and this interpretation would coincide with the treaty provision between Columbia, Panama and Nicaragua, cited above.

In addition, international law jurists, such as Oppenheim,[2] Garcia Mora,[3] L.L. Deere,[4] substantially agree that anarchistic and terroristic offences are excluded and do not fall in the category of political offences or offences of a political character, and therefore, do not give rise to a claim for asylum or 'political asylum'.

Art.2 of the Pan-American convention of 1902 provided

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1. Bedi, op.cit., p.186, n.90, 91, 92, 93.

2. Oppenheim, op.cit., p.710.

3. Garcia, op.cit., p.86.

4. L.L. Deere, op.cit., p.255.

that acts which may be classified as pertaining to anarchism shall not be considered as political offences.[1] The Institute of International Law as long ago as 1892, recommended that:

> "Crimes directed to uproot the fundamental social institutions, irrespective of national divisions or any given political constitution or form of government are not to be considered as political crimes."[2]

Not by way of repetition, but in order to show the distinction between cases with and without elements of anarchism and terrorism, we will consider some cases in which different conclusions were reached laying down one principle in one case and another in another case. The lesson is that each case turned out on its own facts.

Before the English courts theproblem came twice in Ex parte Castioni,[3] and in Re Meunier.[4] In the case of Castioni, a Swiss who had taken part in a revolutionary movement in the Canton of Ticino and had incidentally shot a member of the government, the court refused extradition, as the crime was considered political. On the other hand, in the case of Meunier, a French anarchist, who was prosecuted for having caused explosions in France, one of which resulted in the death of two individuals, the extradition was granted because the crime, an anarchist and terrorist act, was not considered to be political. The decisions came out on the facts of each case.

In Kaphengst, the Swiss Federal Court in 1930 granted

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1. Bedi, op.cit., p.187, n.100.
2. Bedi, op.cit., p.187, n.99.
3. (1891) 1 Q.B. 149.
4. (1894) 2 Q.B. 415.

the extradition of a person accused of having committed bomb outrages of a purely terrorist character.[1] In the Pavan case the Swiss Federal Court granted extradition (to France) of a person accused of killing an Italian Fascist in France.[2] But the same court refused extradition in a case of homicide in which a member of the National Socialist Party was involved, and the court held that the alleged offence took place in the course of a political struggle between two parties approaching a civil war.[3] During the civil war in East Pakistan, if Mujibur Rehman or his fellow supporters had fled to India, and if extradition had been requested by the Pakistan government, the defence taken in Ockert's case [4] (see above, p. 329) would have been available to them, so that their acts, related to a general movement, would have qualified being 'of a political character'.

(c) War crimes and crimes against peace and humanity

The third limitation on 'political offences' relates to war crimes, crimes against peace and humanity. Lauterpacht has described these crimes as crimes against international law.[5] As the Indian Extradition Act, 1962, has not defined 'offence of a political character', it does not impose limitations or exceptions so the meaning of 'offences of a political character' and the limitations thereon will have to be deduced from the

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1. A.D. 1929-1930, Case No.188.

2. A.D. 1927-1928, Case No.239.

3. In Re Ockert, A.D. 1933-1934, Case No.157.

4. In Re Ockert, ibid.

5. Lauterpacht: "The Law of Nations and Punishment of War Crimes", 21 B.Y.I.L. 1944, p.58.

well-established principles of international law, established by practice in the family of nations, and the principles of law, both municipal and international, established by a long series of judgments. On this subject, it may be claimed that, unlike terrorist activities, established principles are available to guide us. As has been seen above, India was a pioneer in signing the convention for prevention and punishment of crimes described as acts of political terrorism and war crimes. Obviously, therefore, the Indian government will not exempt from extradition, war crimes and crimes against peace and humanity, and neither courts nor executive will afford asylum in Indian territory to persons who have committed war crimes and crimes against peace and humanity.

If an accused files a petition for habeas corpus before the Supreme Court or puts the defence before the magistracy or executive that the alleged war crimes and crimes against peace and humanity are offences of a 'political character' and invokes Articles 14, 19, 20, 21, or 22 of the Constitution the defence will be rejected, because no organ of government would recognise as valid such acts of 'lawless order', and would never permit an offender, who has committed these offences abroad, to take asylum in India under the guise of a political offence. If the persons, at present allegedly guilty of genocide in 'Bangla Desh' are extradited to Pakistan, which decides to prosecute and punish them for offences against peace and humanity and they take refuge in India and ask for political asylum, the executive wing would refuse it, as they would be guilty not of 'political offences' but of crimes against peace and humanity.

If the Pakistan Government under an extradition treaty

or arrangement or under the Indian Extradition Act, 1962, requests their extradition, they cannot invoke Article 21 of the Constitution, as the courts would not recognise genocide or other offences against peace and humanity as offences of a political character under Section 29 and 31 of the Indian Extradition Act. If any lenient view, for political reasons was taken, it would not be 'conducive to the public good' (cf. Section 29 of the Act).

In the absence of definition of 'war crimes' and 'crimes against peace and humanity' questions may be raised as to what they are. The Indian courts will certainly be faced with practical difficulties.

International law does not recognise any legal right or duty to extradite, apart from treaty obligations, and this seems to be the reason why Lord Russell, C.J. in Re Arton,[1] used the expression 'Community of Nations' and not 'international law'. Various writers on international law because of their training and background, lay more emphasis on the international aspect, rather than the constitutional aspect. In the law of extradition, the constitutional aspect is more important, especially in India, because of the guarantee of Fundamental Rights, so that the extradition proceedings can be challenged before the magistracy, the executive, the High Courts and the Supreme Court in appropriate proceedings at appropriate stages. This constitutional aspect must be emphasised, because in international law no two states follow identical practice in case of extradition. The constitution of a State may prohibit extradition

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1. (1891) 1 Q.B. 108 at p.111.

of its nationals,[1] and this is why it is essential to enact a special law relating to extradition. A treaty between State A and State B may differ from the treaty between State A and State C so that State A may have to apply different principles when State B demands extradition from the principles applicable when State C demands extradition. This may be illustrated by two English cases: R. v. Wilson,[2] and Re Galwey,[3] which reveal the great difference between extradition law in India, with its detailed written Constitution and the position in countries which look only to treaties and specific statutes.

In the first case, the court had to consider the treaty between the United Kingdom and Switzerland which provided that, 'No Swiss national should be delivered up by Switzerland to the Government of the United Kingdom and no subject of the United Kingdom be delivered up by the United Kingdom Government to Switzerland.' In the later case, the treaty between the United Kingdom and Belgium provided, 'in no case, nor on any consideration whatsoever, shall the High Contracting parties be bound to surrender their own subjects, whether by birth or naturalisation'. Despite the similar language in the two treaties, in the former case, the court refused to surrender and allowed it in the latter. In Wilson's case (at p.46), the court said: 'It should consider the Extradition Act as well as the extradition treaty during extradition proceedings'. Lord Russell of Killowen, C.J., while allowing the surrender in the later case, held that the words of the treaty (quoted above) mean that, while the States are not

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1. Cyprus Constitution Cmd. 1093 (1963).

2. (1877) 3 Q.B.D. 42.

3. (1896) 1 Q.B. 230.

bound, they may, under the treaty and any legal enactment which relates to the treaty, make such extradition.

Therefore, it is fair to point out, in order to avoid confusion and embarrassment to the Central Government provision should be made by Parliament in the Indian Extradition Act, by adding a proviso to Section 29 or 31 or otherwise declaring that anarchist or terrorist offences, war crimes and crimes against peace and humanity and acts of collaboration with the enemy during war, shall be offences 'not of a political character'. It is by no means to be presumed that the extradition of war criminals will defeat the ends of justice, even if their crimes were indubitably political offences.

Various national laws have incorporated provisions making war criminals, and those who commit crimes against peace and humanity, punishable under their laws. The Nazi Collaborators (Punishment) Law, 1950, enacted by the Israeli Parliament, makes crimes against the Jewish people, crimes against humanity and war crimes part of Israeli criminal law. Chapter 10 of the Criminal Code of the Hungarian Peoples Republic, 1961, is entitled 'Crimes against Peace and Humanity', and sets out such offences as instigation of war, genocide and cruelty and destruction in time of war. Chapter II of the Criminal Code of Yugoslavia is concerned with crimes against humanity and international law. Art.8 of the Dutch Law of 18 May, 1952, provides, inter alia, that breaches of the laws of warfare, inhuman treatment, and systematic terrorising of civilians in time of war shall be crimes visited with various penalties.[1] The General Assembly of the

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1. Bedi, op.cit., p.188, n.106.

U.N.O. by Resolution of 13 February, 1946, recommended the surrender of war criminals.[1]

The Charter of the International Military Tribunal, which sat in Nüremberg, defined war crimes and crimes against humanity as specific offences; those offences were declared to be inimical to the very concept of civilisation and no sane person would recommend the extermination, enslavement and deportation of the civil population (as seems to have happened in East Pakistan), or prosecution of them on political, racial or religious grounds (as is reported to have been done in East Pakistan) or ill-treatment of prisoners-of-war or hostages, or the plunder of private or public property, wanton destruction of towns or villages or devastation without justification, as they have no connection whatsoever with the successful prosecution of the war.[2] All this happened in World War II on a mass scale and has happened before and during other wars. Further, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 8 December, 1948, in Art.7 provides that genocide and other acts enumerated in Article III shall not be considered as political crimes for the purposes of extradition.

It is desirable, therefore, that India should insert in its Extradition Act of 1962 similar provisions taking these offences out of the purview of 'offences of political character'. If this amendment is made, the uncertainty prevailing in the extradition laws will disappear and the chances of India being

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1. Bedi, op.cit., p.188, n.103.

2. Bedi, op.cit., p.188, 189.

misunderstood by other nations and the strain on diplomatic relations in case of refusal of extradition will be minimised.

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In this connection, mention of one thing is necessary: the definition of war crimes and crimes against humanity in the Charter of the International Military Tribunal involved the enactment of ex post facto legislation, as the Charter allowed prosecution after the termination of war, for new offences covered by the Charter. The same principle would apply more vigorously in the case of municipal laws, particularly since the Constitution of India came into force and any retrospective penal legislation would be void for repugnancy to Article 20(1), which provides that no person shall be convicted except for violation of a law in force at the time of the commission of the act charged as an offence. No difficulty would arise if the alleged offence was committed after the amendment, but if it were committed before the amendment, the High Court or the Supreme Court in a habeas corpus petition would be bound to interfere and declare the extradition proceedings void. Further, an 'extradition offence' has been defined under Section 2(c) of the Extradition Act of 1962, as provided in the Extradition Treaty or in the Second Schedule to the Act in the circumstances mentioned in sub-clause (i) and (ii) of sub-section (c). The Second Schedule to the Act provides that: 'The following list of extraditable offences is to be construed according to the law in force in India on the date of the alleged offence'. This provision seems to have been taken and adapted from the British extradition provisions. Halsbury [1] says that extradition

1. Halsbury: Laws of England, Section 1160, p.567, vol.16, 2nd ed.

crimes must be construed according to the law existing in England or in the British possessions (as the case may be) at the date of the alleged crime.[1]

If, therefore, the Indian law is amended and extradition is demanded for an offence committed earlier than the amendment, the application of the amended law to the offence committed earlier would amount to ex post facto legislation and the extradition would be in infringement of Art. 20(1).

Precision and definiteness in connection with a criminal offence is also necessary, so that the prisoner may know whether what he was doing was or was not an offence. For instance, an alleged offender who has fought for his political convictions without violating the well-established customs and rules of warfare, could claim that what he had done was a political offence and therefore, he was entitled to invoke the protection of Section 31(a) of the Indian Extradition Act of 1962.

(d) Acts of Collaboration with the Enemy during War

According to international law writers, the acts of collaboration with the enemy during war is regarded as one of the exceptions in political offences.[2] These offenders were called Quislings and traitors,[3] traditionally treated as political offenders, and therefore, the state of asylum did not order their extradition up to 1945. The United Nations General Assembly by resolution of 15 December, 1946,[4] provided that

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1. R. v. Dix (1902) 18 T.L.R. 231.

2. Oppenheim, op.cit., Vol.2, para.159, p.422.

3. Morgenstern, op.cit., p.382.

4. Journal of the General Assembly, First Session, II, part, p.880.

'handing over for trial of war criminals, quislings and traitors is an urgent task and obligation'; and procedure for demands of their surrender was laid down by the Resolution of 31 October, 1946.[1] The principle of inducing asylum States to surrender those accused of collaborating with the enemy during war was recognised by these resolutions.

In addition to the Resolution of the General Assembly, treaties between nations provide for the extradition of such offenders and these agreements did not remain pious hopes or solemn agreements; they have been translated into practice and in various cases, fugitives have been surrendered to the requesting States. The Court of Appeal of Nancy (France) in 1949, on the request of the Belgian Government for extradition of Leonard Spiessens for collaborating with the enemy, extradited the accused, repelling his argument that the offence was a political one, observing: 'Collaboration with the enemy is not considered by French legislation or judicial decisions to be a political offence'.[2] Earlier, the court of Appeal in Paris in 1947 in the case of Colman had observed: 'The offences of intelligence for the enemy and of carrying arms against Belgium were not political offences'.[3] These decisions were the outcome of notes exchanged between France and Belgium on 10 January, 1947, cited in Colman's case.

It is desirable that these offences should be mentioned specifically in treaties or conventions or municipal legislation

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1. Bedi, op.cit., p.190.

2. 1949 A.D., Case No.89, pp.275-276 at p.276.

3. 1947 A.D., Case No.67.

and a clear definition of these offences must be given so that the courts, or in the case of India, the Central Government may not have to face difficulties in deciding whether the offences are of a political character or not. The asylum State, under international law, has complete discretion to surrender quislings and traitors as an act of grace, under treaties or conventions, but it is not legally bound to extradite a fugitive, who has come to seek shelter within its territories. Such is the view of the Supreme Court in Hans Muller's case that extradition is possible only in accordance with 'a procedure established under law and not otherwise'; and unlike the principles of international law, it is not 'an act of grace' of the Central Government to extradite them. Of course, if they are aliens they can be expelled or deported, but that is a separate question. In the absence of a specific provision in the convention of 15 August, 1874, between France and Belgium for collaboration with the enemy during the war, the extradition of van Bellinghen was refused by the Court of Appeal in Paris, in 1950.[1] This was a case of interpretation of the convention. The Supreme Court of Brazil, applying its municipal law, actually refused to extradite to Denmark in 1947, Danes convicted in Denmark of collaboration with the German occupation forces, observing: 'The crime of assisting the enemy in the time of war is a political one lato sensu, because it is a crime against the State in its supreme function, namely, its external defence and its sovereignty'.[2] The Brazilian Supreme Court in 1955 in the

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1. In Re Van Bellinghen, 17 Int. Law Reports (1950) Case No.88.

2. Denmark, (Collaboration with the Enemy) Case, 1947, A.D., Case No.71, p.146.

case of In Re Bernonville[1], rejected the application of France for extradition of the accused, who had been sentenced to death by a French court on a charge of committing acts against the security of the State, or more precisely, of treason consisting in participation in acts aimed at the demoralisation of the army, or the country in time of war. It observed: 'since treason to country is expressly included amongst political crimes under Brazilian law, therefore, the author of that act is not subject to extradition'.

By contrast, the Fugitive Offenders Act, 1881, which, of course, has been replaced in India by the Indian Extradition Act, 1962, mentioned treason as an offence and thus these offences will not become political offences in India. The Act of 1962 unaccountably did not include treason, though it is arguable that it is capable of being included by reason of item 18 which (as we have seen) includes all crimes punishable under the Indian Penal Code, if these are notified by the Central Government generally or specially. No case of this nature has so far arisen in India, but in future, specific provisions for these offences with accurate and precise definitions of the offences should be made in treaties, conventions, or municipal laws, to avoid these difficulties and such criminals should not be allowed to go scot-free because of the absence of any provisions in a treaty, like in the case of van Bellinghen, and in the two decisions of the Brazilian Supreme Court, viz. Denmark (Collaboration with the Enemy) case, and the case of In Re Bernonville.

In the Indian Extradition Act itself either in the Second Schedule 'Treason or collaboration with the enemy during war' may be added as an extraditable offence; or a standard

1. 22 Int. Law Reports, (1955) pp.527-528.

clause on the pattern of the Peace Treaties of Paris with Italy,[1] with Bulgaria,[2] with Finland,[3] with Hungary,[4] and with Rumania [5] of 10 February, 1947, which specifically demand surrender of national fugitives for 'treason or collaboration with the enemy during the war' [6] may be inserted in conventions or treaties with different countries entered into or to be entered by India. That would solve the problem, as Section 3 of the Act would give the sanction of municipal law to these amended treaties and conventions when once the required notification has been made. Further, notification, as required by Sections 3 and 12 of the Act, introducing an amendment in the Second Schedule will make these offences extraditable offences in the eye of the municipal law, whereunder the amendment procedure for treaties followed under Sections 3 and 12 has to be strictly complied with.

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1. Art. 45 U.N.T.S. Vol.49, p.3.
2. Art. 5 U.N.T.S. Vol.41, p.21.
3. Art. 9 U.N.T.S. Vol.48, p.203.
4. Art. 6 U.N.T.S.,Vol.41, p.135.
5. Art. 6 U.N.T.S. Vol.42, p.3.
6. Bedi, op.cit., p.187, n.102.

(2) 'Prescription' as a bar to extradition

(a) Whether according to the law of the requesting State or requested State or both.

(b) From when does time run in the fugitive's favour?

(c) Limitation in cases when penalty has been imposed or punishment inflicted in absentia (par contumace).

(a) Whether according to the law of the requesting State or requested State or both

'Prescription' (of the offence) is another ground for refusal of extradition of a fugitive offender. The exceptions are by some called limitations and restrictions, being based on considerations of law, humanity, policy and convenience and give the right of refusal or discretion to refuse to surrender by the extraditing or requested State. This particular restriction is generally inserted in conventions, extradition treaties, arrangements or municipal statutes. This clause is for the protection and safeguard of the individual person from time-barred and long-delayed prosecutions, especially as, under the general law, if the aggrieved party has taken no action till the expiration of the period of limitation or for an unduly long time, he cannot be allowed to do so. The sword of Damocles should not be kept hanging over his head.

The Indian Extradition Act, 1962, by Section 31(b) has laid down that a fugitive criminal shall not be surrendered or returned to a foreign State or Commonwealth country, 'if prosecution for the offence, in respect of which his surrender is

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1. Bedi, op.cit., p.165.

sought, is according to the law of that State or country, barred by time'. This clause, therefore, gives an immunity to the fugitive offender from prosecution or punishment if the prosecution has become time-barred, and this specifically makes the law of prescription binding on the demanding State. As in India for criminal prosecutions no period of limitation is prescribed, so far as India is concerned, there is no question of the applicability of the law of prescription and this is why extradition is prohibited, if the immunity has been acquired by the law of the requesting State. Art. 5 of the Indo-American Treaty is only abundante cautela and either party may take advantage, if any, otherwise for all practical purpose, section 31(b) is enough, though the treaty may conceivably cover exceptional cases.

In internatinnal law, in the absence of a common period of limitation in the two given States, there was no unanimity of opinion on the question whether the law of prescription of the requesting State would govern the matter or the law of the requested State would apply. In both these cases, unlike India, it was assumed that a law of limitation was in force in both countries to govern criminal prosecutions, and that the prosecution was barred by the law of limitation in force. The difficulty arose when the requested State had to determine whether acquisition of immunity from prosecution or punishment was governed by its own law or according to that of the requesting State or of both.

Most writers on international law hold that the law of the requesting State should determine the period of prescription, and India seems to have adopted this pattern basically, but as in India no law of prescription exists for criminal prosecutions (with few exceptions) obviously India could not enact that the

immunity from prosecution would be governed by its own laws as a requested State.

On the other hand, the majority of treaties are to the effect that the law of the requested State must decide the issue. It is just and equitable in the interest of the requesting State that an offender should not be allowed to escape punishment by taking asylum in a State where the period of limitation is shorter in the requesting State where he committed the offence.

> "To hold otherwise and to give the fugitive the benefit of foreign statutes of limitation, which are necessarily more or less arbitrary is to defeat the end for which extradition treaties are made namely, to prevent criminals for securing immunity from punishment by flight."[1]

But this argument would apply only to treaties which do not mention the applicability of the law of limitation of either State, in contrast to those treaties which specifically have a clause stating that the laws of limitation of the requested State would apply.[2] Moore's opinion would not cover bilateral treaties like the Indo-American Extradition Treaty of 1 April, 1966,[3] wherein para.5 contains a clause seemingly inconsistent with Section 31(b) of the 1962 Act, that extradition shall not take place, if, subsequent to the commission of the crime or the institution of penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting party

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1. J.B. Moore: Extradition, op.cit., Vol.1, para,373, p.569.

2. For the later category of States, see Bedi, supra, p.166. n.2.

3. Published in the Extraordinary Gazette of India, part III, Section 3, sub-section (i) dated 1 April, 1966.

applying to or applied to, which means that by this bilateral treaty the period of prescription should be determined by laws of both the countries, viz. India and the United States of America.

There is another aspect of the matter. According to the definition of an extradition offence under Section 2(c) of the Indian Extradition Act, 1962, the offences may be provided in the treaty of a foreign State, being a treaty State; and in relation to a foreign State, other than a treaty State, or in relation to a Commonwealth country, offences are provided in the Second Schedule. A foreign treaty like the Indo-American Treaty, lays down (as we have seen) that the law of prescription governing the case at hand will be the laws of both the parties. The other two cases will be governed by the Second Schedule, and according to that schedule, the offences mentioned therein should be construed to be offences according to the law in force in India on the date of the alleged offence. Smuggling narcotics, offences under the Defence of India Rules and the like, might be offences on the date of the commission of the offence, but later cease to be offences, by the expiry of such temporary laws which, having given them life, died a natural death, and will not revive. But, of course, if a prosecution had been launched already, Section 6 of the General Clauses Act will operate for the continuance of the prosecution already launched, unless the legislature, by implication or necessary intendment, holds and provides otherwise. If by the laws of the requested State, the prosecution became barred by time, it would stand on the same footing as an offence not included in the list of extradition offences in theSecond Schedule, because the offence should not only be an extraditable offence but should also be an offence for which a

prosecution could be launched in the territory of the requested State. This will not be the case, even if the offence was an offence in India at the date of its commission, if lapse of time put an end to the capacity of the execution in the requesting State to institute prosecution, and vice-versa. That being so, the doctrine of 'double criminality' (see below) may stand in the way of surrender, if there happen to be a prescriptive law of limitation in force in India. Once the prosecution or punishment is barred by lapse of time under the laws of India (in a hypothetical case), the situation will not be different from that where the act done is not a crime under the territorial law and, therefore, even if the extradition offence were mentioned in the Second Schedule, he could not be extradited. But no such eventuality would normally arise in India, as no general law of limitation bars a criminal prosecution.

Section 31(b) of the Act of 1962 is as it were a prototype of clauses in the few codes and treaties in international practice, which without referring to the laws of the requested States determine the question of prescription, either by the laws of the requesting State or by the laws of the place where the alleged offence was committed. Consequently, surrender of an offender would be refused if prosecution or punishment is barred by lapse of time, in accordance with the laws in force in the requesting State or according to the law of the State where the offence was committed (and in that case, it may either be the requesting State or a third State).[1]

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1. In Re Weill, decided by the Argentine Federal Supreme Court on 4 July, 1939, 1941-42, A.D., Case No.104.

There is no dearth of national statutes which make extradition impermissible, if the prosecution or punishment is barred under the laws of the requested State.[1] The reason for these provisions seems to be that the requested State, having codified laws and limitation for criminal actions, cannot be expected to surrender its rights to examine a request in the light of its own laws, including the statute of limitation, except when they contain provisions to the contrary. It is therefore, necessary that the laws of the requested State, if any, should be given due consideration, before the surrender of the fugitive. Looking to all these difficulties, permissive language has been used in the Draft Convention adopted by the International Law Association in 1928 by Art.5, which leaves it to the discretion of the requested State to refuse extradition, if the person has acquired immunity under its own laws.[2] This midway course, though not a final solution of the problem and not (necessarily) applicable to India at present, may be just and equitable and may be fruitfully adopted in various state practices in treaties and municipal laws. This provision is somewhat akin to that adopted in Indo-American Treaty by clause 5.

The importance of the treaty clauses becomes more evident when questions are raised before the courts about the 'equal protection' clause in different State treaties and also its

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1. See Belgium, Law of Extradition, 1874, Art.7; Germany, Extradition of Law of 23 December, 1929, Art.4 (2); Netherlands, Extradition Law of 1875, as amended in July, 1965, Art.5; Peru, Extradition Act of 23 October, 1888, Art.3(3); Sweden, Law Regarding the Extradition of Criminals, 6 December, 1957, Art.10; Art.5(b) of the South American Convention of 1911, cited by Bedi, op.cit., p.167, n.6.

2. Report of 35 th Conference, Warsaw, 1928, London, 1929, pp. 324-329 at p.326; Bedi, op.cit., p.167, n.5.

variance from the Extradition Acts. The provisions of extradition acts may be qualified by the terms of the treaty and the order of the Central Government under Section 3 of the Indian Extradition Act, 1962, applying the Act to the treaty. Extradition treaties exist between India and other countries, but the terms of the treaty or treaties vary from country to country. The courts would assume that foreign State with whom the Central Government had diplomatic relations would observe the terms of the treaty.[1] The court would also assume that a foreign government will honour its obligations under any law or arrangement.[2] In R. v. Wilson,[3] it was observed:

> "Extradition treaties with a foreign state, in consequence of which the Extradition Act is applied by Order in Council in the case of that State, are narrower in terms, than the Act; the operation of the Act is limited with what is consistent with the treaty and not otherwise."

To the same effect is the case of Ganz.[4] Therefore, if the treaty clauses are narrower than the Extradition Act, the fugitive could conceivably get an advantage not available to persons extradited by virtue of the Second Schedule and no question arises of challenging the vires on the ground of the 'equal protection' clause. It may be that only in those cases where the treaty provisions are wider than the Second Schedule, that

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1. See R. v. Governor of Brixton Prison, Ex parte Atkinson (1962) 2 All E.R. 1146; (on appeal) Sub-nom. Atkinson v. United States Government (1969) 3 All E.R. 1317 (H.L.); Royal Government of Greece v. Governor of Brixton Prison (1969) 3 All E.R. 1337 (H.L.).

2. Royal Government of Greece v. Governor of Brixton Prison (1969) 3 All E.R. 1337 (H.L.).

3. (1877) 3 Q.B.D. 42.

4. R. v. Ganz, 9 Q.B.D. 93, 46 L.T. 592, 51 L.J.Q.B. 419.

complaint could be made of violation of Art.14 of the Constitution, the fundamental right of equality before the law. The law of extradition, in the words of the Supreme Court in Hans Muller's case, being a special branch of the criminal law, and different treaties having been entered with different States on different considerations, Art. 14 cannot be made a ground for challenge, as different States stand on different footings and cannot be said to be similarly situated. Ultimately, whether the law of the requesting or requested State applies, the discretion to refuse extradition lies with the Central Government, as decided by the Supreme Court in Hans Muller's case. But the discretion must be objective and must not be arbitrary, as has been observed in the case of R. v. Galwey.[1]

> "Where an extradition treaty reserves an absolute discretion as to the granting or refusing the surrender of their nationals by the contracting parties, the discretion of the United Kingdom is exercised by the Secretary of the State. The exercise of such discretion is objective and not subjective. If the discretion is allowed to be exercised subjectively, it will lead to abuses in this country's Extradition laws, as far as its administration is concerned."

Another interpretation of the Extradition Act, 1962, is open to us and, caution apart, it might seem to conclude the question. Under Sec.32, to which we have often referred, nothing contained in Sections 3 or 12 of the Act shall have the effect of limiting the provisions of Section 31. Consequently, since Section 31(b) 'shall apply without any modification to every foreign State or Commonwealth country', no provisions, even in the Indo-American Treaty, can vary the position that no fugitive criminal may be surrendered if his prosecution is

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1. (1896) 1 Q.B. 230.

barred by time according to the law of the requesting State. The simplicity of this solution is appealing, and as long as Indian criminal law remains unchanged in respect of limitation, no other solution commands serious attention.

It may be mentioned that the fixation of the period of limitation is a procedural matter and nobody has a right to claim a longer or shorter period. In such cases 'equality before law' or 'equal protection of the law' could not be invoked. Of course, the prisoner may, in a given case, claim a period of limitation as it existed at the time of the commission of the offence. So far as India is concerned, these arguments on the applicability of the prescriptive laws of India in criminal acts are not relevant, as there is no law laying down the period of limitation for launching a prosecution.

(b) <u>From where does time run in the fugitive's favour?</u>

There is some divergence between State practices and, consequently, difference regarding the period in time when prescription takes effect in the various judgments based upon different treaties, municipal laws, and divergent rules on the subject.

Some treaties provide that immunity must have been acquired at the time of the surrender; others provide for acquisition of the immunity before the requisition and a third category provide for accrual of the immunity prior to the arrest or commitment of the fugitive. Municipal statutes of some States provide for the refusal of surrender, if immunity has accrued under their statutes of limitation, the reverse of the provision to Section 31(b) of the Indian Extradition Act, 1962.

The refusal of surrender is, therefore, a foregone conclusion in such cases, if the time for taking judicial action or inflicting punishment or penalty has expired under the laws of the State of asylum. The Belgian Court of Appeal in Re Addis [1] in an advisory opinion given on 19 December, 1931, held that the request should not be granted, observing:

> "As Article 7 of the two Belgian laws on extradition provides, extradition cannot take place if, since the alleged commission of the act, prosecution or sentence has become barred under Belgian law by a Belgian Statute of limitations."

The same result was reached in the Supreme Court of Argentina in the case of similar provisions incorporated in the treaty giving the requested State the right to decide the question of prescription according to its own laws. The Supreme Court of Argentina by judgement dated 16 May, 1951, refused extradition to the Netherlands in the case of Riphagen,[2] where the terms of the Extradition Treaty permitted the application of the law of the country which was less rigorous in this matter, and it was held that the time which has elapsed between the commission of the alleged offences and the submission of the extradition request exceed the limits fixed by the Argentina Penal Code. Obviously, the judgment is correct. If, in India, the Penal Code or any other statute or law of limitation prohibited prosecution after the expiry of a certain time, and if a person was committed for extradition after that time, the committal would certainly violate Article 21 of the Constitution of India. On similar grounds, the Federal and Cassation Court of Venezuela rejected the appli-

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1. 1931-32 A.D., Case No.166.

2. 18 Int. Law Reports , 1951, n.1, p.334.

cation for extradition in the case of In re Romaguera De Mouza on 23 July, 1952.[1] A similar practice is evidenced in the case of Plevani,[2] in which France refused to extradite the accused to Italy in 1955, as, according to Article 10 of the Franco-Italian Treaty of 12 May, 1870, the sentence had become barred by the law of the requested State (France). The article specifically provided: 'Extradition may be refused, if the sentence has become time barred according to the law of the country in which the extradited person has taken refuge'. The principle ignores a danger which may lead to lawlessness and anarchy, viz. that it would encourage persons to commit offences and take refuge in a state, the prescription laws of which limit the time for prosecution for a shorter period than others.

Section 31(b) of the Indian Extradition Act has not given any date of the commencement of the immunity and, it is submitted, when the law of requesting State on the subject has been made applicable, the date of commencement of immunity will be governed by that law. However, in Art.5 of the Indo-American Treaty is a clause to the contrary on the subject, the parties have not fixed the date but have simply provided that subsequent (i) to the commission of crime, and (ii) institution of penal prosecution or the conviction thereon exemption from prosecution has been acquired by lapse of time, according to the laws of the High Contracting parties applying or applied to according to the laws of both the countries. So there is an outer limit subsequent to (i) commission of crime, (ii) subsequent to the institution of penal prosecution or conviction.

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1. 19 Int. Law Reports, 1952, Case No.84.

2. 22 Int. Law Reports, pp.514-515, decided on 7 January, 1955.

It has been suggested above that Indian courts must observe Section 31(b), even in the face of a treaty inconsistent with it, because of Section 32. However, the Indian legislature should end this controversy and make the position clear as to when the immunity commences.

(c) Limitation in cases when penalty has been imposed or punishment inflicted in absentia (par contumace)

Section 26 of the British Extradition Act of 1870 provides that 'conviction' and 'convicted' do not include or refer to a conviction which, under foreign law, is a conviction for contumacy, but the term 'accused person' includes a person so convicted.

A person convicted par contumace in France continues (in the common law view) to be an accused person, liable to be delivered over under the Extradition Acts. In a case where a person is accused of an offence in France, and a jugement par contumace has been given against him, many writers argue that this will be a sentence as by trial with a jury. But it is not so. When that person is arrested, extradited or surrenders himself, that jugement against him given par contumace is annulled and he is placed in the same position as if no proceedings had been taken against him.

In Re Coppin [1] on the demand of extradition by the French court, the accused inter alia argued that he was not within the Extradition Act at all, as he was not an accused person, having been condemned par contumace. Ordering the extradition the argument was repelled and the court observed:

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1. (1866) L.R. 2 Ch. App.47.

> "I should assume that it has been established that the jugement par contumace does work some prejudice to the party upon trial, either by reducing the amount of necessary proof, or by changing its character by making him liable to costs, How could that possibly take him out of the category of accused persons? He has ceased to be a person condemned, because his condemnation has been annulled upon his appearance and he is to take his trial for offences with which he is charged. What better, I ought rather to say what other, description of him could be given than that of a 'person accused'?"

The definition of the 'accused' in the British Extradition Act, 1870, by Section 26 of that Act adopts the judgment in Coppin's case.

The Indian Extradition Act of 1962, too, has adopted the rule in Coppin's case and has inserted the definition of 'accused person' in the British Extradition Act of 1870 verbatim in Section 2(b). The definition of 'person accused' is not 'exhaustive but illustrative'. In Section 2(f) the definition of the words 'fugitive criminal' includes the 'person accused' and the words 'fugitive criminal' or 'person accused' which occurs in the various sections of the Indian Extradition Act, 1962, includes a person convicted for contumacy. Section 2(b) read with section 2(f) therefore, makes 'fugitive criminal' mean and include a person convicted for contumacy. Section 31(b), the Second Schedule of the Indo-American Treaty of 1 April, 1966, also as far as the law of prescription is concerned applies to the person convicted par contumace and the person not so convicted.

As we have already seen, much turns on the distinction, since an accused (but not a convicted) fugitive has the right to escape extradition if no sufficient prima facie case is esta-

blished against him.

Now the different practices under international law and practice may also be noticed.

The same principles of limitation, as laid down in the cases of In re Addis, Riphagen, Plevain (supra) would apply, where a penalty is imposed or punishment inflicted in the case of a person convicted in absentia (par contumace) for whose extradition a request has been made. The State applied to has a complete discretion and is fully entitled to reject the request for extradition if the extradition is made in violation of guarantees afforded by its laws. In Re Ibrahim Moussa Costa,[1] where France, on behalf of Syria, had requested in 1935 Argentina for the extradition of the appellant Ibrahim Moussa Costa, who had been sentenced in absentia by the Court of Beirut in 1920 to 20 years imprisonment with hard labour, the Camera Federal of Rosario, Argentina, accepting the plea of the accused, invoking the statute of limitation and rejecting the application of France for extradition, after hearing the parties on the nature of penalty inflicted in absentia and its inapplicability under the constitutional guarantees conferred upon the residents under the Constitution of Argentina, observed:

> "The question is of particular importance in view of its bearing on statutes of limitations since Moussa Costa is merely an accused person, the action for the crime charged ... is barred seeing that between the date of judgment and the extradition petition more than 10 years in action have passed; that being the period allowed by Article 481 of the Ottoman Penal Code. It should be observed that the same result follows if one looks at the French legislation, where Article

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1. 1935-1937 A.D., case No.179.

> 637 of the Code of Criminal Procedure decides the point in the same way and the same period as the Ottoman Penal Code ... The same result arises, if the matter be referred to Argentina law, for the period of 12 years fixed by Article 62, para.2 of the Penal Code has now elapsed, without any act or proceeding being brought to interrupt it ..."

In India, as we have seen, no prescriptive limitation has been laid down, and the superior courts have power to set aside an order of a magistrate if he has dismissed a complaint on the ground that prosecution has been undertaken after a long lapse of time having regard to the magnitude and seriousness of the offence.

Unlike the case of Ibrahim Moussa Costa, if no period is prescribed by the Statute of Limitations, an application for extradition may not be open to serious challenge on account of long lapse of time and because it is, therefore, inexpedient or may be oppressive or not in the interest of justice. In the case of Nicolo Liotta,[1] the Argentina Federal Supreme Court granted extradition of an Italian sentenced in absentia (par contumace) in Italy. The judgment of the Federal Supreme Court turned on the ground of absence of any bar on the prosecution both under Italian law and law of Argentina, on account of prescription of time.

The argument about the absence of a prescriptive bar of time in the asylum State weighed too, with the second circuit Court of Appeal in the United States of America which allowed extradition of one Caputo,[2] who was condemned to death in absentia

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1. A.D. 1935-1937, note p.384, decided on 12 February, 1936.
2. President of the United States ex rel. Caputo v. Kelly, decided on 9 May, 1938, A.D. 1938-1940, Case No.146.

by the Court of Assizes of Aix on 14 January, 1923, 15 years earlier. The Court repelled the argument made on behalf of the accused that the offence was barred by the French Statute of Limitation, for relying on Art.VIII of the Franco-American treaty, it held that the offences with which Caputo was charged were not barred by the laws of the place of asylum.

According to the Indian Extradition Act, 1962, such a request would be refused, as the offence was barred by the French (i.e. requesting State's) statute law of limitation. In Caputo's case, if the offence was barred by time, the extradition should not have been allowed after 15 years, whether the offence became barred under the law of the asylum State or not, and the fact that the sentence was in absentia could make no difference.

In Re Rebeiro,[1] the Supreme Court of Colombia held that States are free to reject the application for extradition, because of the inconclusiveness of the request as to the effective date of operation of prescription.

In any case, the objection regarding the accrual of immunity on account of prescription or limitation must be raised by the accused, and if he does not do so, the failure to mention it in the request or absence of information on the subject in the request for extradition is irrelevant, as was held in Re Berz by the Supreme Court of Argentina in 1944.[2]

Cases also arise where a State, after pronouncement of its policy, through its national laws, denounces it when necessary. Such a case is in Re Dobalo, 1949,[3] where the Supreme

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1. 26 Int. Law Reports, 1958, pp.525-526, decided on 2 July, 1958.
2. In Re Berz, decided on 22 November, 1944, A.D. 1943-1945, note 239.
3. Decided on 7 February, 1949, A.D. 1949, Case No.90.

Court of Argentina, instead of applying Article 3(5) of the Extradition Law of 1885 of Spain, the requesting State, which was the law of prescription applicable to the case, applied Article 62, para.2, of Argentina Statute of Limitations and refused extradition to Spain.

So far as a demand from India is concerned, the question of par contumace does not arise, because trials are not held in India in the absence of the accused and they are never convicted or sentenced in absentia.

(d) Date of commencement of immunity

The provisions of Section 31(b) have been enacted on the salutary principle that if a fugitive offender cannot be tried in a foreign country owing to lapse of time or the crimes being barred by time under the law of limitation of the requesting State, it is no use extraditing the accused. In doubtful cases only, should a foreign State make a request for surrender and the Central Government should consider whether the immunity has accrued and if so, on what date. In determining the question, the relevant dates could be as under:-

1) Date of request for surrender.

2) Date of receipt of such request by the Central Government.

3) Date on which the magistracy gives its verdict on this particular preliminary issue or makes an order for committal.

4) Date when the Central Government receives the report of the magistrate committing the fugitive to prison for eventual extradition.

5) Date when the High Court passes an order under Section 491 of the Criminal Procedure Code or allows a habeas corpus

petition under Article 226 of the Constitution, in revision under Sections 435, 439 and 561A of the Criminal Procedure Code, or rejects the petition of the accused to quash the orders of the magistracy or the Central Government.

6) Date when the Supreme Court passes the order under Article 136 of the Constitution, dismissing the appeal of the accused against the order of the High Court or against the order of the Central Government or magistracy, dismissing a habeas corpus petition.

7) Date of the order of the Central Government accepting the recommendation or report of the magistracy and ordering the extradition of the accused under Section 8 of the Extradition Act, 1962.

Apart from the different State practices in international law, under the Indian law the last-mentioned date seems to be the decisive date, for on that date the Central Government makes up its mind whether the accused should be extradited or not. But this, logically, should be the outer limit and the earliest and inner limit will be the date of receipt of requisition, and therefore, the relevant date could be any date between the date when the requisition is received and the order of the Central Government is made under Section 8 of the Extradition Act. If the immunity has accrued on the date of the receipt of requisition, the request will be rejected outright by the Central Government, without the appointment of a magistrate under Section 5 of the Act. If, during the inquiry before the magistrate, the time limit passes, the magistrate should not make a report for committal but should discharge the accused. If, while making an order under Section 8 of the Act, the Central Government is satisfied that, on that date the prosecu-

tion is barred by lapse of time according to the law of the requesting State, it should refuse extradition. So neither the date of receipt of requisition, nor the date of making an order by the Central Government under Section 8 of the Act, nor any other intervening dates are singly final and decisive, but these dates will cover a wide range, varying between the date of the receipt of request for extradition till the date of an order under Section 8 of the Act and the former can be said to be an inner limit and the latter an outer limit. If the prosecution becomes barred at any time between these dates, extradition will be refused. The date of passing the order under Section 8 is in favour and to the advantage of the accused; if the prosectuion was not barred between the date of receipt of requisition but it becomes barred on the date of order under Section 8, the accused cannot be extradited and in that sense, this date is the decisive date.

A subsidiary question in this connection may arise, if by virtue of the non-surrender of the fugitive because of the circumstances of non-surrender provided under Section 31(d),[1] whether the prosecution becomes time-barred under Section 31(b) and whether the fugitive offender can be exempt from extradition.

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1. Section 31 of the Extradition Act: A fugitive criminal shall not be surrendered or returned to a foreign State or Commonwealth country -
(a)
(b)
(c)
(d) if he has been accused of some offence in India, not being the offence for which his surrender or return is sought, or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise.

Section 31(d) of the India Act of 1962 is in pari materia with Section 3(3) of the British Extradition Act, 1870, and the cases decided by the British courts will be relevant in interpreting the provisions of Section 31(d) of the Indian Act.

In the case of ex parte van der Auwera,[1] it was held that proceedings upon a claim for extradition by a foreign State may be instituted before the sentence has expired and an order of committal for extradition made to take effect upon such inquiry the prisoner may be surrendered under such order, although at the date of the surrender, but not at the date of the extradition proceedings, the fugitive had become, by the law of the foreign country, exempt from prosecution by reason of lapse of time. Lord Alverstone C.J. declined to express an opinion as to the validity of the proceedings for committal taken after such a period has elapsed, as it would prevent the offence being subject to punishment in the foreign country.

The resultant position, taken literally, is that if the order of committal has already been passed by the Central Government under Section 8 of the 1962 Act before the accrual of the immunity or prosecution became time-barred under Section 31(b) of the Act, the right of physically surrendering the accused to the foreign State, in pursuance of the order under Section 8, remains suspended or is, by virtue of the provisions and the circumstances mentioned in Section 31(d) kept in abeyance and, when the contingencies mentioned in clause (d) of Section 31 are over, he may be physically surrendered to the foreign requesting State. But if on the other hand, no order of committal has been passed

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1. R. v. Governor of Brixton Prison, Ex parte van der Auwera (1907) 2 K.B. 157.

by the Central Government under Section 8 and if the prosecution becomes barred by lapse of time in the meantime, the bar of Section 31(b) would operate and the surrender of the accused to the foreign requesting State would be refused. The reason for this seems to be that a mere act of request or the pendency of the proceedings for extradition before the courts or the Central Government in India would not operate to suspend the period of limitation unless the order is finally made by the Central Government under Section 8 for committal, and if, until then, the prosecution has not become barred by time under the law of prescription of the requesting State, there is no question of, or occasion for a bar to extradition, as provided under Section 31(b) of the Act.

The crux of the matter in such a situation is whether the prescribed period of foreign limitation laws expires before or after the passing of the final order of the Central Government ordering his extradition. Therefore, it is a case either of suspension of surrender or of a conditional order not to surrender the fugitive, until the termination of contingencies provided under Section 31(d) of the 1962 Act. If it is a case of <u>suspension</u> of the running of the period of limitation, the prescriptive period cannot begin during the time the fugitive is undergoing a prison sentence in the territory of the requested State, otherwise the fugitive might intentionally commit a lesser crime and invite punishment within the territory of the requested State, in order to save himself from being extradited on the plea of lapse of time.

Another circumstance may arise in such cases. Suppose the order for surrender is made by the Central Government before

the period of foreign limitation has expired and the accused seeks his remedies in the High Court or the Supreme Court but before the termination of those proceedings, the period expires and the accused is not in gaol, i.e. is on bail, or is in gaol, can he still be surrendered?

If we take this view, as we are bound to do, that the validity of the Central Government's view is subject to adjudication by way of review, the effect of the court's decision against the order is to set the fugitive at liberty, and the effect of the court's deciding in favour of the order is to establish its validity. We have already submitted that the final date in all the limitation questions is the date of that order. Judicial review cannot prolong the date, a suggestion which would be against reason. Thus, if immunity is alleged to have accrued while the review proceedings are pending it cannot be relied upon to render the order void.

(3) The principle Non bis in idem

The principle non bis in idem is another ground for refusal of extradition. This rule is known as "nemo debet bis vexari pro uno delicto' or'pro eadem causa' and is a rule of general application. It bars extradition of fugitive criminals upon prosecution for the same offence or pending prosecution for the same offence in the State of asylum. It is based on considerations of humanity and public policy to safeguard the life and liberty of individuals, citizens and aliens alike, in India against double prosecution, based upon the principles known to criminal law as res judicata, autrefois acquit, or autrefois convict. According to this rule, a requested State may decline the surrender of a person claimed, if such person has already been prosecuted, sentenced or discharged in the requested State or any other State for the same act or acts, which form the grounds of his extradition. However, this rule of non bis in idem would not apply where the requesting State, in whose custody he was, has, after trial, prosecuted and convicted him, and he has escaped to the requested State, without serving his sentence, as under these circumstances he is not wanted for a new trial after conviction, but he is wanted only to undergo the sentence, or the remaining sentence, as the case may be, already pronounced against him.

The rule of non bis in idem is normally applicable to interstate offences but it has become a well-recognised principle of international law in extradition proceedings, being based upon the general principle recognised by all members of the international community that a person should not be vexed twice for the same offence or should not be subjected to repeated trials for the same act. This is commonly known as the rule

against double jeopardy, enshrined as a fundamental right provided under Article 20(2) of the Constitution: "No person shall be prosecuted and punished for the same offence more than once"; though as early as 1898 it was propounded in Section 403 of the Indian Criminal Procedure Code. Sub-section (1) of Section 403 is the rule against double jeopardy, and the rest of the sub-sections are the exceptions of this rule. Though the doctrine of double jeopardy was already there, it was given constitutional protection when incorporated in Chapter III of the Constitution, and that being so, the legislature while enacting the Indian Extradition Act, 1962, did not think it necessary to reproduce it in the Extradition Act, 1962, as it would be unnecessary or redundant. Section 31(d) in fact deals with offences, "not being the offences for which the surrender or return of the fugitive is sought", i.e. other than the rule of non bis in idem. One deals with reprosecution for the same offence, whereas the other prescribes the non-surrender of the fugitive who is being prosecuted or serving sentence for an "offence other than that for which the surrender or return is sought". The protection of this doctrine has been guaranteed, in addition to the constitutional gurantee under Article 20(2) and the guarantee under Section 403(1) of the Code of Criminal Procedure, in Article 6 of the Indo-Nepalese Extradition Treaty of 22 February, 1963,[1] and in Article 4 of the Indo-American Treaty.[2]

A similar provision was made in Article 4 of the Anglo-German Treaty which has binding effect so far as India is con-

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1. Published in the Gazette Extraordinary of India, Part II, Section 3, sub-section (1) of 22 Feb., 1963.

2. Published in the Gazette Extraordinary of India, Part III, Section 3, sub-section (1) of 1 Apr., 1966.

cerned, by virtue of the definition of an Extradition Treaty in Section 2(d) of the Indian Extradition Act, 1962. This rule, being protected by constitutional guarantee in the chapter of Fundamental Rights in India, stands on a higher footing than as declared in the Criminal Procedure Code, 1898, or by the doctrine as applied in international practice as a part of international law, or inserted in treaty provisions. The magistracy during extradition proceedings, the superior courts in habeas corpus petitions and in revision proceedings, and the Central Government while passing an order under Section 8 of the 1962 Act, cannot brush aside a plea based upon this doctrine. The protection of this clause is analagous to that given by Art.14 and the right cannot be waived as was held in Basheśarnath's case.[1] The court while considering this doctrine should take into consideration the Extradition Act as well as the extradition treaty during extradition proceedings.[2]

As action taken under the Extradition Act involves the curtailment and infringement and deprivation of the liberty of the individual, the provisions of the Extradition Act should be strictly interpreted,[3] especially because extradition involves an individual's being sent for trial in a foreign land, perhaps under unknown laws in an unknown language, perhaps with no or few resources to set up his defence and possibly without defence evidence. The Allahabad High Court has held:

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1. Basheśarnath v. I.T. Commissioner, A.I.R. 1959 S.C. 149, para.13.

2. Queen v. Wilson (1877) 3 Q.B.D. 42 at p.46.

3. Ram Pargas v. Emperor, A.I.R. 1948 All., p.129 at pp.130-131.

> "The Extradition Act and the Criminal Procedure Code, both being penal enactments, their terms must be strictly construed in favour of the accused persons, whenever such construction can be reasonably justified." [1]

At another occasion, the Calcutta High Court has held:[2] "The right of a citizen not to be sent out to a foreign jurisdiction without strict compliance with the extradition law is a valuable right".[3] The Supreme Court in Hans Muller's case (supra),[3] has held: "But a citizen who has committed certain kinds of offences abroad can be extradited, if the formalities prescribed by the Extradition Act are observed".

The doctrine of non bis in idem has assumed importance in extradition proceedings when the applying State desires extradition, even though the person whose extradition is sought has already been prosecuted, convicted or acquitted, either in the requested State or a third State, because of the availability of better evidence in the State where the offence has been committed or in its opinion the other State was not in a position to appreciate the gravity of the offence and no adequate penalty has been inflicted on the fugitive, having regard to the nature of the offence. The substantive criminal laws, the procedural codes, and the laws of evidence providing for the sufficiency of proof, punishments for different offences vary

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1. Ram Pargas, ibid. A.I.R. 1948 All. 129 at pp.130-131.
2. Santabir Lama v. Emperor, A.I.R. 1935 Cal.122 at p.124.
3. Hans Muller, supra, A.I.R. 1955 S.C. 367.

from State to State, and it does not matter whether the requesting State feels adversely towards and frowns upon the criminal laws of the third State or the requested State as unsatisfactory. But if once a fugitive has been tried, punished, convicted or acquitted anywhere, he cannot be prosecuted for the same offence; hence, the necessity of provisions in municipal laws, of Section 31(d) of the Indian Extradition Act, and Clause 4 of the Indo-American Treaty, Article 4 of the Anglo-German Treaty, Article 6 of the Indo-Nepalese Treaty and a number of bilateral and multilateral conventions providing this protection and also municipal statutes giving mandates in those statutes, prohibiting extradition if once the accused has been prosecuted, convicted and punished or acquitted.

In addition to the provisions regarding conviction and acquittal in municipal laws and treaties, provisions are made for cases of pending criminal trials for the same offence or offences. One is found in the second part of Article 6 of the Indo-Nepalese Treaty (supra) and the second part of Article 4 of the Indo-American Treaty, which provides that extradition shall not take place if the person, whose extradition is claimed by one government, is still under trial in the territory of the other government for the crime for which extradition is demanded. The first part of this Article incorprates the rule against double jeopardy. Section 31(d) of the 1962 Act provides for non-surrender during the pendency of trial for offences other than the offence with which the accused is charged. Normally, treaties use imperative language, as in Article 6 of the Indo-Nepalese Treaty and Article 4 of the Indo-American Treaty, using the words "the Extradition shall not take place if the person is going to be tried for a second time" for the same offence for

which he has already been prosecuted, sentenced or discharged", with a further additional provision against extradition if the fugitive was still under trial for the same offence in the territory of requesting State. But some treaties make the former mandatory and the latter permissive. The treaties of this category make this slight but notable distinction that extradition shall not be granted if the accused has been prosecuted, convicted or acquitted for the same offence, whereas in the case of a person whose trial for the same offence is pending in the requested State, the latter is given a discretion to extradite the fugitive criminal, presumably, on the assumption that the competent authorities of the requested State will decide either not to prosecute or to terminate pending proceedings, or the requested State may think it more proper that the trial should take place at the place of commission of the offence, and the purpose and object of laws where courts will, inter alia, better assess the circumstances under which the offence was committed and the adequate punishment to be awarded.

An exception to this doctrine of non bis in idem is this: if the municipal laws of the requested State permit a fresh trial on the discovery of important new material, then a prosecution may proceed in spite of acquittal. Consequently, provisions are made in certain treaties, where the laws of the requested State allow the trial to be reopened, that "extradition shall be granted if, under the laws of the requested State, the statutory conditions for retrial for the same offence are met". In India, no such situation can arise, as there is no provision for reopening a trial which haa become final. It amounts to criminal res judicata for the purposes of that case or trial, except in the cases given in the explanation to Section 403 of

the Criminal Procedure Code, and if the case strictly falls within this explanation, extradition may be allowed.

The requested State would be well within its obligations under international law if return of the fugitive criminal is declined because he has been prosecuted, convicted or discharged by the courts of the requesting State. Most of the treaties in international practice are silent in regard to the earlier prosecutions having been taken place in the requesting State. Most of the treaties provide for the rule against double jeopardy, providing that a request for extradition shall be rejected, if the person claimed has already been prosecuted, convicted or acquitted, by a court of the requested State and such sentence has become final; but there are some treaties - an admixture of the two categories of the treaties mentioned above - which make provisions for "conviction or acquittal" by the courts of both the countries, generally inserting the words 'in either the requesting State or requested State'. The Indo-Nepalese and Indo-American treaties, Articles 6 and 4 respectively, come within the second category of treaties which mention 'conviction or acquittal or pending of proceedings in the territories of the requested State'.

There are treaties like the Netherlands-Israel Treaty, Article 4(2)(1), which positively provide that extradition shall not take place, if the person claimed has already been tried, punished or discharged in the requesting, requested or any third State for the offence or offences for which his extradition is demanded. In the Indian Extradition Act of 1962, no such provisions exist and no treaty made by India with other States contains this provision.

The insertion of such a provision seems desirable. Extradition is refused, when the fugitive has been prosecuted, convicted or acquitted by the Indian courts, by applying the rule against double jeopardy, but in a case where a person is prosecuted, convicted or acquitted by a third State for the offence committed in the requesting State and the fugitive is in India and the requesting State wants the extradition of that person for prosecution for the same offence for which he has already been prosecuted, convicted or acquitted, this rule of double jeopardy, non bis in idem, Article 20(2), Section 403 of the Criminal Procedure Code, principles of criminal res judicata, autrefois acquit, autrefois convict, or issue estoppel should be extended to such cases so as to refuse the extradition. If the fugitive has been prosecuted, convicted or acquitted for the same offence once, whether by the courts of the requested State, requesting State or third State, the principle of non bis in idem should come to his rescue.

To test the validity of this argument, the same result would follow if the person had not come to India, but remained in the territory of the third State where he was prosecuted, convicted or acquitted and the requesting State makes a request for his extradition for trial of the same offence to the third State, would the requested State not refuse the extradition on the ground of the rule of non bis in idem or double jeopardy? The answer will be in an emphatic affirmative. If so, then why should the Central Government or any other requested State not refuse extradition on this ground? In India, a provision should soon be made to this effect in our municipal legislation and in treaties with other States.

Another branch of this argument leading to the same conclusion and result may also be noticed. Article 20(2) of the Constitution nowhere mentions the conviction or acquittal by a court of India. It simply gives a mandate, as mentioned above, in the words of the Supreme Court in the case of Basheshar-nath (while interpreting the question of waiver of Fundamental Rights under Article 14 of the Constitution) to the State, Executive, legislature and the judiciary that 'no person shall be prosecuted and punished for the same offences more than once'; it does not matter by what courts. Section 403 of the Criminal Procedure Code only speaks for the trial by a court of competent jurisdiction it does not preclude courts of third States and if the judgments of the third States are given by competent courts, the extradition should be refused.

Some treaties, without referring to the requesting State make mention only of the requested State and third State,[1] provide against extradition where the person has been previously tried in a third State. This should be the pattern to be adopted in India so far as trial by third States are concerned. Amongst the multilateral conventions, the Central American Convention of 1934, Art.2(5) provides 'Extradition shall not be granted if the accused should have served the sentence which may have been imposed upon him for the same crime in any other country'. The Montevideo Convention of 1933, Art.3(b) and Harvard Research (Extradition) of 1935, Art. 9(b) leave the matter to the discretion of the requested State, maybe to see if the judgments were given by a court of competent jurisdiction

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1. Belgium-Israel, Art. 4(c,d), No.3; Israel-Switzerland, Art. 4(2, 1 and 2). See Bedi, op.cit., p.174, n.37.

to try those offences. Some treaties also make provisions leaving the grant or refusal of the extradition in the hands of the requested State where conviction or acquittal has been passed by the third State.[1]

A different problem came before the English court in Stallman's case,[2] where Lord Alverstone observed at p.444 that: 'a fugitive who has been discharged in extradition proceedings cannot be said to have been tried and discharged or punished'. The extradition proceedings are not in the form of the trial and consequently, if an extradition application has been refused once, a second application may be brought for the surrender of the fugitive, if some further evidence has been made available which, in the opinion of the requesting State, may warrant a second application. Extradition proceedings as such, do not come under the rule against double jeopardy. The protection of the fugitive against double jeopardy is confined to trials for the crime attributed to him. But if new evidence is forthcoming successive applications may be filed for extradition, unless the question has been decided that the man had been earlier prosecuted, convicted or acquitted, whereupon the rule of double jeopardy will lead to the dismissal of the subsequent petition for extradition. Cases of former dismissals of extradition request on grounds of previous prosecution, conviction or acquittal will bar successive and subsequent applicatinns, whereas in cases of refusal of extradition request or discharge on the grounds of non-availability of evidence at the time of earlier extradition petitions, and subsequent availability of evidence

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1. Bedi, op.cit., p.175, n.40, 41.

2. Rex v.Governor of Brixton Prison, Ex parte Stallmann(1912) 3 K.B. 424.

will be a good ground for subsequent and successive application.

The two situations should not be confused. It is one thing to say that extradition shall not be allowed if the fugitive has previously been prosecuted, convicted or acquitted, and it is another thing to say that successive applications will be allowed if the evidence was not available earlier and the fugitive was discharged. Lord Alverstone's dictum in Stallmann's case would not cover those cases where the extradition has been refused on the ground of the accused's previously having been tried in the requested State or a third State, but would apply to the other cases.

See also chapter 5 below, Section (2) which deals with 'double jeopardy' from a constitutional standpoint.

(4) Locus delicti within the territorial jurisdiction of the requested State or outside the requesting State

The statutory provisions under the Indian Extradition Act, 1962, applying to fugitive criminals defines them as individuals who are 'accused or convicted of an extradition offence committed within the jurisdiction of a foreign State or a Commonwealth country' [1] for extradition purposes. This includes all persons who have committed an extradition crime within the jurisdiction of a foreign State, whatever their nationality.[2] In determining the scope of the arrangement for extradition in order to decide whether a person is within it, reference is made to the treaty to construe its terms.[3] Indian Extradition laws have to be read together with Article 4 of the Indo-Nepalese Treaty and Article 1 of the Indo-American Treaty. In the former treaty, the words 'in whose territory the offences has alleged to have been committed', and in the latter treaty 'crimes or offences committed within the jurisdiction of one party' have been respectively used and by the place of commission of offence would mean the territory of the requesting country. From the definition alone of 'fugitive criminal' in Section 2(f) when the words 'an extradition offence committed within the jurisdiction of a foreign State or a Commonwealth country' have been used, a wider proposition could emerge. In other words, extradition would be allowed if the offence is committed within the jurisdiction of the territory of a foreign State, etc., otherwise not, so far as Indian Extradition laws are concerned. A foreign State under the Extradition Act, 1962, by section 2(e) has been

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1. Section 2(f) of the Indian Extradition Act of 1962.

2. R. v. Ganz (1882) 9 Q.B.D. 93.

3. R. v. Ganz, ibid.

defined as 'any State outside India, other than a Commonwealth country and includes every constituent part, colony or dependency of any Commonwealth country so specified or added'. In pursuance of Section 2(a), the Commonwealth of Australia, Canada, Ceylon, Cyprus, Federation of Malaysia, Ghana, New Zealand, Nigeria, Pakistan, Sierra Leone, Singapore, Tanganyika, and the United Kingdom have been notified as the Commonwealth countries. By virtue of the Extradition Act, 1962, and of treaties with India as mentioned above, extradition could only be granted if the offence has been committed in the territory of the foreign State making an extradition request. The concept of territory has been well enunciated in the two English cases, i.e. Ex parte Minervéni,[1] and Schtraks case.[2] A State territory is not limited to land or any part of her country where she exercises de jure sovereignty as well as de facto sovereignty.[3] Territory means the requesting State exercising effective administrative jurisdiction and that territory is equivalent to jurisdiction. In Minervéni's case, the accused, an Italian seaman, was accused of having murdered another seaman on board a Norwegian ship. When the ship docked in the United Kingdom, the prisoner was arrested to await extradition to Norway. In a habeas corpus petition before the English courts, he alleged that he committed no crime on Norwegian territory as Article 1 of the Treaty of 1873 provided 'accused found within the territory of the other party', and the Norwegian ship was within the territorial waters of a third power. Lord Parker C.J. observed:

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1. R. v. Governor of Brixton Prison, Ex parte Minervéni (1959) 1 Q.B.D. 155.

2. Schtraks v. Government of Israel (1962) 3 W.L.R. 1013.

3. Schtraks case, ibid.

> "If I am right in saying the territory in article of the Treaty is equivalent to jurisdiction then assuming that the ship was at the time of the alleged murder in the territorial waters of a foreign power, it would only be a matter of competing jurisdiction and no one suggests it is wrong to legislate to provide for competing or concurrent jurisdiction."

It was also further observed:

> "This treaty is not treating 'territory' in its strict sense, but in a sense which is equivalent to jurisdiction, and it is only in that way that one can make sense of the treaty. Indeed, it is to be observed that in many of these treaties reference is made not to territory but to jurisdiction and in my view in this treaty, territory is equivalent to 'jurisdiction'."

The accused was held to have committed murder within the territorial jurisdiction of Norway and extradited.

The Lotus case,[1] and Mubarak Ali Ahmed in the Supreme Court of India,[2] are cases where even if the offence takes place in one territory, if the effects or results are produced in another territory, the offence is said to have been committed in the latter territory. In the Lotus case, a collision had occurred on the open sea between the French Steamship Lotus and the Turkish Steamship Boz-Kourt, resulting in the loss of the latter and the death of eight Turkish subjects. When the Lotus arrived at Constantine, the Turkish Government instituted joint criminal proceedings against the captain of the Turkish vessel and the French officers of the watch on board The Lotus and they were both sentenced to prison. The French Government protested on

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1. P.C.I.J. (1927) series A, No.10, p.18.

2. Mubarak Ali Ahmed v. State of Bombay, A.I.R. 1957 S.C. 857.

the ground that Turkey had no jurisdiction over an act committed on the open sea by a foreigner on board a foreign vessel whose flag it had and that State (French) has exclusive jurisdiction in such matters or acts; on the dispute on agreement, being referred to the Permanent Court of International Justice, by a casting vote of the President, it was held that Turkey had not acted in conflict with the principles of international law in instituting the criminal proceedings, because (inter alia) the act committed on board The Lotus produced its effects on board the Boz-Kourt, under the Turkish flag, and thus, as it were,on Turkish territory whereupon Turkey acquired jurisdiction over its foreign perpetrator. The cases present an unusual interpretation of the notion of 'territory' because the act committed elsewhere produces effects on this 'territory'.

In Mubarak Ali Ahmed's case (supra) the complainant was the business man from Goa, doing business in import and export and he came into contact with the accused, who was, at that time, in Karachi doing business in the name of Allas Industries and Trading Corporation, and in the name of Iftiar Ahmed and Co., and by letters, telegrams, telephones, a contract was entered into for the purchase by the complainant from the accused of 1,200 tons of rice, £51 pounds per ton, to be shipped from Karachi to Goa. Money was received but the rice was not supplied. One of the accused's objections inter alia was that he was a Pakistani national who, during the entire period of commission of offence never slipped into India and was only at Karachi and consequently he committed no offence punishable under the Indian Penal Code, and he could not be tried by an Indian court. The Supreme Court held that there was no question that it was a result of the representationsand the statement of the accused made through the phone from Karachi becom-

ing a representation to the complainant when it reached the complainant at Bombay, which was not disputed in this case, and as a result of these representations, the complainant parted with $5\frac{1}{2}$ lacs of rupees and thus, the offences accrued at Bombay and in that sense, the entire offence was committed at Bombay. The ratio decidendi of this case is the 'effects and results' produced in the territory other than that where offences were committed.

The English case of Minervini was followed by the case of Schtraks,[1] in which the independent question arose, viz. whether the requesting State was sovereign of the territory where the offence was committed. In Schtraks, following some civil proceedings in Israel, the accused came to live in England with a seven-year old boy, without the consent of his parents. The Government of Israel asked for extradition, under an agreement of 4 April, 1960, between Israel and the United Kingdom, and an Order in Council (Israel Extradition Order, 1960) which applied the Extradition Acts to the agreement, for perjury and child-stealing. When he was committed a point was raised in habeas corpus that Jerusalem was not territory of Israel within the meaning of the Extradition Agreement, since the United Kingdom Government did not recognise Israel Government as de jure sovereign in Jerusalem, but only de facto authority so that there was no power to order his extradition on a charge of perjury committed in Jerusalem.

> Territory in the context of the argument included any area over which a contracting party exercised effective jurisdiction and that, accordingly, since the Israel Government had de facto

1. Schtraks v. Government of Israel (1962) 3 W.L.R. 1013.

> authority and exercised jurisdiction over Jerusalem and no other State is recognised as having de jure sovereignty, Jerusalem was within the Territory of Israel and that courts while dealing with the Extradition Act are concerned with territory in which constitutionally effective territorial jurisdiction is exercised, but no sovereignty in the sense of international law.[1]

In determining whether a particular area is within the 'territory' of a contracting party, the most important consideration is whether the writ of the contracting party runs in that area.[2]

Territorial competence is a well-established principle of law, it makes a State competent in general to punish all crimes committed in its territory and to exercise full authority over all persons present in its territory (cf. The Lotus and the Mubarak Ali's case). On the principles of territorial competence, the extradition statutes of some States (like India), provide the pattern that extradition will be granted if the offence has been committed in the territory of the requesting State; others provide that extradition shall not be granted if the crime has been committed outside the jurisdiction of the requesting State.[3] Other States in their municipal laws or statutes provide that extradition shall be refused for offences committed within their respective States.[4] If an offence has been committed in the asylum State, this State will try the offence, and extradition will be refused. Extradition will also be refused if the offence

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1. R. v. Governor of Brixton Prison, Ex parte Schtraks (1964) A.C. 556 (H.L.), (1962) 3 All E.R. 529, at P532, letter G, per Lord Reid at P537, letter G, H, I, per Viscount Radcliffe, P541 letter H, per Lord Evershed, P548, letter E, affirming Re Shalom Schtraks (1962) 2 All E.R. 176 at P181, letters BB, per Lord Parker C.J.
2. R. v. Governor of Brixton Prison, Ex parte Schtraks (1962) 2 All E.R. 176.
3. Bedi, op.cit., p.176, n.43; also p.63, n.8.
4. Bedi, op.cit., p.175, n.42.

has been committed in the territory of a third State. Most of of the treaties are mandatory in application and they make provision that extradition shall not be granted if the offence was committed in the territory of the requested State and the reason is that if the offence has been committed in the territory of the requested State and the accused is surrendered to the requesting State, it means the requested State is surrendering its sovereignty to that State at the cost of its self-effacement. Difficulties do not arise if the offence is committed wholly in the territory of the requested State, but they arise in cases where the offence partly arises in the territory of the requested State and partly in the requesting State, or partly in a third State; or where acts committed in one State have results or effects in another State as in The Lotus and Mubarak Ali's case, or the offence is committed in a place treated as a territory of the requesting State. In some treaties, permissive language is used giving the requested State a discretion to reject a request for extradition if the offences are committed in its own territory. As for instance Pakistan makes a dispute over Kashmir, but India takes it to be its territory, no extradition can be allowed if there is demand arising out of an offence committed in Kashmir. In Goa also if Portugal made a request, it will be disallowed. The question of de jure and de facto territory and control was raised before the Goan Court,[1] though in a different context but the Judicial Commissioner, Goa, predictably held it was a de facto Indian Territory.

As seen in the case of Minervini,[2] the words 'Territory' and 'jurisdiction' are taken to be of equivalent import, and treaties also use these words interchangeably, but there is a long catena of cases in the Privy Council and of courts of other

1. The Registrar Judicial Commissioner's Court v. S. Francisco, A.I.R. 1970 Goa 56.
2. (1959) 1 Q.B.D. 155.

States which demonstrate a distinction between these two terms 'territory' and 'jurisdiction'. Courts of the requested States, relying upon the interpretation of a particular treaty, have declined to surrender or return the fugitive offender to the requesting State. The Privy Council;[1] while dismissing the request of France for surrender of fugitive offenders, held Article 1 of the Extradition Treaty with France of 1878 applied only'to crimes committed within the territory of the Power which is seeking extradition', and further observed:

> "In their Lordships opinion no one of the appellants was liable to be extradited under the Treaty, unless the crime of which he was convicted was in fact committed within the territory of the French Republic."

The Swiss Federal Court,[2] while rejecting Yugoslavia's request for surrender of criminal fugitives on political grounds made the following observations on the question of territoriality in relation to the place of the commission of the offence under reference:

> "The principle that extradition is not granted for offences on Swiss territory is laid down in Article 12 of the Extradition Law; it is valid even in relation to States with whom an extradition treaty is in force which does not contain that principle."

So this case is an authority for the proposition that even in cases when treaties do not contain the clause providing for the principle of territoriality, the principle will be applicable. The presence or absence of the territoriality clause or provision or stipulation makes no difference. The same prin-

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1. Kossekechatko and others v. Attorney General of Trinidad, L.R. (1932) A.C. 78 (P.C.).

2. In Re Kavic Bjelanović and Arsenijević, decided 30 April, 1952, 19 Int. Law Reports, 1952, Case No.80. See also Bedi, op.cit., p.177.

ciple is also found in two more cases, viz. of Spiessens,[1] and Mertz.[2] The conclusion, therefore, is that it is in the judicial discretion. Decisions may indeed be subject to severe criticism by writers, or may, in case of refusal, lead to strained diplomatic relations. Again, in a case of illegal grant, the municipal courts of the requested State may interfere and nullify the order of the Central Government, after taking into consideration all the circumstances of the case. If the offence was wholly or partly committed within its territory or jurisdiction, it may grant or decline the extradition of the fugitive criminal as it thinks fit.

Situations like The Lotus and Mubarak Ali's case may arise. Suppose, in the Mubarak Ali's case, the complainant files a complaint before the Pakistan Government and that government makes a requisition to the Indian Government for the extradition of the accused, on the principles laid down by the Supreme Court in that case wherein it has been held that even though the man never came to India but because of his representations that criminal result was effected in India, the Government of India could deny the surrender, as according to Indian law the offence was perpetrated in India,and similarly the reverse may be the situation where India makes a demand for the surrender of the accused to the Pakistan Government which comes to the conclusion that the offence was committed in Pakistan.

Now The Lotus and Mubarak Ali's case may be considered for the purpose of Extradition in Reverse. If the accused is brought in India, by unlawful seizure even, can the accused say,

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1. (1949) A.D., Case No.89, decided on 10 Nov., 1949.
2. (1931-1932) A.D., Case No.174, decided on 8 August, 1931.

that he committed the offence not in India and can he be successfully released in habeas corpus (a) on the ground that because of unlawful seizure or otherwise as he has been brought to those courts and therefore, those courts have no jurisdiction to try him, and (b) that as the offence has not been committed in that territory, he cannot be tried? For the latter, the reply will be found in The Lotus and Mubarak Ali's case; for the former, the British practice denying breach of municipal law in bringing the accused before British courts is in the negative,[1] so also as to the breach of principles.[2] The Supreme Court of India in the case of Jugal Kishore More,[3] agreeing with the approach of the British courts, held that once the accused was before the courts in India, he could be tried for the offence; and the courts would not enquire into the irregularity of the laws of the other country extraditing him and the irregularity caused in his bringing before the Indian courts would not be a ground for his discharge. The U.S. Supreme Court,[4] while citing the cases of R. v. Sattler and Ex parte Scott observed:

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1. Ex parte Scott (1829) 9 B & C 446. 109 E.R. 166; R. v. Marks, 3 East 137; 102 E.R. 557; Ex parte Krans, 1 B& C 258. 107 E.R. 96; R. v. Sattler (1858) D & B 539; 169 E.R. 1111; R. v. Vinayak Damodar Savarkar I.L.R. 35 Bom. 225; Sinchlair v. H.M. Advocate (1890) 17 R. (J.C.) 38; Ex parte Elliott (1949) 1 All E.R. 373.

2. R. v. Garrat (1917) 86 L.J.K.B. 894.

3. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171.

4. Ker v. Illinois (1886) 119 U.S. 436; 30 L.Ed. 421.

> "There are authorities of the highest respectivity which held that such forceable abductions [abduction by a U.S. official of a criminal from the territory of Peru] is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for an offence; and presents no valid objection to his trial in such court."

This was an extreme case of unlawful seizure by abduction.

The Canadian court , similarly, in Walton's case,[1] observed:

> "We do not see any sufficient ground that has been made out to entitle the prisoner to his discharge. The prisoner was before the police magistrate on a preliminary investigation. There were no extradition proceedings and we cannot inquire into the circumstances under which he was brought in to this country ... If he is found in this country charged with an offence against its laws it is the duty of our courts to take care that he should be amenable to justice."

In cases of offences committed outside the jurisdiction or territory of the requesting State, the requested State may refuse extradition. Mostly the conventions and treaties of the common-law countries mentioned that extradition will be granted only in case of commission of offences within the jurisdiction of the requesting State. Some treaties and statutes in accordance with the relevant national legislation provide that extradition may be granted for offences committed outside the territory of either of the contracting parties, on the condition, however, that the laws of the State applied to authorise prosecution for

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1. R. v. Walton (1905) 10 Canadian Cr. Cases, 269 at p.275.

offences even if committed abroad. On the basis of the Extra-territorial Jurisdiction Act such a thing is possible in India and provisions in Indian treaties may be made to that effect. Some of the treaties provide that surrender must be made by the laws of both the States, and this is what the doctrine of double criminality also provides and requires.

In any case the locus delicti can certainly be challenged by a fugitive under the provisions of Articles 13 and 21 of the Constitution of India and the other provisions of law of the Constitution as was done in Hans Muller's case, and the cases of Extradition in Reverse in Jugal Kishore More and Mubarak Ali Ahmed decided by the Supreme Court, as mentioned above.

It is suggested that clear-cut provisions should be inserted and enacted in the Extradition Act or in the treaties to be entered into with different nations to meet all these situations discussed above, to make the law of extradition simpler, and more certain so the Indian courts and the Central Government may not be lost in the labyrinth of different practices of different nations and their courts while deciding extradition cases.

(5) Refusal of Extradition on other grounds

Additional grounds on which the extradition may be refused need special mention.

1) When the requesting State is an enemy or potential enemy state.[1]

2) When the Government of the requested State is not recognised,[2] for example, when the U.S.A. did not recognise the Chinese Government, the latter would refuse the request of the former. This principle would also extend to the cases where the Government of the requesting State is also not recognised. But the State can surrender if it recognises the de facto authority of the requesting Government,[3] particularly taking into consideration reciprocal rights and obligations arising under an agreement.

3. Where the requisition for extradition is not in accordance with Section 4 of the Extradition Act, 1962, or is not in accordance with the treaty arrangements.[4]

4. Where the formalities required to be completed under the Indian Extradition Act, 1962, are not followed.[5]

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1. Regina v. Governor of Brixton Prison, Ex parte Kolczynski (1955) 1 All E.R. 31.

2. G.H.Hackworth, op.cit., p.37.

3. Schtraks v. Government of Israel (1962) 3 All E.R. 529; (1962) 3 W.L.R. 1013 (H.L.)

4. Valentine et al. v. United States Ex rel Neidecker (1936) 299 U.S. 5. In re Talbot, A.D. 1947, Case No.68, p.142; Re Chacur, 26 Int. Law Reports, p.525; Re Marsal Marce, 28 Int. Law Reports, pp.324-326.

5. Hans Muller's case, supra, A.I.R. 1955 S.C. 367.

5. Where the magistrate has not been properly nominated as required by Section 5 of 1962 Act.
6. Where the documents submitted do not establish the identity of the person sought.[1]
7. Where evidence presented does not make out a prima facie case against the alleged offender [2] in trials under Chapter II.
8. Where supplementary information has not been furnished within the prescribed period of time,[3] or such time mentioned in the treaty, or evidence sufficient to justify extradition has not been supplied within two months or within any further period allowed.[4]
9. Where the requesting State withdraws its request. Under international law, extradition may be refused where the crime cannot be prosecuted, ex officio by the State but needs the intervention of a complainant.[5] This latter category of case will arise where the requesting State, after requisition, does not withdraw the request but does not prosecute it. In India by virtue of Section 9 of the 1962 Act the complaint, private party, is intended to help the court, and in that case, the request will not automatically lapse.
10. Where the penalty imposed in par contumace cases is less than the minimum prescribed or only a fine,[6] which implies

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1. Bedi, op.cit., p.207, n.197.
2. Bedi, op.cit., p.207, n.198.
3. Bedi, op.cit., p.207, n.199.
4. Art.9 of the Indo-Nepalese Treaty; Article 11 of the Indo-American Treaty.
5. Bedi, op.cit., p.207, n.200.
6. Bedi, op.cit., p.207, n.202.

the offence may be of a trivial nature.

11. Where the person committed for extradition has not been removed within the agreed time limit from the territory of the requested State.[1]

12. The extradition may be refused on humane considerations.[2] Thus, a requested State may refuse extradition of the person claimed where the courts find that too long time has elapsed since the charges were first made or when it thinks that action in pressing for extradition is oppressive,[3] and would result in undue hardship to the person concerned.

13. Where the offence is of a trivial nature.

14. The application for surrender is not made in good faith.

15. The surrender is not in interests of justice, or

16. The surrender is for political reasons.

17. Or is unjust.

18. Or is inexpedient.[4]

19. It would be a sufficient cause to refuse extradition if the accused is not surrendered within two months from India after the order of extradition has been passed by the Central Government.[5]

20. Request may be also refused in cases of: racial or religious discrimination where the accused is not required to stand his

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1. Sec.24 of the Indian Extradition Act, 1962, and Art. 11 of Indo-American Treaty.

2. Re Henderson (1950) 1 All E.R. 283; Regina v. Governor of Brixton Prison, Ex parte Naranjansingh (1962) 1 Q.B.D. 211.

3. Re Naranjan Singh (1961) 2 All E.R.565.

4. Sec.29 of the 1962 Act.

5. Sec.24 of Indian Extradition Act, 1962. See also:Re Shuter (1960) 1 Q.B.D. 142; R. v. Governor of Brixton Prison, Ex parte Enahoro (1963) 2 W.L.R. 1260; The King v. Governor of Brixton Prison, Ex parte Percival (1907) 1 K.B. 696.

trial in the requesting State before the ordinary criminal courts, but before an extraordinary tribunal; as firstly it may be against a treaty, if any, secondly the requested States does not presume such a situation and extradition in such circumstances may amount to infringement of Article 21 and 14 of the Constitution. The fugitive can challenge his extradition in the Indian court on the ground that he should not be subjected to the extraordinary procedure.

Powers under Section 31 can be exercised concurrently by the magistrate and by the Central Government, whereas powers under Section 29 of the Act can be exercised by the Central Government only. The matters mentioned in Section 31 and 29 can be examined by the superior courts in habeas corpus and by the Supreme Court in habeas corpus and on a special leave petition under Art.136 of the Constitution.[1]

The Indian Consitution gives a freedom of religion. So also on racial basis,discrimination is prohibited and made an offence. Therefore, no extradition can be granted when the charge, for which a person is demanded, is of a religious nature or where the crime is against a form of religious worship. As a reaction to the Nazi régime in Germany, responsible for the gas chambers, various countries have provided in their treaties that extradition will not be allowed if the requesting State is going to prosecute the accused on account of race, religion, nationality or political opinion. Some of the treaties even go further, contemplating refusal if the surrender may 'prejudice

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1. Dharama Teja's case (1971) 2 All E.R. 11; Fernandez v. Government of Singapore and others (1971) 2 All E.R. 691 (H.L.), affirming (1971) 2 All E.R. 24. R. v. Governor of Pentonville Prison Ex parte Fernandez.

the position of that person'.[1]

But religious liberty has its limitations. Like other constitutional guarantees, it is subject to certain conditions for the maintenance of public order, morality and health. Thus, in a mixed society of secular state like India, the United States of America and others, an act performed in accordance with the tenets of a particular religion, faith or sect, creed or denomination may endanger public order as, e.g. preaching communal hatred.[2] Religion may allow polygamy, but if it disrupts morality or freedom of conscience, it can be prohibited by legislation.[3] If the performance of a religion is against health, the State may enforce regulations such as vaccination, compulsory medical examination for the admission of students to public schools, isolation for contagious diseases and the like, even against the will of such as believe, e.g. in faith-healing.[4] In such cases, the Central Government can order the extradition if other conditions are fulfilled. Moreover, no claim of asylum can stand in cases where the religious act (alleged against the fugitive as a crime) is not directed to the realisation of a particular religious object recognisable by the Court as an essential part of the religion.

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1. Bedi, op.cit., p.204, n.176, 177.

2. R. v. Majid, 1949 F.L.J. 133 (F.C.); Noor Mohd v. Rex, A.I.R. 1949 All 120.

3. The Hindu Marriage Act, 1956; Reynolds v. U.S. (1879) 98 U.S. 145.

4. People v. Pierson (1903) 176 N.Y. 201.

5. Derrett, J.D.M. Religion, Law and the State in India. (London, 1968) ch. 13.

(6) Freedom of Expression, opinion and the Press

Freedom of expression like freedom of religion is the backbone of a modern democratic society. Freedom of expression is guaranteed under Art.19(1)(a) of the Constitution of India. This freedom is not limited to speech only but includes the right to express oneself through any medium, such as writing, or drawing, or painting, or by publication in newspapers, books, pamphlets, advertisements, or in any other manner addressed to the eye and ear, and by any visible representation such as gestures and the like, by carrying banners and signs or by legally operated visual or auditory devices, like loudspeakers, tape recorders, television, radio, cinematograph, the gramophone and the like.[1] The importance of the right of freedom of expression has been recognised by Indian courts in several decisions.[2]

But this freedom of speech or expression of opinion is not uncontrolled but are subject to 'reasonable restrictions'. In exercise of its 'police power', the freedom of speech and expression including the freedom of the press, may be subject to reasonable restrictions on the grounds of security of the State from internal and external disorder,[3] and for the prevention of

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1. Bedi, op.cit., p.205.

2. Ramesh Thapper v. State of Madras, 1950 S.C.R. 594; Sakal Newspapers v. Union of India, A.I.R. 1962 S.C. 305; Bennett Coleman v. Union of India, A.I.R. 1973 S.C. 106; Ram Narayan v. M.P., A.I.R. 1970 M.P. 102.

3. Schen ck v. U.S. (1919) 249 U.S. 47; Cox v. New Hampshire, (1941) 312 U.S. 569; Chaplinsky v. New Hampshire (1942) 315 U.S. 568; Dennis v. U.S. (1951) 341 U.S. 494; Harisiades v. Shaughnessy (1952) 342 U.S. 580.

obsenity.[1] If the fugitive committed such an offence, he could not seek the protection of freedom of expression or press, nor claim asylum in the requested State. But he could claim the protection of the guarantee in other circumstances.

The reason for refusal on ground that the offence is a 'racial' or 'religious' offence or it is inconsistent with the freedom of opinion and speech or the press is that these freedoms (subject to their exceptions) are constitutionally guaranteed in India. Obviously, none of them would be punishable in accordance with the laws in force in India. Therefore, an accused demanded for prosecution and punishment for these offences cannot be extradited. Suppose Mujibur Rahman would have taken asylum in India, could he have been extradited on the request of the Pakistan Government, for expression of political opinions against the then ruling party or régime in Pakistan? The answer is 'NO'.

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1. Reynolds v. U.S. (1897) 98 U.S. 145; Winters v. N.Y. (1948) 333 U.S. 507 (511-518); Libel and Slander-Near v. Minnesota (1931) 283 U.S. 697; Incitement of Crime-Dejonge v. Oregon (1937) 299 U.S. 353, and Contempt of Court-Bridges v. California (1941) 314 U.S. 252; Bennett Coleman & Co. v. Union of India, A.I.R. 1973 S.C. 106.

   Shanker & Co. v. Madras, I.L.R. (1956) Mad. 161; Gopalvinayak Godse v. Union of India, A.I.R. 1971 Bom. 56 (S.B.); Kedar Nath Singh v. Bihar, A.I.R. 1962 S.C. 955.

(7) Pardon or Amnesty

Extradition on the grounds that the fugitive has been pardoned or an amnesty applicable to him has been declared may be refused, though it is not specifically mentioned amongst the grounds for refusal under Sections 29 and 31 of the Act. The question whether to grant the request for extradition is in the discretion of the Central Government. If the court dismisses an application for habeas corpus, the Central Government may refuse extradition. The converse is not true, for if the court discharges the offender, the Central Government has no power to extradite.

A sovereign state is fully competent to grant amnesty or pardon to persons who have been sentenced or accused, or against whom a judicial investigation is going on. There may be another situation where the accused has been granted pardon by the court under the criminal Procedure Code in connection with the prosecution of another accused but connected with the same offence, e.g. when he becomes an approver. This situation of having been pardoned or an amnesty granted by the courts of the requested State is akin to the situation where the accused is not punishable under the laws of the requested State. The declaration of pardon or amnesty, therefore, creates a bar to the proceedings and it destroys the jus puniendi to the same extent as the maxim of non bis in idem (see above, pp. 367-77) and prescription (see above, pp. 345-366) create bars to prosecution.

In cases of amnesty or pardon, the doctrine of double criminality comes in and in conformity with that doctrine, the requested State may refuse surrender of the accused. The declaration of amnesty puts an end to certain actions which are not described as offences thereafter, and the people indicted

on those charges are free from imputations attached to their reputations thereby.

But although the States as sovereign entities are free to refuse to surrender a person in principle, their conduct is in general controlled by treaty provisions which serve as limitations on their sovereignty. Therefore, it is the duty of the requested State to see whether in the absence of a clause in treaty provisions to that effect, it is going to surrender the person, relying basically on its own law of pardon or amnesty or on the law of the requesting State whose legal social and political order has been violated by the accused.

In international practice, there is no settled decision on this problem. But where a pardon or amnesty, whether by the laws of the requesting State or of the requested State, has exonerated the accused from prosecution or punishment the situation is analogous to that where the act done is not a crime under the laws of either of the two States, and one of the conditions to extradition will be lacking and this will be a ground for refusal to surrender. Further, the requested State would not abdicate its right to determine according to its own laws, including the statute providing for its law of pardon or amnesty, whether conditions under which extradition may or should be granted are present, except when there is a treaty contrary to that.

Most of these treaties . . mandatorily provide for the bar of extradition if pardon or amnesty have been granted or a person is entitled to that under the laws of the requested State. But the later situation is not contemplated under the laws of India, unless actually pardon has been granted by the

courts or the executive. The Executive Government under the provisions of the Criminal Procedure Code and Constitution has powers even to remit sentences. The question has not so far been decided by the Indian courts and no international practice binds India.

Would the requested State resolve this problem of amnesty or pardon in accordance with the laws of the requesting or requested State or of both? Obviously, if the fugitive has already been granted amnesty (pardon) in accordance with the laws of the requesting State, the latter would not make requisition for him. Conceivably, a new Government of a former opposition leader may be formed, and in spite of amnesty or pardon, they may express their revenge alleging the former pardon or amnesty to have been irregular, whereupon such requests could arise. There are treaties and international conventions which are utterly silent on the point of the grant of pardon. The proper view seems to be it can be in accordance with the laws of either State as this will lead to the same result, viz. the offence will not be punishable in accordance with the laws of both the States.

A further question arises sometimes about precedence of amnesty law passed subsequently over treaties entered into earlier. International law (e.g. in Panama) prevails over municipal law and international agreements or conventions cannot be abrogated entirely by the subsequent enactment of municipal legislation.[1] But the opposite view found a place in Re Zanini, where the German Supreme Court (in criminal matters) in 1936 refused to enforce international agreements on the ground that unless the international conventions are transmitted into municipal law, it

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1. In Re Brooks, 1931-1932, A.D., Case No.5, decision of the Supreme Court of Panama on 21 May, 1931.

has no effect and force of law.[1] This would arise where treaties are not enforced as municipal law, but require legislation for their enforcement.

The Supreme Court of Federal Germany in 1951 reiterated the same principles:[2]

> "Extradition must not be granted if, on the assumption of a reversal of the factual position, a prosecution could not, according to the provisions of the German law of amnesty, be launched or a sentence executed in respect of the offence which is intended to form the basis of extradition. In this context it is immaterial whether there is an independent German right to inflict punishment which exists side by side with a similar right of a foreign State."

In India also a provision in the Extradition Act should (I submit) be inserted about refusal of surrender on the grounds of amnesty being granted or having been granted under and by the laws of either, or conceivably both the States.

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1. (1935-1937) A.D., Case No.173, decided on 13 January, 1936.

2. Cited in 18 Int. Law Reports, 1951, Case No.103, p.331n; Bedi, op.cit., p.203, n.172.

(8) Military Offences

A person can be extradited only for an extraditable offence, mentioned in the treaty, convention or the Second Schedule of the Indian Extradition Act. It should be punishable under the laws of India. Obviously,military offences of other countries would not be punishable in India, unless either identical acts are made offences or a treaty includes such offences. This is why in the Second Schedule no military offence as such is made extraditable.

In the Indo-Nepalese treaty, item 10, of Article 3 lists 'desertion from Armed forces'. The Indo-American Treaty does not make mention of any military offence. Consequently, no military offence is made extraditable under the Indian Act. Therefore, if the Indian Government in conformity with the Indian Extradition Act, 1962, or the treaty provisions (except with the exception of 'desertion from Armed forces' in Indo-Nepalese treaty) rejects the application of the requesting State for extradition of a person claimed charged with an offence which constitutes a military offence punishable under military law or regulation of the requesting State it violates none of the rules or principles of international law or of municipal law. This argument may be fortified with the judgment of the Cámera Federal de la Plata (Argentina) in Re Girardin,[1] wherein the accused having violated provisions of Law 4707 regulating conscription and compulsory,military service, had fled to Uruguay, and the Argentine Government asked the Court to approve the

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1. (1933-1934) A.D., Case No.153, decided on 4 Sept. 1933.

request to be made to the Uruguay Government for the extradition of Girardin, the Court rejecting the application, held that the crime was a military one and therefore, extradition should not be asked for.

In India, the practice adopted is by way of enumeration of the extraditable offences in the Second Schedule or the Treaty and if no offence is mentioned in either, it is not an extraditable offence. Other States, on the other hand, probably to be positive or expressive, expressly exclude extradition of fugitives, if charged with an act or omission punishable only under the military laws of the requesting State. There are, in fact, inconsistent practices in this matter. The latter method is not of much significance, because the same result could be achieved by mention of list of extraditable offences in the treaties or municipal statutes, as in India.

The treaties which expressly make the military offences non-extraditable, demonstrate considerable variety of expression in the use of terms, e.g. prohibiting extradition for 'purely', 'solely', 'strictly' or 'essentially' military offences, without defining what they mean, as in the case of the words 'political offences' or 'offences of a political character'. Other treaties give the expression providing that no extradition will be allowed if the offence 'consists solely of violation of a military obligation' or which is an offence punishable only under military law without necessarily applying the above epithets and thus leave the courts and the requested and requesting Government to guess what these terms mean and avenues are opened to evolve the formula of interpretation as and when occasions arise. But with the Indian Extradition Law, this point is immaterial because India has not adopted such a pattern.

Some treaties provide for extradition of fugitives for military offences committed by persons not subject to military law. It seems that to be a military offence it must be solely and exclusively a military offence or related acts punishable under special legislation applicable to the members of the Armed forces, the object of which is to maintain order and discipline in the forces, as contradistinguished with the ordinary criminal offences unconnected with the military offences.

Item 18 of the Second Schedule leaves a possibility of any such offences to be included in the list as an extraditable offence, provided the formalities laid down therein are completed. Item 10 of Art.3 of the Indo-Nepalese Treaty is one of such example, and this is based upon the principle of reciprocity as provided in Article 1 of the Treaty and this is so because the contiguity of the territory of the two countries where chances of army personnel escaping into the territory of the other are more frequent. Desertion from any of the units of the Armed forces declared by the Central Government by notification in the Official Gazette was made an extraditable offence in the First Schedule of the Indian Extradition Act, 1903. Desertion has not been included in the Second Schedule of this Act of 1962.

(9) Fiscal Offences

These offences are generally directed against the internal revenue or the customs and excise laws as well as the exchange control laws of a State.

On the theory of the doctrine of Good morals, i.e. a national ought not to encourage the violation of the revenue laws of another, even if such acts are not prohibited by its own laws, India has gone a step further and has made violations of certain revenue laws in requesting State also punishable under its laws as an extraditable offence under the Second Schedule, Item 18, e.g. smuggling of gold, gold manufactures, diamonds, and other precious stones, narcotic-drugs. Powers under the Second Schedule, item 18, are given to the Central Government read with Section 2(d) and 3(3)(c) for adding a list of more revenue offences committed in the requesting State or the list can be added in treaties between India and other States.

Very old treaties allowed extradition for smuggling or for violation of revenue laws of the requesting State, but later on this practice was dropped and only more serious offences were included in the extradition list called 'grand crimes'. Reasons for non-surrender of persons claimed for violation of customs regulations in British and United States practice, seems to be due to the acceptance of the concept of international economic warfare as a normal condition of existence. In British practice, as nearly as 1734 violation of a Portuguese revenue law was held not to be an extraditable offence.[1] Lord Mansfield

1. Harvard Research (Extradition) 29 A.J.I.L. (1935) Supp. P231: See Bedi op.cit-P199, N154.
2. Boucher v. Lawson: A.N. Sack, Non-Enforcement of Foreign Revenue Laws, in International Law and Practice, 81 University of Pennsylvania Law Review, 1933, pp.559-560.

in 1775 observed: 'No country ever takes notice of the revenue laws of another'.[1] To the same effect, is the decision in Planche's English case.[2] The Supreme Court of Mississippi in 1869 observed:[3] 'where a contract which violates the revenue laws of the country where it was made, comes before the courts of another country, those courts will not take notice of the foreign revenue laws'. France also adopted the same practice and in certain cases allowed and upheld the validity of certain foreign contraband contracts, whose main objective was the violation of foreign revenue laws.[4] European countries, in accordance with the theory of good morals, allowed extradition for contravention of revenue laws and various international law writers have supported this practice as the right one.[5] Social changes in the modern complex life brought about a tendency in States not to encourage any more violation of foreign revenue laws like smuggling gold, diamonds, precious stones, narcotics, hassish, etc. In 1939, the Italian Court of Cassation granted to Turkey the extradition of one Nessim on the ground that the term 'common crimes' in the treaty between these two States was not held to be restricted to general criminal laws, but included offences under special laws like revenue laws of Turkey.[6]

India also, therefore, held the revenue laws extraditable according to the exingencies of needs. Much is heard

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1. Holman et al. v. Johnson, 98 E.R. (K.B.) p.1120.
2. Planche v. Fletcher (1779) K.B. 99 E.R. p.164.
3. Ivey v. Lalland, 42 Mississippi Law Reports, p.444.
4. A.N. Sack, op.cit., at p.564.
5. Bedi, op.cit., p.199, n.154, 155, 156,
6. (1938-1940) A.D., Case No.151, decided on 10. Feb. 1939.

about the smuggling of hashis from India into Nepal, the bordering State, and then to the United States of America and other European countries, so the revenue laws have been made extraditable.

Many States even now, except the fiscal offences from their treaties; of course, nations should, in the modern conditions, move in their interest further and should willingly offer to extradite for offences relating to fiscal or revenue laws to the requesting State and also should get the same benefit from the other State in reciprocity.

(10) Rule of Speciality and the Doctrine of Double Criminality

Doctrine of double criminality,[1] and rule of speciality,[2] are also other grounds for refusal for the request of extradition.

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1. For a detailed discussion, see Ch.II, pp.118-123, Ch.III, 185-6.

2. For a detailed discussion, see Ch.II, pp. 108-112. and also Ch.III, p. 186.

CHAPTER V

THE CONSTITUTION AND EXTRADITION

(1) The Ex Post Facto Legislation and Extradition (Art.20(1))

Section 2(c) of the Extradition Act, 1962, contains an exhaustive definition of an "extradition offence'. It is an offence provided for in the extradition treaties or in the Second Schedule of the Act. Extradition treaties have been defined (sec.2(d)) as treaties or agreements made by India with a foreign State relating to the extradition of fugitive criminals and include pre-constitution treaties. The offences mentioned both in the pre-constitution and post-constitution treaties will be the extradition crimes,though an additional list of crimes may be added to them, but a person would not be extradited for the offence which does not find place or has not been enumerated in the treaty on the day on which the offence has been committed, e.g. Articles 3 of the Indo-American Treaty, ; 1,4,66 of Indo-Nepalese Extradition Treaty of 2 February, 1963, provide and enumerate the offences for which extradition could be granted.

Similarly, the Second Schedule to the Extradition Act, 1962, provides: "The following list of Extradition offences is to be construed according to the law in force in India on the date of the alleged offence". This meets the requirements of Article 20(1) of the Indian Constitution which prohibits ex-post facto criminal laws. The corresponding provision in Schedule I of the Extradition

Act of 1870 was in similar terms.[1] The Second Schedule enumerates the extraditable offences and also the sections of relevant Acts, and it has been further provided that "whenever the names of the relevant Act are not given, the sections referred to are the sections of the Indian Penal Code"; and the sections of the Indian Penal Code give the quantum of punishment provided for those extraditable offences.

In view of the acceptance in Indian law of the principle that offences cannot be created Ex post facto, it is very possible that India may insist that the requesting State too observed this rule and may refuse extradition altogether if the fugitive is sought to be punished in the requesting State in contravention of it. In that event 'Nulla Poena Nullum Crémen sine lege' as a maxim of international law may help India's stand.

An Ex post facto law is a law which not only imposes penalties retrospectively upon acts already done, but which can also increase the penalty retrospectively for such acts.[2] Article 20(1) has two parts; under the first part, no person is to be convicted of an offence except for violation of a 'Law in force' at the time of the commission of the act charged as an offence, which means a law must be 'factually' in existence at the time the offence is committed; and a law not 'factually' in existence at the time, enacted subsequently and by a legal fiction regarded as operative from an earlier date, cannot be considered to be a law in fact

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1. Tzu-TsaiCheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204 at p.208, per Lord Diplock (H.L.)
2. In Re. Sant Ram, A.I.R. 1960 S.C. 932.

in force earlier than the date of its enactment. The wordings of this Article are intended to cover only Criminal Proceedings,[1] and have no applicability where the law merely authorises the restriction of Fundamental Rights with retrospective effect, but does not create an offence nor imposes a punishment.[2] The Union Parliament and the State legislatures have power of legislation on the respective subjects within their jurisdiction and make laws which are retrospective in their effect.[3] This Article prohibits any conviction or imposition of any penalty by an ex post facto law as from the date of theConstitution, whether the law in question was pre-constitutional or post-Constitution.[4]

The immunity under Art.20(1) extends only to punishment by Courts for a criminal offence under an ex post facto law, and does not apply to a law of preventive detention,[5] or to the demanding of security from the owner of a press under a press law,[6] or to any ex post facto law creating only civil liability not amounting to an offence such as imposition of liability on the employer to pay compensation to the employee under the Industrial Disputes Act, 1947;[7]

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1. Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325.
2. State of Bihar v. Shailbala Devi, A.I.R. 1952 S.C. 329.
3. H.S. Doabia, Supreme Court on Constitution of India, p.274.
4. Kanhiya Lal v. Indumati, A.I.R. 1958 S.C. 444.
5. Prahlad v. State of Bombay, A.I.R. 1952 Bom.1.
6. State of Bihar v. Shailbala, A.I.R. 1952 S.C. 329.
7. Hathi Singh Mfg. Co. v. Union of India, A.I.R. 1960 S.C. 923.

or to a case of a Statute imposing tax retroactively,[1] nor does it apply to trials or change of procedure.[2]

But an ex post facto law which only mollifies the rigour of a criminal law does not fall within the said prohibition. If a particular law makes a provision to that effect, though retrospective in operation, it will be valid. The question whether such a law is retrospective and if so, to what extent depends upon the interpretation of a particular statute, having regard to the well-settled rules of construction.[3] Maxwell summarises the relevant rule of construction thus:

> "The tendency of the modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not altogether be erasedfrom the judicial mind, for it is required by the spirit of over free institutions that the interpretation of all statutes should be favourable to personal liberty and this tendency is still evidenced in a certain reluctance to supply the defects of the language, or to eke out the meaning of an obscure passage by strained and doubtful influences. The effect of the rule of strict construction might almost be summed up in the remarks that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of doubt should be given to the subject and

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1. Sundaraya Mier & Co. v. Government of Andhra Pradesh, A.I.R. 1958 S.C. 468.

2. Shiva Bahadur Singh v. State of Vindhya Pradesh, A.I.R. 1953 S.C. 394.

3. Rattan Lal v. State of Punjab, A.I.R. 1969 S.C. 444.

> against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits to be held to fall within its remedial influences." [1]

The prohibition of ex post facto law would apply to a case where an Act, which was not an offence before the Act was passed, is made an offence under the Act, where under the Act a higher punishment is imposed for an offence committed before the Act was passed. Where the offence and the punishment it carries are mentioned in the Second Schedule to the Act or in a treaty, and it is sought to extend the offence to an area by notification under Section 3 or 12 of the Indian Extradition Act, from a certain date, it will amount to an ex post facto legislation. It does not matter that the provision is made to help the reformation of the offenders, through the agency of courts.[2] In considering the scope of such provision in municipal law, the rule of beneficial construction is adopted as indicated by Maxwell above, but whether such an interpretation would be applicable or not while interpreting the provisions of the Indian Extradition, 1962, its schedule and the treaties made thereunder, is a ticklish problem.

The Second Part of Art.20(1) immunizes a person from a penalty greater than that which he might have been subjected to at the time of his committing the offence.

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1. Maxwell, Interpretation of Statutes, 11th Ed., pp.274-275, followed in Rattan Lal v. State of Punjab, A.I.R. 1965 s.c. 444 at p.446, ibid.

2. Rattan Lal, ibid. at p.447.

It has already been noted that a person cannot be made to suffer more and greater penalty by ex post facto law than he would be subjected to at the time he committed the crime or the offence. Again, this clause, like cl.(1) of Art. 20 applies only to punishments for criminal offences, which would hereinclude such cases as a provision of ex post facto law, made in the Prevention of Corruption Act, 1949, enhancing the prescribed punishment by a further fine to be equivalent to the amount of money found to have been procured by the offender in committing the offence. It was held by the Supreme Court that the enhanced punishment prescribed in the 1949 Act for an offence committed in 1947 was hit by Art.20(1) of the Constitution and that provision was ultra vires,[1] But Art.20(1) would not apply to cases where already the offence has provided for imposition of unlimited fine and a subsequent ex post facto law prescribed a minimum fine.[2] Nor Art.20(1) will apply to cases where in the Foreign Exchange Regulation Act, 1947, only the maximum and no greater penalty than might have been imposed under the old section, has been prescribed by new section 23(1)(a) substituted by the amending Act.[3]

'Extradition offence' under Section 2(c) of the Indian Extradition Act, 1962, has been defined as offences contained in the Second Schedule and in the treaties or arrangements by India with foreign or Commonwealth States as the case may be. Schedule II, which applies under

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1. Kedarnath v. The State of West Bengal, A.I.R. 1953 S.C. 404.
2. Satwant Singh v. TheState of Punjab, A.I.R. 1960 S.C. 266.
3. Union of India v. Sukumar Pyne, A.I.R. 1966 S.C. 1206.

section 2(c)(ii) to foreign States or Commonwealth countries with no treaties, provides that the list of extradition offences mentioned in that schedule is to be construed according to the law in force in India on the date of the alleged offence; and on such a construction, it follows that no extradition will be allowed in case ex post facto legislation is sought to be applied to the fugitive in the requesting State, as otherwise, Art.20(1) of the Constitution would be violated. Further, the same schedule provides that whenever the names of the relevant Acts are not given, the sections referred to are the sections of the Indian Penal Code. The sections of the Indian Penal Code also provide the penalties, in which case the presence ofArt.20(1) would prevent the penalty being increased for the offence committed before the passing of the relevant law. Therefore, in both cases the question of infringement of the Fundamental Right of the fugitive will enable such a law to be declared ultra vires and the request for requisition of the fugitive for such an offence made by ex post facto legislation will be refused. The fugitive would be entitled to invoke the immunity of Art. 20 since the Article applies to all persons, and not only citizens, for the time being in Indian territory.

Furthermore, 'extradition offence' has been defined in section 20(c)(i) in relation to a foreign State, being a treaty State provided for in the extradition treaty with that State. Treaties are, generally, not retroactive and come into operation only after ratification by both the parties as provided therein. On this basis, the Anglo-American, including Indian, law does not allow the surrender

of the fugitive on demand for an extraditable offence anterior to an extradition treaty, because if the treaty were given retroactive effect, it would result in the infringement of Art.20(1) of the Constitution of India.[1]

Therefore, whether it is an offence mentioned in a treaty or in the Second Schedule to the Extradition Act, 1962, mentioned as an extraditable offence, request for surrender will be refused on the ground of ex post facto law giving retrospective effect to it or imposition of greater penalty, whether by the law of India or of the requesting State.

1. Valentine et al. v. United States Ex rel. Neidecker (1936) 299 U.S.5: see also Bedi, op.cit., p.37.

(2) Art.20(2) Extradition and Guarantee Against Double Jeopardy

'No person shall be prosecuted and punished for the same offence more than once' is the version of the rules against double jeopardy contained in Art.20(2) of the Constitution of India. The provision appeared in the Draft Constitution as Art. 14(2) as under: 'No person shall be punished more than once'. But T.T.Krishnamachari suggested an amendment in the Constituent Assembly, which was adopted and included in the Constitution, resulting in the present form of Art.20(2).[1] The reasons for adopting the present form of words were, 'no person would be punished more than once', might probably result in the position that a Government official dealt with departmentally and punished, could not be prosecuted and punished by a law court if he had committed a criminal offence, and conversely, if he has been prosecuted and sentenced to imprisonment or fined by the court it might preclude the Government from taking disciplinary action against him.[2]

The root of the principle of Double Jeopardy is to be found in the well-established rule of English Common law, expressed in the maximum 'Nemo debet bis Vexari', that a man should not be put twice in peril for the same offence.[3] Where a person has been convicted of an offence by a court of competent jurisdiction, the conviction is a bar to all

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1. C.A. Deb., vol.VII, pp.795-7 and 840-842. B. Shiva Rao, The Framing of India's Constitution, pp.230-231.

2. Ibid., pp.230-231.

3. M.P. Jain, Indian Constitutional Law, Second Ed. (1970),p.583. See above pp. 367-377 for a discussion of the principle of nonbis in idem.

further criminal proceedings for the same offence.[1]

The fundamental right guaranteed in Art.20(2) enunciates the principle of 'autrefois convict' or 'autre-fois acquit' 'double jeopardy'. The roots of that principle are to be found in 'the well-established rule of common law that where a person has been convicted of an offence by a Court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence.'[2] To the same effect is the ancient Latin maxim 'nemo debet bis puniri pro uno delicto', that is to say that no one ought to be twice punished for one offence or as it is sometimes written 'pro eadem causa', that is for the same cause.[3] The two Latin maxims 'nemo debet bis puniri pro uno delicto' and 'nemo debet bis vexari pro eadem causa' have been considered by the House of Lords in Connelly's case.[4] The classic statement of the principle is to be found in Hawkins Pleas of The Crown:[5]

> "that a man shall not be brought into danger of life for one and the same offence more than once ..."

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1. M.P. Jain, ibid., p.583.

2. Per Charles J. in Reg. v. Miles, L.R. (1890) 24 Q.B.D. 423 at p.438.

3. Maqbool Hussain v. State of Bombay, 1953 S.C.J. 456 at p.459. See Halsbury's Laws of England, Vol.9, p.152-153, para.212, 3rd ed.

4. Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401 at pp.416E, 420H, 425I to 426A, per Lord Morris, at p.428C per Lord Hodson, at p.436B per Lord Devlin. See also B.K. Mukherjea J. in S.A. Venkataraman v. Union of India, A.I.R. 1954 S.C. 355.

5. Hawkins Pleas of theCrown (8th ed., 1824), vol.2 at p.515, followed in Connelly, ibid., at p.428C, D, per Lord Hodson.

The same principle has been enacted under General Clauses Act,[1] and Code of Criminal Procedure;[2] Fifth Amendment of the American Constitution,[3] and stated by Willis,[4] but circumscribed it by a prosecution and punishment for the same offence in the previous trial,[5] before a court of law or judicial tribunal [6] required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The words 'convicted', 'Commission of the act charged as an offence', 'be subjected to penalty', 'commission of the offence', 'prosecuted and punished', 'accused of any offence' used in Article 20, would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a

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1. Section 26 of the General Clauses Act, 1897.
2. Section 403 of the Criminal Procedure Act, 1898.
3. Fifth Amendment of the American Constitution. ' .... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'.
4. Willis, Constitutional Law, at p.528.
5. Maqbool Hussain v. State of Bombay, 1953 S.C.J. 456 at p.460.
6. Cooper v. Wilson, L.R. (1937) 2 K.B. 309 at p.340, followed in Bharat Bank Ltd. Delhi v. Employees of Bharat Bank Ltd. Delhi, 1950 S.C.R. 459 and in Maqbool Hussain v. State of Bombay, 1953 S.C.J. 456 at p.461.

criminal nature before a court of law or judicial tribunal in accordance with the procedure in the Statute which creates the offence and regulates the procedure.[1]

The word 'offence' in Article 20(2) has not been defined in the Constitution, but has been defined in section 3(38) of the General Clauses Act, 1897. Article 367 provides that the General Clauses Act applies for the interpretation of the Constitution. Therefore, the word 'offence' in Article 20(2) must be taken to mean 'any act or omission made punishable by any law' as defined in section 3(38) of the General Clauses Act. The words 'punishable by any law' in the context of the Extradition Act of 1962 would mean offence under that Act or under the Indian Penal Code or under any other Indian Act or a Foreign Act.

Similarly, the words 'before a court of law or judicial tribunal' are not found in Article 20(2). But the various expressions used in Article 20(2) such as 'convicted', 'commission of offence', 'penalty', 'prosecuted and punished', etc. all indicate that this Article contemplates criminal proceedings before a court of law or judicial tribunal, and further contemplates that there was a judicial decision in the previous proceedings under which punishment was awarded for the commission of an offence.

The following pre-conditions are necessary before invoking Article 20(2) in proceedings under the Extradition Act, namely:-

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1. Maqbool Hussain v. State of Bombay, 1953 S.C.J. 456 at p.461. See. Ch.V(8)(c) infra, for a discussion whether a magistrate acting under the Extradition Act, 1962, is a 'judicial tribunal'.

(1) That there has been previous proceedings before a court of law or judicial tribunal;[1]

(2) That the previous proceeding was of a criminal nature and in respect of the commission of an 'offence' that is, act or omission which is punishable under any law;

(3) That there was a judicial decision in the previous proceeding by a 'court of competent jurisdiction';[2]

(4) That under the decision a punishment was awarded; and

(5) That the offence of which the offender now being tried is the 'same offence',[3] or has the same ingredients as the previous offence or is based on the same facts which constituted the previous offence.[4]

Provisions of section 403, Criminal Procedure Code, are based upon general principles of 'autrefois acquit' recognised by English courts, i.e. a man maynot be put twice in jeopardy for the same offence.[5] But where the accused person was not liable lawfully to be convicted at the first trial because of lack of competence of the court, the defence of 'autrefois acquit' has no application.[6] Trial

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1. Venkataraman v. Union of India, A.I.R. 1954 S.C. 375 at p.377. See Ch.V, infra.

2. Assistant Collector of Customs Bombay v. L.R. Motwani, A.I.R. 1970 S.C. 962 at p.964; Baijnath Prasad Tripathi v. State of Bhopal, A.I.R. 1957 S.C. 494 at p.496.

3. State of Bombay v. S.L. Apte, A.I.R. 1961 S.C. 578 at p.583; Bhagwan Swaroop lal Bishan lal v. State of Maharashtra, A.I.R. 1965 S.C. 682.

4. Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325; Venkataraman v. Union of India, A.I.R. 1954, S.C. 375.

5. Mudholker J. in Mohd.Safi v. State of West Bengal, A.I.R. 1966 S.C. 69 at p.71.

6. Mohd.Safi v. State of West Bengal, A.I.R.1966 S.C. 69. Thomas EwartFlower v. R. (1957) 40 Cr.App.R.182 at p.193.

by a court of competent jurisdiction and acquittal of the alleged offence are the prerequisites for the applicability of the plea of'autrefois acquit' provided under section 403(1) Criminal Procedure Code. Identity of the offence in both the trials is a condition precedent for attracting Art.20(2), section 26 of the General Clauses Act or section 403 Criminal Procedure Code. It is necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether they are proved identical.[1] It is a general principle recognised by all members of the international community that a person should not be subjected to repeated trials for the same act. States normally refuse to extradite the fugitive if he has been tried once or he is undergoing trial in the territory of the requested State for the same act for which his surrender is demanded.[2] The principle of res judicata or issue-estoppel would come in, if the matter had already been raised and decided between the same parties.[3] If a man is prosecuted or indicted once, and a demand of surrender with a view to extradition is made for the same offence, he can plead as a complete defence, his formal acquittal or conviction. This is technically expressed as the plea of 'autrefois acquit' or 'autrefois convict' (Section 403)

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1. Bhagwan Swarup lal Bishan lal v. State of Maharashtra, A.I.R. 1965 S.C. 682; Manipur Admn. v. Thokchom Bira Singh, A.I.R. 1965 S.C. 87 at p.90; State of Bombay v. S.L. Apte, A.I.R. 1961 S.C. 578 at p.583.

2. Article 9 of the Harvard Research Draft (1935) A.J.I.L. (Supp.) p.145.

3. Piara Singh v. State of Punjab, A.I.R. 1969 S.C. 961; Mohar Rai v. State of Bihar, A.I.R. 1968 S.C. 1281.

Criminal Procedure Code, and Article 20(2).[1]

Mudholkar J. speaking for the Court in Md.Shafi observed:[2]

> "The provisions contained in Section 403 Criminal Procedure Code are based upon the general principle of autrefois acquit recognised by the English courts. The principle on which the plea autrefois acquit depends, is that a man may not be put twice in Double Jeopardy for the same offence. This principle has now been incorporated in Article 20 of the Constitution."

The fundamental principle of the plea of 'autrefois acquit' as laid down by the judges in England in 1796,[3] and as stated by writers earlier than that date, has been consistently followed.[4] It was thus stated in 1848 in Broom's Legal Maxims:[5]

> "and this plea is clearly founded on the principle that no man shall be placed in peril of legal penalities more than once upon the same accusation - nemo debet bis puniri pro uno delicto."

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1. Indian Constitutional Law, M.P. Jain, p.442.
2. Mohammed Safi v. State of West Bengal, A.I.R. 1966 S.C. 69 at p.71. See contra: Venkataraman S.A. v. Union of India, A.I.R. 1954 S.C. 375.
3. In R. v. Vandercomb and Abbott (1796) 2 Leach 708 at p.720, followed in Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401 at p.416 per Lord Morris (H.L.)
4. Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401 at p.416E per Lord Morris (H.L.).
5. Brooms Legal Maxims, 2nd ed., p.257, followed in Connelly, ibid at p.416E, per Lord Morris.

The defence of 'autrefois acquit', however, has no application where the accused person was not liable lawfully to be convicted at the first trial by the court's lack of jurisdiction. This is what has been pointed out by the court of criminal appeal.[1] From the language used in Section 403(1) of the Indian Criminal Procedure Code, it is clear that the following can be successfully pleaded as a bar to a subsequent trial for the same offence or for an offence based on the same facts—that the accused has been (a) tried by a court, (b) of competent jurisdiction, and (c) acquitted of the offence alleged to have been committed by him or for which he might have been convicted under Section 237 of the Code.[2] On these being proved, the extradition of the fugitive will be refused.

While considering the scope of the 'same offence', the Supreme Court observed:[3]

> "To operate as a bar, the second prosecution and consequential punishment thereunder, must be for the 'same offence'. The Article is that the offences are the same, i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of the fact in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the

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1. Thomas Ewart Flower, V.R. (1957) 40 Cr. App. P.182 at p.193.

2. Hidayat Ullah J. in Khark Singh v. State of U.P., A.I.R. 1965 S.C. 83 at p.86.

3. Rajagopala Ayyangar J. in State of Bombay v. S.L. Apte, A.I.R. 1961 S.C. 578 at p.581.

> two complaints but the ingredients of the two offences and see whether their identity is made out."

In Connelly, Lord Morris observed:[1]

> "The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction."

Subbarao C.J. in another later case, observed:[2]

> "The two conspiracies are distinct offences and it would not even be said that some of the ingredients of both the conspiracies were the same and the ingredients of both the offences being totally different, they did not form the 'same offence' within the meaning of Article 20(2) of the Constitution".

Two offences were held to be distinct when spaced slightly by time and place, even though they formed part of the transaction.[3] But in cases when a trial for some reason has become abortive, either because the trial court had no jurisdiction to try or because of some inherent defect or illegality affecting the validity of the trial itself, a second trial is not barred by Article 20(2).[4] In the absence of a valid prior sanction for prosecution of an offence under Section 161 Indian Penal Code, the proceedings that took place were held to be null and void ab initio. Under those circumstances, a second trial was not barred for the same offence,

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1. Connelly v. Director of Public Prosecutions (1964) 2 All E.R. 401 at p.415A.

2. Bhagwan Swarup v. State of Maharashtra, A.I.R. 1965 S.C.682.

3. Hidayatullah J. in Khark Singh v. State of U.P., A.I.R. 1965 S.C. 83 at p.86 C2.

4. Upendra v. State, A.I.R. 1954 Assam 106.

aa the accused has not been prosecuted and punished for the same offence,[1] and as there has been no acquittal on merits, Section 403 of the Criminal Procedure Code or the plea of 'autrefois acquit' or res judicata, or issue-estoppel could not be an answer to the request for extradition in those proceedings.

One and the same act of a person may constitute two or more offences and punishment or acquittal for one does not bar prosecution for the other, e.g. conspiracy for a crime is different from the offence itself and punishment for the crime is no bar for prosecution for conspiracy.[2] Though some of the ingredients in offences under Section 161 Indian Penal Code and Section 5(2) of the Prevention of Corruption Act are common but punishment in one does not bar punishment for the other, though they arise from the 'same fact'.[3] The offence of criminal misconduct has been held to be different from Section 409 Indian Penal Code, and so there may be a separate trial one after another for these offences.[4] In cases of different defalcations committed at different times, according to the other view, it has been held that it is not desirable that in such cases the accused should be tried as many times, when he could have been tried for all of them at one trial. In the interest of justice, applying Section 561A Criminal

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1. Baij Nath v. State of Bhopal, A.I.R. 1957 S.C. 494.
2. Leo Roy Frey v. Superintendent Jail, A.I.R. 1958 S.C. 119.
3. M.M. Gandhi v. State of Mysore, A.I.R. 1960 Mys.111. Also see Kunji Lal v. State of M.P., A.I.R. 1960 M.P. 149; Thirunav.ukkarusu v. State, A.I.R. 1959 Mad. 339.
4. State of M.P. v. Veereshwar, A.I.R. 1957 S.C. 592.

Procedure Code, it was held that second trial in such circumstances is not proper and would amount to an abuse of the process of the court; the reasoning being that the purpose behind such prosecution is not vindication of justice but retribution.[1] In other words, where the second prosecution is different from the previous prosecution in that the nature of the charge itself is different and the plea that in the interest of justice or in order to avoid the abuse of the process of the Court, the High Court should intervene is not available, because it could not be said that the present prosecution amounted to retribution or satisfaction of public indignation, then Art.20(2) will not be available. But in cases of convictions for criminal breach of trust, subsequent prosecutions for different sums embezzled during different periods in the part are permissible, but the High Court can disallow such repeated prosecutions under Section 561A, Criminal Procedure Code, if the interest of justice so requires.[2] Similarly, in extradition proceedings in applying the above principle of Kerala and Bombay High Courts, the Magistrate may refuse extradition under Section 403 Criminal Procedure Code, and the Central Government may refuse to extradite the fugitive on the basis that the request was not made in good faith, or was unjust, or it would be inexpedient to grant it in the interest of justice under Section 29 of the Indian Extradition Act, 1962.

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1. K. Sadashivan J. in Pillai v. State of Kerala (1971) K.L.T. 818.

2. Chudaman Narayan v. State, A.I.R. 1969 Bom. 1.

Some High Courts have also held that a person can be prosecuted and punished for an offence for which he has been previously prosecuted but acquitted.[1] But it seems this principle in extradition cases would not apply for the reason that it overlooks the provisions of Section 403, Criminal Procedure Code, and the maxim 'autrefois acquit'. The Criminal Procedure Code does not contain provisions similar to Sections 29 and 31 of the Extradition Act. In the ultimate anlysis, it is the discretion of the Central Government which is final whether a fugitive should be surrendered or not.

In cases of continuing offences, like conspiracy, particularly of smuggling gold, narcotics, precious stones, and other substantive offences, an offence is committed every day and the act of omission continues every day and each offence can be punished separately.[2]

Appeal against an acquittal is in substance a continuation of the prosecution, and when the accused has not been punished as a result of the prosectuion, this Article does not bar the State from preferring an appeal against acquittal.[3] So also enhancement of sentence or punishment by the appellate or revisional court does not amount to a second punishment.[4]

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1. M. Dev. v. State of Tripura, A.I.R.1959 Tripura 1; In re. Darla Ramadass, A.I.R. 1958 A.P. 707.

2. In Re M. Daveed, A.I.R. 1959 A.P.137; G.D. Bhattar v. State, A.I.R. 1957 Cal.483.

3. Kalawati v. Himachal Pradesh, A.I.R. 1953 S.C. 131.

4. D.A. Kelshikar v. Bombay, A.I.R. 1960 Bom.225.

On these principles, therefore, an accused fugitive may in extradition proceedings successfully raise the plea of Double jeopardy contained in Article 20(2) and Section 403, Criminal Procedure Code, i.e. 'autrefois convict' and 'autrefois acquit' including the plea of criminal res judicata, issue-estoppel, i.e. in substance the principles contained in the legal maxim 'nemo debet bis vexari'.

But preventive detention is not 'prosecution and punishment' and it does not bar a prosecution of the person concerned,[1] and therefore, the detention of a person cannot be pleaded as a bar in extradition proceedings which generally happens in the case of Nationals of Pakistan who are sometimes held in preventive detention [2] for deportation, as well as for extradition. In such cases, detention cannot be a bar for extradition as it is neither prosecution nor punishment within the meaning of Article 20(2). Section 403, Criminal Procedure Code, would not be attracted as the detention or release from detention under orders of the Court or executive are neither 'autrefois acquit' nor 'autrefois convict'. So also, in cases of prosecution and punishment for breach of permit rules under the Influx from Pakistan (Control) Act, 1949; the Central Government could direct the removal of such persons (foreigners) from India, and Article 20(2)would not be attracted as there is no question of a second prosecution for the same offence.[3] So also in

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1. Tilok v. Sindhi,A.I.R. 1954 Ajmer 19; Ghulam Ahmed v. State, A.I.R. 1954 J & K 59.

2. Anwar v. State, J & K, A.I.R. 1971 S.C. 337 at p.339.

3. Ebrahim Vazir v. State of Bombay, A.I.R. 1954 S.C. 229.

the case of a foreigner arrested and convicted for smuggling himself into India and who is subsequently deported from India, it has been held by the Supreme Court that in such circumstances the restraint on his 'personal liberty' for the purposes of taking him to the border in order to expel him from India in accordance with the statutory provision could by no means be considered to be an illegal custody justifying an order of release. Section 3(1)(b) of the J & K Detention Act clearly empowered a 'foreigner' to be detained with a view, inter alia, of making arrangements for his expulsion from the State of J & K.[1]

In extradition proceedings, the burden of proof is on the fugitive to show that Art.20(2) or Section 403, Criminal Procedure Code, or issue-estoppel would cover his case and provide him a defence.

The word 'prosecution' in Article 20(2) has been interpreted by the Supreme Court to mean a proceeding either by way of indictment or information in criminal courts in order to put the offender to trial.[2] An action before a 'Judicial Tribunal' is also a bar to a second trial,[3] but it seems in view of Thomas Dana's case,[2] the previous trial would not include trials by quasi-judicial bodies or tribunals. The constitutional right guaranteed by Article 20(2) against double jeopardy can be successfully invoked only where the prior proceedings were of a criminal nature

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1. Anwar v. State of J & K, A.I.R. 1971 S.C. 337 at p.342.
2. Thomas Dana v. State of Punjab, A.I.R. 1959 S.C. 375.
3. Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325.

instituted or continued before a 'court of law' or a 'judicial tribunal' in accordance with the procedure prescribed in the Statute which creates the offence and regulates the procedure.[1]

An inquiry under the Public Servants (Inquiries) Act, 1850,[2] proceedings in departmental inquiry,[3] infliction of punishment by a Jail Superintendent on a detenu for breach of disciplinary rules,[4] Levy of Penalty for default in payment of sales-tax,[5] and confiscation of gold by customs authorities under Section 167(8) of the Sea Customs Act,[6] have been held not to be trials that would bar a subsequent prosecution in a criminal court.

None of these authorities including the Sea Customs Authorities are criminal courts and proceedings before them do not constitute prosecution, and therefore, Article 20(2) does not bar a subsequent action in a criminal court for an offence under the Sea Customs Act or Foreign Exchange Regulations even though the Customs authorities may have imposed penalties of fine and confiscated the goods of the accused. Customs authorities, it has been held, act as quasi-judicial

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1. Narayan Lal Bansi Lal v. Naneck Phiroz, A.I.R. 1961 S.C.29.
2. S.A. Venkataraman v. Union of India, A.I.R. 1954 S.C.375.
3. Panduranga Swamy v. State, A.I.R. 1961 A.P.234; D.A.Kelshikar v. State of Bombay, A.I.R. 1960 Bom. 225.
4. Maqbook Hussain v. State of Bombay, A.I.R. 1953 S.C. 325.
5. M. Sutharamaswami v. Commissioner, Taxes Officer, A.I.R. 1960 A.P. 451.
6. Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325.

bodies.[1]

The scope, thus, of Article 20(2) in spite of the wide language in which it is couched, has been very much restricted by a process of judicial interpretation.[2]

There is no specific provision of Double Jeopardy in the Indian Extradition Act of 1962. But the rule against double jeopardy as mentioned above, is incorporated in Article 20(2) of the Constitution and section 403, Criminal Procedure Code, and the use of the word 'person' in Article 20(2) signifies that the guarantee is available to citizens and foreigners alike. The fugitive, therefore, in addition to the provisions of section 403, Criminal Procedure Code, which has been made applicable before the magisterial inquiry by virtue of section 7(1) of the Indian Extradition Act of 1962, can invoke the provisions of Article 20(2) of the Constitution. Protection against double jeopardy may be guaranteed under a treaty.[3] The plea of the fugitive offender against double jeopardy will have to be examined by the magistrate or the superior courts. The protection of the fugitive against double jeopardy is confined to a trial for the crime attributed

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1. F.N. Roy v. Collector of Customs, A.I.R. 1957 S.C. 648; Leo Roy Frey v. Superintendent Jail, A.I.R. 1958 S.C. 119; Sewapujan Rai v. Collector of Customs, A.I.R. 1958 S.C. 845; Gaurang Chandra Deb. v. Collector of Central Excise and Land Revenue A.I.R. 1968 Tri. 39.

2. Indian Constitutional Law, 2nd ed. (1970), M.P.Jain, p.585. See Ch.V, infra, on whether a magistrate acting under the Extradition Act, 1962, is a judicial tribunal.

3. Article 6 of Indo-Nepalese Treaty of 1953 published in the Gazette of India Extraordinary, dated 22 February, 1963; and Article 4 of the Indo-American Treaty, published in Gazette of India Extraordinary, dated 1 April, 1966.

to him, and if he has been in the earlier proceedings tried, convicted, discharged or acquitted, then the bar of Article 20(2), section 403 Criminal Procedure Code, would apply. It does not apply to extradition proceedings which are not in the form of a trial. Lord Alverstone in Stallmann's case, observed that a fugitive who has been discharged in extradition proceedings cannot be said to have been tried and discharged or convicted.[1] Consequently, if an extradition application has been refused once, second application may be brought for surrender of the fugitive if some further evidence is made available, which in the opinion of the requesting State, may warrant a second application,[2] as extradition proceedings do not come under the rule against double jeopardy.[3]

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1. R. v. Governor of Brixton Prison, Ex parte Stallmann (1912) 3 K.B. 424 at p.444.

2. R.C. Hingorani, The Indian Extradition Law, p.67.

3. Executive Discretion in Extradition, 1962 Columbia Law Review, p.1314. Also see, R.C. Hingorani, ibid., p.67,n.67.

(3) Article 20(2) of the Constitution: Issue-Estoppel and Res Judicata in Extradition Proceedings

The principle of issue-estoppel is different from the principle of double jeopardy or 'autrefois acquit' as embodied in S.403 Criminal Procedure Code. The principle of issue-estoppel applies where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently for a different offence which might be permitted by the terms of Section 403(2), Indian Criminal Procedure Code. For issue-estoppel to arise, there must have been distinctly raised and inevitably decided the same issue in the earlier proceedings between the same parties. An issue, as between the State and one of the accused persons, in the same litigation cannot operate as binding upon the State with regard to another accused.[1]

Issue-estoppel also should not be confused with res judicata which in criminal proceedings are expressed in the pleas of 'autrefois acquit' and 'autrefois convict'. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of new liability. Issue-

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1. Rama Swami J. in Piara Singh v. State of Punjab, A.I.R. 1969 S.C. 961 supra.

estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. The principle has its roots in well-known doctrines which control the re-litigation of issues which are settled by prior litigation.[1] The determination of a factual point in favour of a prisoner in a previous criminal trial when brought to the view of the court in a second criminal trial of the same prisoner attracts the principle of issue-estoppel.[2] But the law, giving effect to issue-estoppel is not concerned with the correctness or incorrectness of the finding which amounts to issue-estoppel, nor with the processes of reasoning by which the finding was reached in fact. It is enough that an issue or issues have been directly raised and found, and so long as the finding stands in any subsequent litigation between the same parties, no allegations can be made that would be legally inconsistent with that previous finding. Res judicata pro veritate accipitur ... applies in pleas of the Crown.[3] Therefore, before issue-estoppel can succeed in a case there must be a prior proceeding, determined against the Crown, necessarily involving an issue which again arises in a subsequent proceeding taken by the Crown against the same prisoner. It depends upon an issue or issues having been distinctly raised and found in the former proceedings.[4]

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1. Piara Singh v. State of Punjab, A.I.R. 1969 S.C. 961 at p.964.
2. Dixon J. in King v. Wilkes, 77 C.L.R.511 at pp.518-519.
3. Dixon C.J. in Marz v. The Queen (1956) 96 C.L.R. 62.
4. Herron & Maguire JJ. in Brown v. Robinson (1960) S.R. (N.S.W.) 297, approved by the Supreme Court in Piara Singh v. State of Punjab, A.I.R. 1969 S.C. 961 at p.964. See also, Manipur Administration v. Thakchom Bira Singh, A.I.R.1965 S.C.87 & Pritam Singh v. State of Punjab, A.I.R. 1956 S.C.415 approved in Piara Singh's case, supra.

In order to get the benefit of Section 403, Indian Criminal Procedure Code or Article 20(2) of the Constitution of India, it is necessary for an accused person to establish that he had been tried by a court of competent jurisdiction for an offence and the said conviction or acquittal is in force. If that much is established then only the accused is not liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236 Criminal Procedure Code or for which he might have been convicted under Section 273 Criminal Procedure Code.[1]

In several judgments of the Indian Supreme Court, the rule of estoppel got its approval.[2] In American courts also the rule of issue-estoppel has received approval.[3] The Judicial Committee of the Privy Council [4] observed:

> "The effect of verdict of acquittal pronounced by a competent court on a lawful charge after lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The Maxim 'res judicata pro veritate accipitur' is

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1. Assistant Collector of Customs Bombay v. L.R. Motwani, A.I.R. 1970 S.C. 962.

2. Banwari Godara v. The State of U.P.,(1969)2 S.C. W.R.109; Assistant Collector of Customs v. L.R. Motwani, A.I.R. 1970 S.C. 962. See also Karam Singh v. State, A.I.R. 1969 orissa 23.

3. Sealfon v. United States (1947) 68 S.Ct. 237.

4. Sambaswami v. Public Prosecutor, Federal of F.N. Malaya,L.R. (1950) A.C. 458.

> no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial."

This statement of law was accepted as correct by the Supreme Court in Pritam Singh [1] and Mohar Rai's[2] cases, supra.

The doctrine of issue-estoppel is concerned with the admissibility of evidence in a subsequent trial, designed to upset a finding, recorded by a competent court in a previous trial.[3] A judgment of a criminal court acquitting the accused, is no bar to disciplinary proceedings, as a criminal prosecution is intended mainly for breaking the 'King's peace' and this shows the indignation felt by the community towards criminals, whereas disciplinary proceedings are intended to maintain purity and efficacy of public service. In criminal proceedings, evidence can be admissible only in accordance with the Evidence Act. In quasi-judicial criminal proceedings, strict rules of evidence are not followed, evidence inadmissible in criminal cases will be admitted, and any material which has a logically probative value to prove or disprove the facts in issue is relevant and admissible. In criminal cases a high standard of proof beyond reasonable doubt is required for convicting the accused,

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1. Pritam Singh v. State of Punjab, A.I.R. 1956 S.C. 415.
2. Mohar Rai v. State of Bihar, A.I.R. 1968 S.C. 1281 at p.1284.
3. Spadigam v. State of Kerala (1970) K.L.T. 1047, per K.K. Mathew J.

whereas in quasi-criminal judicial proceedings such a standard of proof is not required and preponderance of probabilities to prove the guilt is enough.[1] But the rule has been extended to departmental trials where one department punishes, the other department cannot proceed against the man for the same offence in order to give him a more deterrent punishment; it is opposed to Article 20(2) of the Constitution.[2] But the Patna High Court went a step further on the application of this rule and held that sometimes both criminal trial and departmental inquiry go on and there is no bar to it, but if a departmental inquiry is withheld till the decision of the criminal trial which ended in the acquittal of the employee, the departmental inquiry on charges of an identical nature as in the criminal trial is not justified.[3]

A departmental proceeding is not a prosecution within the meaning of Section 403, Criminal Procedure Code, nor can it fall within the ambit of Article 20(2). The words 'prosecution' and 'punishment' have no fixed cannotation and they are susceptible of both a wider and a narrower meaning, but in Article 20(2) both words have been used with reference to an 'offence' and the word 'offence' has to be taken in the sense in which it is used in General Clauses Act, 1897, as meaning 'an act or omission made

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1. Spadigam v. State of Kerala, ibid. (1970) K.L.T. 1047.
2. Anantnarayanan K. v. State of Madras (1968) 2 M.L. J.443.
3. Banta Singh v. National Coal Development Corporation, A.I.R. 1968 Patna 300.

punishable by any law for the time being in force'. It follows that the prosecution must be with reference to the law which creates the offence and the punishment must also be in accordance with what the law prescribes. In a departmental inquiry there is neither a question of investigating an offence punishable in law for the time being in force nor is there any question of imposing punishment prescribed by law. Hence, Article 20(2) has no application.[1] Therefore, if a fugitive has been punished in departmental proceedings in the requested State, the requisition for trial for a criminal offence is no bar to extradition. If the fugitive has already been tried on the same or identical facts and has been convicted or acquitted, the extradition would be barred for a subsequent trial. In cases where the plea of the accused failed in the previous trial, the Supreme Court per obiter has doubted whether the rule in question - issue-estoppel - could be pressed against the accused. The reason being that while the prosecution cannot succeed unless it proves its case beyond reasonable doubt, the nature of the proof required of the accused is that his defence must amount to a reasonable plea. In that event, he is entitled to the benefit of doubt.[2] In the case of Manipur Administration,[3] this aspect was noticed by the Supreme Court, but they preferred not to express any

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1. The State of Andhra Paradesh v. K.H. Khan (1967) 2 A N.W.R. 121.

2. Mohar Rai v. State of Bihar, A.I.R. 1968 S.C. 1281 at p.1285.

3. Manipur Administration v. Thakchom Bira Singh, A.I.R. 1965 S.C. 87.

final opinion on this question, as it did not arise for direct consideration. So in extradition proceedings, if the fugitive took a plea in the previous proceedings in a previous trial and if it failed or was not accepted by the court, then according to the Supreme Court's obiter dicta in Mohar Rai and Manipur Administration, that finding could not be pressed against the fugitive. This, it is submitted, is the better view.

(4) Double Jeopardy and International Practice in Extradition Proceedings

Procedural rules in extradition may emanate from (a) treaties, (b) extradition legislation or (c) other municipal law applicable to criminal proceedings generally or to extradition proceedings by analogy, (Sections 7 and 25 of the Extradition Act, 1962), or by implication or necessary intendment.[1]

By the laws of some countries (see below), a request for extradition once rejected on account of procedural defect or for any other reason, may not be so presented or re-submitted in relation to the same offence. The Montevideo Convention, 1933, provides that: 'once extradition has been refused, an application may not be made again for the same alleged act'. In re. Diaz,[2] this same rule has been imported by analogy from the principle of non bis in idem in proceedings not governed by express treaty stipulation. But as the discharge of the accused is based on the procedural law of the requested State, discharge in Anglo-American and Indian system of law does not give rise to a subsequent plea of 'autrefois acquit'.[3] In cases of procedural requirements under the treaty no problems arise, each State has access to the treaty clauses in its own language and may from it make the request suitably. The difficulties arise in cases of procedural requirements contained in Municipal laws of the

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1. I.A. Shearer, Extradition in International Law, p.146.
2. Re Diaz. 22 Int. Law Reports 517 (Fd.Ct. Venezuela (1954).
3. U.S. v. Ford and Fray, 29 D.L.R. 80 (1916); J.B. Moore, Extradition Vol.I 457 at p.461.

requested State.

As for international practice, a request has been refused by Brazilian Courts on the ground that the copy of the applicable penal law of the requesting State did not accompany the requisition;[1] also by Columbia on the ground for failure to state in a supporting document that prescription has not been against the offence for which surrender has been requested.[2] Extradition has been refused as the date of commission of the offence was not specified in the request for extradition.[3] Warrants must be sufficiently specific also as to identity of the fugitive; if the name of the fugitive is not known, a description such as would clear all reasonable doubts as to the identity is justifiably expected.[4] A requistion must state the offence with sufficient particularity as to apprise the accused of the charge; it is not sufficient that the foreign warrant be sworn out for 'a crime of fraud' when fraud simplicter was not a treaty crime.[5]

But under the Extradition Act, 1962, though the request must be accompanied by documents (Section 10), the request would not be rejected outright on technical grounds and time may be allowed.

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1. Re Gomes, 1929-30 A.D. 281.
2. Re Ribeiro, 26 Int. Law Reports (Columbia, 1958) pp.525-526.
3. Re Fonseca, 18 Int. Law Reports (Argentina, 1951), Case No.107.
4. Rossi and Blythe v. Bell (1957) I.R. 281.
5. Re Wise, 168 F. Supp. 366 (S.D. Tex. 1957); 26 Int. Law Reports, pp.518-525, decided on 31 October, 1957.

(5) Art.20(3) and Extradition

At the time of framing the Constitution in Art.20 providing for protection in respect of conviction for offences, the principle of guaranteeing to every person, citizen or alien, protection against 'ex post facto' laws, double jeopardy and self-incrimination were provided for in K.M. Munshi's draft. Ambedkar's draft also contained a provision: 'No bill of attainer or 'ex post facto' law shall be passed'. The draft of Munshi accepted by the Sub-Committee on Fundamental Rights contained two clauses, and Art.20(2) and (3) were combined in one as clause (2); and later on, the drafting committee split up sub-clause (2) into two independent clauses, the former dealing with Double jeopardy and the latter with 'self-incrimination'. The drafting committee later on renumbered the 'self-incrimination' clause as Art.20(3) of the Constitution, and it was included in the Constitution.[1]

The privilege under Art.20(3) applies to 'testimonial compulsion' both oral and documentary,[2] that are likely to support a prosecution against him.

Before Art.20(3) is brought into play, three conditions must be satisfied: viz. (1) that at the time when the person made the statements there was a formal accusation of commission of an offence against him; (2) that he was compelled to make those statements, and (3) that the

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1. C.A. Deb., Vol.VII, pp.795-7 and 840-2; B. Shiva Rao, The Framing of the Constitution, pp.229-31.

2. M.P. Sharma v. Satish Chandra, A.I.R. 1954 S.C. 300 at pp. 303-4.

statements in question would be used against him at the trial and would prove to be incriminatory in nature.[1] This clause confers a privilege upon an accused person that he shall not be compelled to be a witness against himself; it confers immunity upon an accused person against testimonial compulsion.[2]

In an inquiry under the Sea Customs Act by the Customs Officer, any statement made by a person is not hit by Art.20(3) of the Constitution.[3] The reason is the person against whom an inquiry is made by the Customs officer is not an 'accused' and the statement made is not by a person accused of an offence.[4]

A person accused of an offence may, if he chooses, appear as a witness in penalty proceedings.[5] The necessity to enter the witness box for substantiating his defence is not compulsion under Art.20(3). In criminal trial under section 342 A, [illegible] Criminal Procedure Code, the accused is a competent witness to give evidence on oath in disproof of the charges against him, but if he voluntarily gives evidence,

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1. Ambalal Chiman lal Chokshi v. State, A.I.R. 1966 Bom. 243.

2. Ambalal, ibid.

3. Ramesh Chandra Mehta v. State of West Bengal, A.I.R. 1970 S.C. 940; Ilhas v. Collector of Customs, Madras, A.I.R. 1970 S.C. 1965, followed in Percy Rustomji Basta v. The State of Maharahstra, A.I.R. 1971 S.C. 1087 at p.1091.

4. Percy Rustomji Basta v. The State of Maharashtra, A.I.R. 1971, S.C. 1087 at p.1091.

5. Sec.342Aof the Indian Criminal Procedure Code.

Art.20(3) is not attracted. Compulsion under Art.20(3) must precede from another person or authority.[1] But the Supreme Court left the matter open whether it would be compulsion or not if the authorities summoned him to give evidence, as the question did not arise in that case.

Under Section 118 of the Evidence Act, all persons are competent to testify, unless the court considers that they are incapable of understanding the questions put to them for reasons indicated in that section. Under Section 132, a witness shall not be excused from answering any questions as to anything relevant to the matter in issue in any criminal proceedings (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution, nor can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. The protection is further fortified by Art.20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This Article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answers questions from the witness box waives the privilege which is against being compelled to be a witness against himself because then he is not a witness against himself but against others.

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1. T.G. Goakary. R.N. Shukla, A.I.R. 1968 S.C. 1050 at p.1053 per Bachawat J.

Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect, the witness is in worse position than the accused who volunteers to give evidence on his own behalf or on behalf of the co-accused. There, too, the accused waives the privilege conferred on him by the Article since he is subjected to cross-examination and may be asked questions, incriminating him.[1]

Compulsion may take many forms. A person accused of an offence may be subject to physical or mental torture. He may be starved or beaten and a confession may be extorted from him. By deceitful means he may be induced to believe that his son is being tortured in the adjoining room and by such inducement he may be compelled to make an incriminating statement. Element of duress, coercion or compulsion, use of force against the person, use of oppressive ways in extracting confession are the prerequsities of applicability of Article 20(3) to prove compulsion.[2] In this case, the Supreme Court did not lend its approval to the police practice of tapping telephone wires and setting up hidden microphones for the purpose of tape-recording. Asking the accused to give thumb impressions or specimen handwriting does not amount to testimonial compulsion which is violative of Art. 20(3).[3] In a later case, the Supreme Court held that the tape-recorded conversation was admissible in evidence and

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1. Hidayatullah J. in Laxmipat Chorasia v. State of Mahrasthra, A.I.R. 1968 S.C. 938 at p.942.

2. Per Bachawat J. in Yussufali v. State of Maharashtra, A.I.R. 1968 S.C. 147.

3. Mahadeva Reddy J. in Rama Reddy v. State of Andhra Pradesh, (1971) 2 An. W.R. 94; Government of Manipur v. Inokchom Tomba Singh, A.I.R. 1969, Manipur 22.

there was no violation of either Article 20(3) or Article 20 of the Constitution, as the conversation recorded on the tape has a mechnical contrivance to play the role of an eaves-dropper and the conversation not being extracted under duress or compulsion was not hit by Art.20(3).[1] Even if evidence is illegally obtained it is admissible,[2] as long as it is not tainted by an inadmissible confession of guilt.

But tape-recording evidence should be genuine and free from tampering or mutilation and the court may also secure scrupulous conduct and behaviour on behalf of the police officer in recording such evidence.[3]

In extradition proceedings, the fugitive may invoke Art.20(3) before the Magistracy, the Central Government or the Superior Courts. This article is a privilege against self-incrimination, one of the fundamental canons of common law system of criminal jurisprudence in America, embodied in 5th Amendment. This salutary privilege is based upon the principle that an accused is presumed to be innocent throughout the trial and that it is for the prosecution to prove and establish his guilt beyond reasonable doubt, and the accused need not make any statement if he dods not want to. Compulsory examination of the accused has a danger of use of force and torture against him to entrap him into fatal contradictions and confusions and admissions. This

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1. R.M. Malkani v. State of Maharashtra, A.I.R. 1973 S.C.157.

2. R. v. Letham (1861) 8 Cox C.C. 498.

3. R.M. Malkani, ibid.; Reld on June v. Owen, 34 J.P. 759; R. v. Maqsud Ali (1965) 2 All E.R. 464; Magraj Patodia v. R.K. Birla, A.I.R. 1971 S.C. 1295; Yusufali v. State of Maharashtra, A.I.R. 1968 S.C. 147; Pratap Singh v. State of Punjab, A.I.R. 1964 S.C. 72.

privilege enables the maintenance of human privacy and observance of civilised standards in the enforcement of purity of criminal justice. This clause is an immunity against testimonial compulsion and is a right pertaining to a person "accused of an offence',[1] and it is a protection against the 'person accused' against 'compulsion to ba a witness', resulting in his giving evidence against himself. Testimonial compulsion is not only intended in the court-room but it may extend to compelled testimony previously obtained from him.[2] But confessions obtained by coercion may not technically amount to compelling the 'person accused' to incriminate himself though the use of coercion is obnoxious to all fundamental principles of criminal justice.[3] The prohibition in this clause equally applies to pre- and post-constitution cases alike.[4] Availability of the protection under this clause pre-supposes a formal accusation [5] with regard to an offence [6] punishable and extraditable under the Extradition Act; and the proceedings must be before a Court of law or judicial tribunal.[7] This Constitutional immunity can be invoked in extradition proceedings before a magistrate,[8] but not in proceedings such

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1. Section 2(b) of the Indian Extradition Act, 1962.
2. Sharma v. Satish, A.I.R. 1954 S.C. 300.
3. Kalawati v. State of H.P., A.I.R. 1953 S.C. 131.
4. Shiva Bahadur Singh v. State of Vindhya Pradesh, A.I.R. 1953 S.C. 394.
5. Section 2(b) of the 1962 Act.
6. Second Schedule or treaty provision sec.2(c)(ii) of the Extradition Act.
7. Narayanlal v. Naneck, A.I.R. 1961 S.C. 29.
8. Under Section 7 and 9 of the 1962 Act.

as under Section 240 of the Companies Act, 1956,[1] or in proceedings under the Insurance Act,[2] or in proceedings under the Banking Companies Act, 1949.[3] The possibility of any disclosures made in these later categories of proceedings (other than extradition proceedings) leading to the starting of some criminal prosecution at some future date will not be a sufficient ground for invoking Art.20(3) of the Constitution.[4]

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1. Narayan lal v. Naneck, A.I.R. 1961 S.C. 29, supra.
2. Dalmia v. Delhi Administration, A.I.R. 1962 S.C. 1821.
3. Joseph v. Narayanan, A.I.R. 1964, S.C. 1552.
4. Narayan lal v. Naneck, A.I.R. 1961 S.C. 29, supra.

(6) Article 21 and Extradition

The Supreme Court of India in Kharak Singh's case [1] held: 'Article 21 is largely modelled on the lines of the 'due process' clause'. It also bears a similarity to Art.31 of the Japanese Constitution, 1946.[2] The due process clause is to be traced to Magna Carta, 1215, clause 39 and 40.[3] The phrase 'due process of law' did not occur in the Magna Carta, but in later statutes of English law that phrase was used synonymously with the phrase 'law of the land'. The Petition of Rights, 1628,[4] prayed that 'freeman to be imprisoned or detained only by 'law of the land' or by due process of law and not by the Kings special command without any charge'. Due process of law was thus understood as a limitation upon the arbitrary power of the king or executive.

The framers of the American Constitution did not put the 'Due process' clause into that instrument. The clause was included later in the bill of rights and appears in the Fifth Amendment adopted in 1791 [5] as a limitation

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1. Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295.
2. Mukherjea J. in A.K. Gopalan's case, A.I.R. 1950 S.C. 27, supra.
3. For historical development of Concept of personal liberty in Magna Carta, 1215, see A. Ghaffar: Unpublished Ph.D. Thesis, 1971, London University, pp.27-28.
4. For history of the Petition of Rights and the Bill of Rights, see A. Ghaffar, ibid., pp.31-34. For the Virginia Declaration, 1776 and the French Declaration of Rights, 1789, see Ghaffar, ibid., pp.34-37.
5. For history of the American Bill of Rights, 1791, see A.Ghaffar ibid., pp.37-39.

upon the Federal power. A similar limitation upon the States was introduced by the adoption of the Fourteenth Amendment in 1868.[1] Before 1850, due process was generally assumed to be a procedural rather than a substantive restriction upon governmental authority.[2] About 1850, the protection of vested rights, i.e. Fundamental Rights became associated with the due process clause of the Fifth Amendment and the Dred Scott Case,[3] and Hepburn case,[4] represented a radical departure in the historic meaning of 'due process', and the words have been interpreted by the American Judges to give a substantive content so as to make it a guarantee against unreasonable legislative interference with private property and a constitutional limitation upon legislative capacity to interfere with vested rights; and the nature of the liberty protected by the 'due process' clause was held to include: "not only the right of the citizen to be free from the mere physical restrinat of his person as by incarceration; but the term is deemed to embrace the right of the citizen to be free in the enjoyment of his faculties; to be free to use them in all lawful ways; live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation etc."[5] The words 'due process' have been interpreted by the American judges to cover both substantive and procedural law. The word 'law' has been interpreted to

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1. A.Ghaffar, ibid., p.43.
2. B. Shiva Rao, ibid., p.233; Alladi Krishna-Swami's Speech.
3. Dred Scott Case: (1857) 19 How-393-15.Law Ed. 691.
4. Hepburn v. Griswold (1870) 8 Wall 603-19.Law Ed.513.
5. Allgeyer v. Louisiana (1897) 165 U.S.578 at p.589-41-Law Ed.832, decided on March 1, 1897, followed in Ajaib Singh v. State of Punjab A.I.R. 1952 Punjab 309, at P317, Para 25.

mean 'reasonable law', and the word 'due' interpreted as 'just and proper' according to judicial interpretation; and what is 'just and proper' depends upon the circumstances of a particular case and what may be regarded as reasonable in one set of circumstances in a given case may not be so in a different set of circumstances. This clause in America imposes a limitation upon all the powers of the Government, legislative as well as executive and judicial. Applied in England only as a protection against executive protection and Royal tyranny, in America it became a bulwark against arbitrary legislation.[1] It is for the courts to pronounce whether a particular law affecting a person's life, liberty or property is reasonable or not. The words 'liberty' and 'property' have wide connotations; most of the legislation affects the individual's liberty or property in some way and therefore, the court can review almost any law, and the due process clause thus assumes the character of a general restriction on all legislative power giving a veto thereon to the courts. On the procedural side, due process clause envisages the observance of principles of natural justice. In substance, the due process clause insisted not only on a reasonable procedure but even on substantive law being reasonable, i.e. what squared with the notions of justice and fair play of the judiciary.

In India, the Constituent Assembly had originally used the words 'due process of law' in the draft constitution, but later on changed the words and adopted the present

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1. Hurtado v. People of California, 110 U.S. 516 at p.532.

terminology 'procedure established by law'.[1] The main reason for adopting the present terminology 'procedure established by law' instead of 'due process' clause was that in America there was no uniformity in judicial decisions as to what was reasonable; and the concept of reasonableness varied from judge to judge, Act to Act, time to time and subject matter to subject matter and the framers of the Constitution of India wanted to eliminate the elements of uncertainty, vagueness and changeability that had grown around the American concept of due process; they also did not want to give a power of veto to the judiciary over the legislative powers of Parliament or the State Legislatures.[2] The expression 'procedure established by law' has been borrowed from Article 31 of the Japanese Constitution, 1946.[3] Like the Belgian Constitution,[4] and unlike English Constitution, the right of Personal liberty flows from the Constitution itself.

In Gopalan's case,[5] the Supreme Court of India pointed out several points of contrast and distinction between the American and Indian concepts viz. in U.S.A. the word 'liberty' is used simpliciter, while in India it is restricted in Article 21 to 'personal liberty' which is comparatively a narrower concept; in the U.S.A. the same

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1. B. Shiva Rao, The Framing of the Constitution, pp.231-237.
2. See B. Shiva Rao, ibid., p.237, Alladi Krishna Swami Ayyar's Speech.
3. Mukherjea J. in A.K. Gopalan's case, supra, A.I.R. 1950 S.C. 27.
4. Wade & Phillips, Constitutional Law, p.488, 4th Ed.
5. A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27.

protection has been given to property also, whereas in India there are separate Constitutional provisions for the same; such as Article 19(1)(f) and Article 31. In India the word 'due' has been omitted and this deliberate omission is very significant, for much of the efficacy of the American doctrine depends on the presence of this word. The Supreme Court also pointed out that the American doctrine of 'due process' generated the countervailing doctrine of 'police powers', i.e. the power of the Government to regulate private rights in public interest, which was another complicated concept evolved judicially to contain the concept of 'due process', and to say that the doctrine of 'due process' has been imported into India would imply that the doctrine of police power was also so imported, in which case it would amount to a great deal of complications. In Gopalan's case, Fazal Ali J. disagreed with the majority in interpreting 'procedure established by law'. He held that it meant 'procedural due process' meaning thereby that no person can be condemned without a hearing for that is a principle well recognised in all modern civilised legal systems. In Gopalan's case, the whole argument centred around procedure and it was not argued that substantive due process should be imported. Professor Alan Gledhill is of the view that the interpretation of Article 21 in Gopalan's case is extremely literal.[1]

The expression 'procedure established by law' denotes an enacted law and not law in the abstract or principles

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1. Alan Gledhill, Life & Liberty in Republican India, 2 J.I.L.I. p.241 (1960).

of natural justice.[1] It does not denote law in the abstract sense of Jus but it means enacted law or lex.[2] The expression refers to the procedure prescribed by any law which is duly made - such as the Indian Extradition Act. This expression is not confined to the procedure contained in the Civil Procedure Code or Criminal Procedure Code. It is open to the Parliament or State Legislatures to alter the prescribed procedure - as Parliament in exercise of its powers under Articles 246 and 253 and entry 18 of List I of the Seventh Schedule replaced the Extradition Act of 1903 and Fugitive Offenders Act of 1881, by the Extradition Act of 1962, provided lot of different procedures in them and such amended procedure (Extradition Act, 1962) will also be the 'procedure established by law' within the meaning of Article 21.[3] The word 'procedure' as used in Article 21 is not confined solely to the procedural provisions. Process of procedure in this respect refers to both the Act and the manner of proceedings to take away the personal liberty or life of the citizen as in extradition proceedings. Therefore, procedure means 'manner and form' of enforcing the law and if the 'manner and form' results in non-compliance of the formalities of extradition procedure provided in the Act, the proceedings can be quashed by Superior Court being contrary to Article 21.[4] 'Procedure' must be taken to

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1. Kania C.J. in Gopalan's case, supra, A.I.R. 1950 S.C. 27.
2. A.K. Gopalan, supra, A.I.R. 1950 S.C. 27.
3. S. Krishna and Others v. The State of Madras, A.I.R. 1951 S.C. 301.
4. Hans Muller's case, supra, A.I.R. 1955 S.C. 367.

signify some step or method of manner of proceedings which may lead to the deprivation of life or personal liberty of the fugitive, e.g. a request for extradition is not made to and by the proper authority in a proper mode, completing all the formalities (Section 4 of 1962 Act) or that the Central Government does not properly nominate a magistrate of competent jurisdiction (Section 5) or that the Magistrate does not issue a proper warrant, containing all the necessary prerequisites of a warrant or that the trial is not in accordance with the provisions of Sections 7 to 10 of the 1962 Act or that where Chapter III is applicable, Chapter II is applied or that there are no proper notifications under Section 3 & 12 of the Act or that the matters mentioned in Sections 21, 29, 31 and 32 are ignored by the Courts and the executive, then the wrong steps, forms and manners of proceedings would be challenged as not being in accordance with the 'procedure established by law' under Article 21. This Article confers only protection against the executive authority and not against legislature. This Article, in substance, is akin to Article 7 of the Belgian Constitution of 1831, which provides that 'no man shall be prosecuted, except in cases provided by the law and in accordance with the procedure laid down by it'.

A necessary corollary follows that the courts while dealing with extradition proceedings must see that the law, - The Extradition Act of 1962, or any rules framed, if ever, by the Central Government in exercise of its powers under Section 36 of the Act of 1962 - under which action is being taken is a valid piece of legislation, passed by a legislature competent to do so and does not violate any provision provided in Part III of the Constitution otherwise

such law or provision and rules or notification under Section 3 or 12 of the Act will be declared ultra vires.[1] Thus, liberty of a person cannot be taken away without having recourse to 'procedure established by law'.[2] Similarly, if the offence is not found in the Second Schedule to the 1962 Act or in a treaty or even if found in a treaty, no Notification has been made under Section 3 or 12, as the case may be, it would not amount to a procedure established by law under which extradition proceedings can be arranged. United Kingdom and United States of America entered into a treaty on 9 June, 1972, making hijacking of planes an extraditable offence. It is hoped that similar provisions will soon be made by India in the Extradition Act, especially after the Lahore hijacking incident.

The Indian Extradition Act of 1962 is the 'procedure established by law' within the meaning of Article 21 of the Constitution. This act has been enacted by Parliament in exercise of the powers conferred upon it by Articles 246 and 253 of the Constitution read with entries 10, 14 and 18 of List I of the Seventh Schedule. Article 246(1) gives exclusive power to Parliament to legislate with respect to any matter given in List I of the Seventh Schedule. Article 253 empowers Parliament to make any law in order to implement any international agreements like extradition treaties and arrangements which the Government of India

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1. Collector of Malabar v. Ereminal Ebhrahim Hajee, A.I.R. 1957 S.C. 688; Vishvanath v. State of U.P., A.I.R. 1960 S.C. 67; A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27; K.Kathi Raning Rawat v. State of Saurashtra, A.I.R. 1952 S.C. 123.

2. Makhan Singh Tarsikka v. State of Punjab (1952) S.C.R. 368; A.I.R. 1952 S.C. 27.

may have entered into with foreign countries. Entry 10 of the Union list makes 'foreign affairs' the monopoly of the Central Government. 'Foreign affairs' are interpreted to include 'all matters which bring the Union in relation with any foreign country'. Entry 14 empowers the Union Government to enter into treaties with foreign countries and to implement the same. Entry 18 specifically empowers the Parliament to make extradition laws.[1]

Article 21 gives a right to a citizen of India to lead a free life subject to social control imposed by valid law. The use of the word 'personal liberty' in Article 21 is a comprehensive one and the 'right to move freely' used in Article 19(d) is an attribute to personal liberty. Both are independent fundamental rights though there is some overlapping. One is not carved out of the other. The fundamental right of 'life and personal liberty' has many attributes and some of them are under Article 19.[2] The expression 'life' used in Article 21 is not only confined to the taking away of life, i.e. causing death but in the words of Field J. in Munn's case,[3] and approved by the Indian Supreme Court, defines it as:

> "Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation

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1. Hans Muller's case, supra, A.I.R. 1955 S.C. 367.

2. Kharak Singh v. State of U.P., A.I.R.1963 S.C.1295 at p.1305.

3. Munn v. Illinois (1876) 94 U.S. 113, approved by the Supreme Court of India in Kharak Singh v. State Of U.P., A.I.R. 1963 S.C. 1295 at p.1305, per Subba Rao J., and in Satwant Singh v. A.P.O. New Delhi, A.I.R. 1967 S.C. 1836 at p.1844.

> of the body by the amputation of an arm or leg, of the putting of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world",

and in this case it was stated that the word 'life' in Article 21 bears the same significance.[1] The expression 'liberty' in America is given a very wide meaning and takes in all freedoms. The U.S. Supreme Court in Balling's case [2] observed:

> "The expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its power such as police power, the power of eminent domain, the power of taxation, etc."

The proper exercise of the power which is called the 'due process of law' is controlled by the American Supreme Court.

In Article 21 of the Indian Constitution, the word 'liberty' has been qualified by the word 'personal' indicating thereby that it is confined only to the liberty of the person. This would not include the liberties included in Art.19.

Diecy explains concept of personal liberty thus:

> "The right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification." [3]

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1. Kharak Singh v. State of U.P., A.I.R. 1963 S.C. 1295 at p.1305.

2. Balling v. Sharpe (1954) 347 U.S. 497 at p.499, followed in Kharak Singh, ibid. at p.1305. See also Meyer v. Nebraska, 262 U.S.390.

3. Dicey, Constitutional Law, 9th Ed., pp.207-208. Quoted with approval in Kharak Singh, ibid. at p.1305.

Blackstone about 'personal liberty' observes: 'Personal Liberty' includes,

> "the power to locomotion of changing situation, or removing one's person, to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."[1]

In Gopalan's case, personal liberty was described to mean liberty relating to or concerning the person or body of the individual and personal liberty was in this sense, the antethesis of physical restraint or coercion. The Supreme Court in Kharak Singh's case,[2] defined the right of 'personal liberty' in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. Referring to 'coercion and physical restraints', the Supreme Court in Kharak Singh's case observed:[3]

> "The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression 'coercion' in the modern age can not be construed in a narrow sense. In an uncivilized society, where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender

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1. Blackstone, Commentaries on the Laws of England, Book 1, p.134. Quoted with approval by the Supreme Court in Kharak Singh, supra, at p.1305. See also for 'Liberty': American Jurisprudence, Vol.II, Para.329 at p.1135.

2. Kharak Singh v. State of U.P., A.I.R. 1963 S.C.1295 at p.1306.

3. Kharak Singh, ibid. at p.1305.

> physical fear channelling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints."

This doctrine of 'personal liberty' was extended by the Supreme Court placing reliance upon the dictum of Frankfurter J. in Wolf's case [1] to encroachment on a person's private life even though the Indian Constitution does not expressly declare a right to privacy as a fundamental right, but the said right was held to be an essential ingredient of personal liberty.

The Supreme Court in Satwant Singh's case,[2] after quoting a passage from Kharak Singh's case,[3] held that that decision is clear authority for the position that 'liberty' in our constitution bears the same comprehensive meaning as is given to the expression 'liberty' by the 5th and 14th Amendments to the United States Constitution and the expression 'personal liberty' in Article 21 excludes only the ingredients of 'liberty' enshrined in Article 19 of the Constitution. Lord Atkin observed:

> "It is one of the pillars of liberty that in English law, every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act." [4]

As for extradition, Moore says:

> "In the absence of a conventional or a legislative provision, there is no authority vested in any department of the Government to

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1. Wolf v. Colorado (1948) 338 U.S.25: 93 Law Ed.1782
2. Satwant Singh v. A.P.O. New Delhi, A.I.R. 1967 S.C. 1836 at p.1844.
3. Kharak Singh v. State of U.P., A.I.R. 1963 S.C.1295.
4. Liversidge v. Anderson, L.R. (1942) A.C.206.

> seize a fugitive criminal and surrender him to a foreign power."[1]

The United States Supreme Court has observed:

> "Applying, as we must, our law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the treaty".[2]

In England, in the absence of legal authority, the Government cannot send a fugitive out of the country to be tried for an offence committed abroad.[3] In India, the question pointedly arose before the Rajasthan High Court in Birma [4] and Nanakas'[5] case that in the absence of treaties having been given the force of Municipal law, the fugitive could not be extradited and that would be against 'procedure established by law' within the meaning of Article 21 of the Constitution. The reason is that the Constitution creates no executive prerogative to restrict the liberty of the individual. Consequently, no one can be arrested or detained and deprived of his personal liberty except under the provisions of the Indian Extradition Act and before extradition is ordered or the fugitive surrendered, all the formalities provided under the Extradition Act should be complied with, as has been held by the Supreme Court of India in Hans Muller's

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1. J.B. Moore, Extradition, op.cit., p.21.

2. Valentine et al. v. United States ex. rel Neidecker, op.cit., p.18; Also see United States v. Rauscher (1886) 119 U.S. 407 at pp.411-412.

3. S.D. Bedi, op.cit., p.42; See also Cases cited by Bedi at p.42, n.77.

4. Birma v. State, A.I.R. 1951 Raj.127.

5. Nanka v. Govt. of Rajasthan, A.I.R. 1951 Raj.153.

case.[1], Apart from Hans Muller's case, Lord Russell C.J.[2] in the leading English case Re Arton No.2, points out as under:

> "The conditions of extradition ... are following: (1) the impugned crime must be within the treaty; (2) it must be a crime against the law of the demanding country; (3) it must be a crime within the English Extradition Act, 1870 and 1873; and (4) there must be such evidence before the committing magistrate as would warrant him in sending for trial, if it were an ordinary case in this country."

In Australia, too, this is the law. There, it has been held that in modern times at least the power of arrest of fugitive offenders is subject not only to treaty but also to the Statute law.[3] A similar statement of law would be found in the leading Canadian cases,[4] and other cases cited by Bedi.[5]

The conclusion, therefore, is that if the extradition proceedings are not in accordance with the Extradition Act of 1962, or are against Chapters II and III of the Constitution, and the procedure not being 'procedure established by law', the extradition will be hit by Article 21 and the request for extradition will be refused.

In Gopalan's case,[6] the Supreme Court judges

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1. Hans Muller v. Superintendent Presidency Jail, Calcutta, A.I.R. 1955 S.C.367.
2. Re Arton No.2 (1896) 1 Q.B. 509 at p.513, per Lord Russell,CJ.
3. Brown v. Lizards (1905) 2 C.L.R. 837, Griffith, C.J., Barnton and O'Connor, JJ.
4. Re Collins (No.3) (1905) 10 C.C.C. 80.
5. Bedi, op.cit., at p.42, n.77.
6. A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27, supra.

were unanimous on the question that if there was no enacted law at all, the freedom guaranteed under Article 21 would be violated if an attempt is made to deprive any one of his 'personal liberty'; though the learned judges differed as to whether any and every enacted law satisfied the description or requirements of 'a procedure established by law'.

If the words 'due process' would have been used in this Article, then the courts could have examined both the substantive and procedural aspects of the Indian Extradition Act, 1962, the treaties entered by India with other countries, the 'reciprocity' clauses and also the Fugitive Offenders Act, 1881, and might have looked into the reasonableness of the law and would have seen if such law is 'just and proper' and the 'reasonableness' of the 'procedural law' and 'substantive law' both would have been examined by the courts; and the courts would have seen whether the extradition law or treaties in force in India squared with the notions of justice and fairplay of the judiciary. But in the words of Mukherjea J. in Gopalan's case 'the constitution makers of India deliberately decided to place these powers in the hands of the legislature.'

The courts in India can examine whether the Extradition Act, 1962, and the treaties having been given the force of Municipal Law have been enacted by a competent legislature, keeping in view the scheme of distribution of powers to the respective legislatures under the Constitution and that the law or any part of it is not repugnant and does not contravene any of the fundamental rights of the fugitive - whether a citizen or alien - like Article 14, 20, 21 and 22, etc. Before a person is de-

prived of his life or personal liberty, three conditions are to be fulfilled, viz. (i) there should be a law conferring authority to deprive a person of his life or personal liberty; (ii) the law should provide a mode of procedure for such deprivation; and (iii) the law should be enacted by the competent legislature. If these conditions are fulfilled, the reasonableness of the substantive law or of the procedure laid down by the Extradition Act is not a justiciable matter and thus, Article 21 provides no protection or immunity against competent legislative action. The extradition law as mentioned above, has been duly enacted by the Parliament in exercise of its powers conferred upon it by Articles 246 and 253 of the Constitution read with entries 10, 14 and 18 of the Union List as given in the Seventh Schedule. The Extradition Act of 1962 is a law enacted by the competent legislature and it is a valid law-conferring authority to deprive the person of his life and personal liberty. Chapters II and III of the Act of 1962 provide the mode of procedure for such deprivation, together with the safeguards provided in section 21, 29, 31 and 32 of that Act. These are the checks and counter-checks in the form of grounds for refusal to surrender the fugitive. As the above three conditions of Article 21 are fulfilled by the Extradition Act, Article 21 provides no protection or immunity against competent legislative action and the law or its reasonableness not being made justiceable by courts by virtue of Article 21, the Parliament has the final say in its sagacity to have laid down the procedure in Chapters II and III of the Act and to provide the grounds of refusal to surrender and also enact other ancillary provisions, with powers of

treaties entered to give the force of law under Section 3 and 12 by notification.

'Administration of Justice' forms part of Entry 3 of the State List as given in the Seventh Schedule. Entry 18 of the Union List empowers Parliament to make extradition laws. Since extradition also forms part of the 'administration of justice' cases may arise, when the same person is being tried for an offence in India and also a request has been made by a foreign State or Commonwealth country or countries for his extradition. For extradition purpose, the Centre has to deal with the matter and for trial in India, it is the sphere of the internal administration of justice and an apparent conflict between the Centre and the States seem to arise in the matter. Obviously, in cases of conflict between the Central legislature and the State legislature, the latter must give way to the former on the basis of the doctrine of 'pith and substance' as described by the Privy Council in Profulla Kumar's case,[1] and by the Federal Court in Subrahmanyan [2] and by the Supreme Court in Atiabari,[3] and in Chambarbangwala cases.[4]

In 'pith and substance' the matter could be regarded as one related to extradition and the Union Government, therefore, could claim full jurisdiction to act.

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1. Profulla Kumar Mukherjee v. Bank of Commerce, 74 I.C. 23.
2. Subrahmanyan v. Muthu Swami, 1940 F.C.R 188.
3. Atiabari Tea Co. v. State of Assam, A.I.R. 1952 S.C. 232.
4. State of Bombay v. R.M.D. Chambarbangwala, 1957 S.C.R.874.

Parliament has provided in Section 31(d) of the Act of 1962 that if the fugitive is accused by a foreign State of an offence other than the one he is charged with in India, for which he may be undergoing a sentence, his extradition may be refused until after he has been discharged in India whether by an acquittal or expiration of his sentence. Thus, a possible difficulty arising out of two different activities under two different legislative entries, Entry 18 of the Union List and Entry 3 of the State List, is avoided.

Whether or not there is distinct and rigid separation of powers under the Indian Constitution, it has entrusted to the Judicature the task of construing the provisions of the Constitution and of safeguarding the Fundamental Rights. When a statute is challenged on the ground that it has been passed by the legislature without authority, or has otherwise unconstitutionally trespassed on Fundamental Rights, it is for the courts to determine the dispute and decide whether the law passed by the legislature is valid or not. Just as the legislature are conferred legislative powers and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of the executive authority, so the jurisdiction and authority of the judicature in this country lie within the domain of adjudication. If the validity of any law, and in any case of any provision of extradition or a treaty given the force of law, or any rules that may be framed under section 36 of the Indian Extradition Act, 1962, is challenged before the courts, the adjudication of such a dispute is entrusted solely

and exclusively to the judicature in this country.[1]

The legislatures in India have undoubtedly plenary powers but these powers are controlled by the basic concepts of the written constitution itself and can be exercised within the legislative fields allotted to their jurisdiction by the three lists in the 7th Schedule.

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1. In Reference under Article 143 of the Constitution of India, in the matter of Contempt of U.P. Legislative Assembly, A.I.R. 1965 S.C. 745 at p.763 per Gajendragadkar C.J.

(7) Extradition and Article 22.

(a) Brief History of Article 22

Preventive detention came to India officially with the Bengal State Prisoners Regulation III of 1818, the oldest statute dealing with preventive detention in India,[1] and it was extended in 1819 and 1827 to Madras and Bombay Presidencies. These three regulations were permanent, and the Bengal Regulation was extended to other parts of India during the period from 1879 to 1929. Preventive detention was also authorised in other ways. Provincial Assemblies passed such Acts. Detention was either authorised, or power was provided to authorise it, by Defence of India Acts of 1915 and 1939, by the Government of India Act, 1919, by the infamous Rowlatt Act, and by such other measures as the Restriction and Detention Ordinance III of 1944.[2] The Congress Ministries in office between 1937 to 1939 had done away with some of these laws but between 1947-50, there was a rush of Public Order and Public Safety Acts throughout the country. No less than 12 provinces adopted such Acts. The Bengal Regulation of 1818 itself was brought up to date by the Bengal State Prisoners Regulations (Adaptation) Order, promulgated in 1947 by the Governor-General under the Indian Independence Act.[3] But the rigors and protection of

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1. A. Gledhill, The Republic of India, The development of its laws and constitutions, p.173.

2. Mohammed Iqbal, The Law of Preventive Detention in England, India and Pakistan, p.137; Glanville Austin, The Indian Constitution, p.107.

3. Sec.9, Iqbal, op.cit., p.126.

these laws were different in different provinces. The acts allowed detention from 15 days to six months; with extensions permitted by some provinces. Acts in all provinces, except U.P., required that the detenue should be informed of grounds of detention; though in U.P. if he was to be detained after six months, then the matter was to be referred to a special tribunal. All these Acts, excepting that of Bombay, granted the detenu the right to make representation against his arrest and detention, but some laws provided that attention need be paid to such representation as the Governor desired. Few of the provincial laws allowed the detenu a counsel. Of course, the West Bengal Act III of 1948 made a provision for placing the case before the Calcutta High Court if the detention was to exceed 3 months, and the High Court could release him in case of insufficient grounds. In case the detention was upheld, the person could be detained for 6 months before the case could go to the High Court again.[1]

In the Constituent Assembly, Dr. Ambedkar introduced Article 15A to qualify and limit the powers of preventive detention conferred by Article 15 of the draft constitution. Together these articles of the draft constitution now constitute Article 22 of the Constitution. It puts a check on unlawful arrest by the executive, gives the accused a right to be produced before the nearest Magistrate within 24 hours, and a right not to be detained further without the authority of the Magistrate and right to consult and

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1. Iqbal, ibid., pp.161-3.

to be defended by a Counsel of his choice.[1] After the coming into force of the Constitution, some of the Preventive Detention laws came to be questioned in the courts on the ground of their incompatibility with Fundamental Rights. To avoid the ensuing confusion, and to provide for the protection of the country against violent activity organised in secrecy and intended to produce chaos, Parliament enacted the Preventive Detention Act in 1950, citing labour troubles, the Telengana uprising, and pointing to the Communists in justification of such executive powers. Patel explained to Parliament that it would be used against those whose avowed object is to create disruption, dislocation and tamper with communications, to suborn loyalty and to make it impossible for normal Government based on law to function. The original Act has been extended from time to time and though the authority given to the Central Government is a potential danger to individual liberty, it has been used with restraint.

Enacted purely as a temporary measure for nearly a year in the first instance, its life was extended from time to time till it lapsed on 31 December, 1969.[2] With the lapse of the Preventive Detention Act enacted by Parliament, a few States have enacted necessary legislation for the purpose in exercise of their powers under Entry 3, List III of Seventh Schedule of the Constitution.[3]

A law for preventive detention can be made by

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1. B. Shiva Rao, The Framing of the Constitution, pp.238-249.
2. M.P. Jain, Indian Constitutional Law, 2nd Ed. (1970) p.596.
3. M.P. Jain, ibid., pp.595, 605.

Parliament exclusively under Entry 9, List 1, of the Seventh Schedule of the Constitution of India, for reasons connected with defence, foreign affairs, or the security of India, and by Parliament and State legislatures concurrently under Entry 3, List III, for reasons connected with the security of a State, maintenance of public order or maintenance of supplies and services essential to the Community.[1]

(b) Article 22 and Deportation Proceedings

Coming to the applicability of the Preventive Detention Act relating to the deportation or expulsion of Foreigners as an alternative to extradition, the competence of the Central legislature to enact a law dealing with this use of preventive detention is derived from Entry 9 of the Union list read with Entry 10. The scope of Entry 9 is in regard to 'Preventive Detention for reasons connected therewith ... Foreign Affairs' and the scope of Foreign affairs is indicated in Entry 10: 'Foreign affairs; all matters which bring the Union in relation with any foreign country'. Given these entries their widest range, it follows that the legislation for keeping foreigners under preventive detention without trial brings the Union into relation with a foreign country. The legislative competence of the Indian Parliament covers not only section 3(1)(b) of the Preventive Detention Act, 1950, but also the Foreigners Act, 1946, for deporting or expelling aliens from India, and restricting their right of movement and prescribing the place of their residence as an alternative to extradition, and it

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1. M.P. Jain, ibid., pp.276, 290, 595.

is in the discretion of the Central Government whether to expel them or to extradite them,[1] and in such cases, the detenu cannot challenge his detention. But if one is a citizen, clauses (1) and (2) of Article 22 ensure four safeguards for a person who is arrested: (1) no such person is to be detained in custody without being informed, as soon as may be of the grounds of his arrest;[2] (2) he shall not be denied the right to consult and to be defended by, a legal practitioner of his choice;[3] (3) a person arrested and detained in custody is to be produced before the nearest magistrate within a period of 24 hours of his arrest, excluding the time necessary for the journey from the place of arrest to the magistrate's court [4] (same provision as in Section 61, Indian Criminal Procedure Code), and (4) no such person is to be detained in custody beyond this period without the authority of a magistrate.[5] These provisions - safeguards - do not, however, apply to an enemy alien or a person detained under a law of preventive detention.[6]

Article 19 prohibits the expulsion, as contra-distinguished with extradition, of an Indian citizen in the absence of a specific law[7]. In India, there is none. In cases of detention, a citizen can invoke Article 22, Article 19 does not apply to foreigners. Articles 14, 20, 21, 22

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1. Hans Muller v. Superintendent Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367.
2. Art.22(1) of the Constitution of India.
3. Art.22(1), ibid.
4. Art.22(2), ibid.
5. Art.22(2), ibid.
6. Art.22(3), ibid.
7. Influx from Pakistan (Control) Act (23 of 1949) to some extent was held good and enforceable. Ebrahim Vazir v. State of Bombay. A.I.R. 1954 S.C. 229. The Act was repealed on 15.10.54 by Act 82 of 1954.

apply equally to foreigners and aliens alike. Whether one is a citizen or an alien, if he is to be extradited, then all the formalities under the Extradition Act should be followed. If not, the accused can take the protection of Articles 21 and 22.[1]

(c) Article 22 and Extradition Proceedings

Article 22(1) and (2) apply to a person accused of an offence and arrested without warrant; and the protection is designed against the powers of the executive or a non-judicial authority.[2] A court's warrant ex facie sets out the reason for arrest and the person arrested is to be produced before the court issuing the warrant. In such a case, the judicial mind has been applied at the time of issuing the warrant. It is in the case of arrest without a court's warrant that the application of a judicial mind is needed.[3]

In the Extradition Act, 1962, under Section 5, the Central Government issues an order to any magistrate, who would have jurisdiction to inquire into the offence, if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case, and the magistrate on receipt of the order, issues the warrant for the arrest, and then an inquiry starts. Though the magistrate does not apply his mind to the facts of the case at the time of issuing the warrant of arrest of the fugitive, and up to that stage there is no application of a judicial mind, later on the inquiry is made and the procedure

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1. Hans Muller, ibid., A.I.R. 1955 S.C. 367.
2. State of Punjab v. Ajaib Singh, A.I.R. 1953 S.C. 10.
3. State of Punjab v. Ajaib Singh, A.I.R. 1953 S.C. 10, supra.

laid down is followed for extradition and therefore, the fugitive could not successfully take the plea for quashing the warrant or extradition proceedings on the ground that it was the Central Government who applied its mind, and not the magistrate - and that his detention was illegal and hit by Article 22.

Brett L.J. in The Reverend Thomas Pelham Dales' case, observed:

> "It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."[1]

Cotton L.J. expressed his agreement with Brett L.J. and added that,

> "the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers might be matters of form." [2]

The authorities charged with the duty of maintaining public order or performing any other governmental duties cannot do anything to the prejudice of individual rights, unless they canshow that they were authorised to do that act by some rule of common law or some provision made by the statute.[3]

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1. The Reverend Thomas Pelham Dales' Case (1881) 6 Q.B.D. 376 at p.461.

2. The Reverend Thomas Pelham Dales' Case (1881) 6 Q.B.D. 376 at pp.469, 470, ibid.

3. Entick v. Carrington (1765) 19 St.Tr. 1030.

A comprehensive procedure for extradition under Chapters II and III of the Extradition Act, 1962, is provided for extradition of a fugitive offender to and from India under a valid law, and the fugitive can hardly take the plea that the proceedings are hit by Article 22 of the Constitution. But if the procedure laid down in the Extradition Act, 1962, is not followed and strictly complied with, then the fugitive offender can challenge the proceedings for his extradition being in contravention of Articles 21 and 22 of the Constitution.

(8) Extradition Proceedings Whether Executive, judicial or quasi-judicial

(a) Nature of Extradition Proceedings

In Hari Sankar Prosad [1] it has been laid down that a magistrate acting under Section 7 of the Extradition Act is a Tribunal within the meaning of Article 227 [2] of the Constitution. That being so, it is doubtful whether the magistrate is a court in the strict sense of the term, or whether he is a persona designata working as a quasi-judicial body performing judicial acts. Therefore, it can be argued, that the warrant issued by a magistrate is not by a 'court of law'. Secondly, before issuing a warrant there should be an application of the judicial mind of the magistrate based upon such information and 'such evidence' as would justify the issue of a warrant in the opinion of the magistrate. This provision is to be found under Section 9(1) of the Extradition Act, 1962, so far as it goes, but the warrant can be issued contrary to it under Section 6 on the discretion of the Central Government which appoints the magistrate under Section 5 to inquire into the offence; and after the warrant is issued, evidence of prima facie case is taken under Section 7. It can well be said that the warrant issued by the magistrate under Section 6 of the Act has been issued without application of his judicial

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1. Hari Sankar Prosad v. District Magistrate Darjeeling (1971) 75 C.W.N. 470. (case for extradition from India to Sikkim, under The Indian Extradition Act, 1962.)
2. Article 227 of the Indian Constitution:
"(1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction."

mind and was a direct result of the commands from the executive issued under Section 5 of the Act, and this contravenes Articles 21. Further, the combined effect of Sections 7(4) and 8 of the Act places no limit of time as to how long the alleged fugitive offender will be kept in custody awaiting the orders of the Central Government. Section 9(3) puts a limit of 3 months. It seems that indefinite detention of the accused may be challenged as a contravention of Article 22. Similarly, Section 17(2) also specifies no limit as to the period of detention. Section 22 of the Act is retrospective and being ex post facto legislation, it contravenes Article 20(1). The arrest under that Section can be challenged under Article 22. The arguments about issue of warrants, arrest and detention of the fugitive mentioned above, would equally apply to a fugitive apprehended under Section 23 of the Act also.

The question of availability of Article 22 depends on firstly whether the order of the magistrate passed under Sections 7(4), 9(2), 17(1) (2), 23, resulting in the issue of a warrant for the arrest of the fugitive is an 'executive' or 'judicial' order and secondly, whether the magistrate is a 'court' within the meaning of Section 6 of the Criminal Procedure Code. There is a divergence of opinion in the High Courts in India on both these points. The Bombay,[1] Calcutta,[2] and Allahabad [3] High Courts held the

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1. The Emperor v. Hasim Ali (1905) 7 Bom.L.R.463; Bai Aisha v. State of Bombay, A.I.R. 1929 Bom.81.
2. Giuli Shahu v. The Emperor (1914) 19 C.W.N. 221: A.I.R. 1915 Cal 426. R.N. Dutta J. in Hari Sankar Prosad v. D.M.Darjeeling & Others (1971) 75 C.W.N. 470.
3. H.K. Lodhi v. Shyam Lal, A.I.R. 1950 All.100.

magistrate's orders in extradition proceedings are judicial orders and that the execution of warrant was not an executive act. The Madras High Court,[1] after considering the judgments of the different High Courts held that the magistrate enquiring under the Extradition Act is a 'criminal court'. R.N. Dutta J. in Hari Sankar Prosad's case,[2] relying upon the word 'courts' used by J.C. Shah J. in Jugal Kishore More's case,[3] drew the conclusion that obviously the Supreme Court considered the magistrate making inquiry under Section 7 of the Extradition Act of 1962 as 'courts' of the country, and held that the magistrate making the inquiry under the Act functions judicially and acts judicially. The quotation relied upon by Dutta J. from the judgment of the Supreme Court in More's case [4] may be usefully reproduced:-

> "Though extradition is granted in implementation of the international commitments of the State, the procedure to be followed by the 'Courts' in deciding whether extradition should be granted and on what terms, is determined by the Municipal law."

The Supreme Court did not pronounce upon any of the above two points. Dutta J. himself at the end of the judgment, observed that the magistrate while acting under Section 7(4) acts as a 'tribunal' within the meaning of Article 227 of the Constitution.

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1. Re: Sankaranarayana Rengan Reddiar (1962) C.L.J. 697, followed by R.N. DuttaJ. in Hari Sankar Prosad, ibid. at p.473.

2. Hari Sankar Prosad v. District Magistrate, Darjeeling (1971) 75 C.W.N. 470 at p.473.

3. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1175.

4. Jugal Kishore More, ibid. at p.1175.

The other view is taken by some of the judgments in Calcutta High Court,[1] and Allahabad High Court.[2] In Thakur Sahdal Singh's case,[3] it was held that where the magistrate orders the execution of the warrant, it cannot be said that he is acting in his judicial capacity or that he is for the time being a court of inferior criminal jurisdiction. Sarma Sarkar J. of the Calcutta High Court in the case of Hari Sankar,[4] held that the other view taken in the cases of Mohan Debdas, the two cases of Stallmann and Gulli Shahu meant that the High Court refused to interfere under section 439 Criminal Procedure Code in proceedings under the Extradition Act of 1903; in almost similar terms like the Extradition Act of 1962. He further held that the court can interfere under Section 491 Criminal Procedure Code since the power can be exercised by the High Court not only for judicial acts, but even for executive acts, when a person is detained illegally by whatever authority. Sarma J. further held that the limited purpose for which the High Court has been specifically empowered in Section 24 and 25 of the Extradition Act, 1962, was to release a person from illegal detention. Therefore, when the magistrate, at the request of the Central Government, makes an inquiry (i) he is not an inferior criminal court, and (ii) under

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1. In Mohant Debdas, 15 C.W.N. 735; Rudolf Stallman v. King Emperor, 15 C.W.N. 1053 (F.B.).

2. In Thakur Sahdal Singh v. District Magistrate Dehradun, A.I.R. 1934 All 148 - 35 Cr.L.J. 1296.

3. Thakur Sahdal Singh v. District Magistrate Dehradun, ibid.

4. Hari Samkar Prosad v. District Magistrate Darjeeling (1971) 75 C.W.N. 470.

Section 7(4) the submission of the report does not amount to a final or definite orders on the basis of the inquiry and when it is not a final or definitive order, it is not an order of a court; (iii) extradition is not merely an executive but a political act (Shah J. in More's case,[1] supra) depending upon the final decision of the Central Government; (iv) the inquiry by the magistrate is on the orders of the Central Government under the provisions of the Extradition Act and not under the provisions of the Criminal Procedure Code, and (v) he has to submit a report if there is any prima facie case to the Central Government under Section 7(4) and 9(2) - and it is for the Central Government under Section 29 and/or 31 of the Act - to decide not only on judicial considerations but on political and other considerations whether the fugitive should be surrendered or not. Sarma J. further held that it was clear from the scheme of the Act that it was, more or less, a political or executive action rather than judicial.

Regarding the applicability of provisions of Criminal Procedure Code or procedure to be followed as mentioned in Section 7(1), he observed:

> "Merely because a statute lays down a particular mode of procedure under which inquiry is to be madeby reference to another code(Criminal Procedure Code) it does not generally and necessarily follow that the magistrate holding the inquiry under the provisions of section 7(1) was working as a court as contemplated by the Criminal Procedure Code - Section 6 of the Criminal Procedure Code -

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171, supra at p.1175.

which lays down for the courts recognised under the code."

In further support of the second point, it was stated by S arma J. at p.477 of the Report that the District Magistrate could not be held to be a court as his order is not final or definite; 'one of the main characteristics of a court is that the order must be final and definitive one and must not await the order of some other body'. On this consideration, the Industrial tribunals appointed under Commissions of Inquiry Act have been held not to be courts.[1] The inquiry under Section 7(4), 8(2) is an inquiry by a tribunal, as the word 'tribunal' under Art. 227 of the Constitution means a person or a body other than a court set up by the State in deciding the rights between the contending parties in accordance with rules having the force of law and doing so does not amount to taking an executive action but is the determination of a question.[2] Interference under Article 227 will be both in judicial and administrative matters in cases of grave injustice by reason of mistake committed by inferior judicial or quasi-judicial body and where the Municipal law provides no adequate remedy. Apart from Article 227, it is the duty of the High Court to see if the prisoner was detained in accordance with procedure established by law under Article 21. Considering Section 491 Criminal Procedure Code, where there was no prima facie case in support of the requisition for the offence of murder, the

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1. Braj Nandan v. Jyotiranjan, A.I.R. 1956 S.C. 66, and Bharat Bank Ltd. v. Its Employees, A.I.R. 1950 S.C. 188.

2. Hari Padda Dutta v. Ananta Mondal, A.I.R. 1952 Cal.528.

Court held that there was no meaning in detaining the petitioner in custody for being sent to Sikkim under the orders of the Central Government.[1] The Supreme Court has not decided so far as to which of the two views stated are correct. However, the latter view seems to be more in keeping with the scheme of the Act and in that case, the fugitive may invoke the provisions of Articles 21, 22(1) and (2) of the Constitution before the Superior courts, except in a case of a foreigner whose entry into India was illegal (Anwar's case[2]) or whom the Central Government is deporting out of India and who has been detained for such deportation by the Central Government or by the State Government (Hans Muller[3]).

It may be stated that if the proceedings are executive throughout, from the time of the issue of the warrant by the magistrate or from the time the appointment of the magistrate was ordered by the Central Government until the final order of the Central Government to surrender the fugitive to the requested State, then Articles 21 and 22 will come to his rescue. But if they are judicial proceedings and if the warrant of arrest has been issued by the magistrate in exercise of his judicial powers, then Article 22 would not apply except in one case. That is the right to consult and to be defended by a counsel of one's own choice; this will certainly be enforced by virtue of this article whether the proceedings are executive, political, quasi-judicial or

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1. Sarma Sarkar J. in Hari Sankar Prosad, supra.

2. Anwar v. State of J & K., A.I.R. 1971 S.C. 337.

3. Hans Muller v. Superintendent Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367 at p.372; Anwar v. State of J & K. A.I.R. 1971 S.C. 337 at p.339.

judicial in nature.

The better view seems to be that on the whole the extradition proceedings are political and executive in nature; and the order of appointment of magistrate by the Central Government is executive in nature; the inquiry by the magistrate discharging the fugitive is purely of a judicial nature, because this is his final order and needs no approval of the Central Government. If the inquiry before the magistrate results in finding a prima facie case, and he recommends extradition, then it is a quasi-judicial function and the order of the Central Government ordering extradition or refusing extradition is an executive and political function, because it is in the discretion of the Central Government to extradite or not (Hans Muller).[1]

(b) Functions of the Central Government under the Indian Extradition Act.

Whether the functions of the Central Government are executive or judicial, Lord Russell of Killowen emphasised the distinction between what he called the political aspect and the strictly judicial aspect of extradition.[2] Lord Russell observed:

> "The question bears on the political aspect of extradition; and it must be determined, upon a consideration of matters into which this court is not competent and has no authority to enter. Such consideration, if they exist at all, must be addressed to the executive of this country,

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1. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367 at p.374.

2. In Re Arton (1895) 1 Q.B. 108.

> They cannot enter and ought not to enter into the judicial consideration of this question, which in this case, turns solely upon the construction of the Extradition Act and the treaty."

These observations were made, where the fugitive charged with the offence of embezzlement by the French Government resisted the demand for his extradition that it was not made in good faith and the charges were merely a pretext to prosecute him for his political activities, and there the surrender was not in the interest of justice.

The right of a citizen not to be sent out to foreign jurisdiction without strict compliance with the extradition law is a valuable right.[1] Following the dictum of Lord Russell (in Re Arton)[2], Shearer J. in proceedings under the Extradition Act of 1903, regarding functions of the Court and the Executive, observed:

> "In this country, as in every other country, the legislature has imposed restrictions on the power of the executive to send persons abroad to answer charges before a foreign tribunal. For instance, the offence with which they are charged must be an extraditable offence and there must be in existence a warrant which is ex facie a valid warrant. If the executive exceeds its powers, the judiciary, and this court in particular, will restrain it but when the conditions laid down by the legislature as a prerequisite to extradition are fulfilled, and the judiciary has no power to intervene, the executive, nevertheless, is under no legal compulsion to surrender the

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1. Santbir Lama v. Emperor, A.I.R. 1935 Cal.122.

2. In Re Arton (1895) 1 Q.B.108.

> prisoners. It retains a discretion in the matter, and may, for reasons which appear to be valid reasons, cancel any warrant which has been issued."[1]

The Supreme Court has also taken the same view.[2] Surrender of a person within the State to another State, whether a citizen or an alien, is a political act done in pursuance of a treaty or an arrangement ad hoc.[3] Though extradition is granted in implementation of the international commitments of the State procedure to be followed by the courts in deciding whether extradition should be granted and on what terms is determined by the municipal law.[4] The Extradition of a fugitive offender is an act of sovereignty on the part of the State who surrenders him.[5]

Chapter II of the Extradition Act, 1903, like Chapter II of the present Extradition Act of 1962, deals with the surrender of fugitive criminals to foreign states. Where a requisition is made for such surrender, the Government may issue an order to a magistrate to inquire into the case. The method of inquiry is described, and a power to commit the fugitive criminal to prison to await the orders of the Government or to release him on bail (under Section 25

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1. Hadibandhu Prodhan v. Emperor, A.I.R. 1946 Patna 196 at p.198. Compare with Section 29 of the Indian Extradition Act, 1962.

2. Hans Muller v. State of West Bengal, A.I.R. 1955 S.C. 367.

3. Jugal Kishore More v. The State of West Bengal, A.I.R. 1969 S.C. 1171 at p.1175.

4. Jugal Kishore More, ibid. at p.1175.

5. Lord Maclara in Sinclair v. H.M. Advocate (1890) A.D. 1941-1942, Case No.97. See also Paul O'Higgins, Unlawful Seizure and Irregular Extradition (1960) B.Y.I.L., Vol.16 at p.317.

of the present 1962 Act) is vested in the magistrate. The result of the inquiry, unless the magistrate discharges the accused, when there was no prima facie case against him, is reported to the Central Government and under the 1903 - not under the 1962 Act - a power was given to the Government to refer to the High Court any important question of law. Under the 1962 Act, the accused can take the matter to the High Court or Supreme Court by writs under Articles 226 and 136 of the Constitution, and Sections 491, 435, 439 and 561A of the Criminal Procedure Code, as discussed elsewhere.[1] But it rests with the Central Government to decide as to the surrender of the fugitive criminal. Section 15 of the 1903 Act empowered the Government to stay proceedings under the chapter and to direct any warrant issued under it to be cancelled and the accused to be discharged,[2] and similar powers have been given to the Central Government under Section 29 of the 1962 Act.

(c) Proceedings before Magistrate whether judicial or quasi-judicial or executive

Chapter III of the Extradition Act of 1903, on the other hand, deals with the surrender of fugitive criminals in case of States other than foreign States - like Nepal - or other erstwhile princely States in India - and in cases falling under this Chapter a similar procedure was prescribed where proceedings are initiated by a political agent. In

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1. Chapter VI, infra.

2. Gu.li Sahu v. Emperor, A.I.R. 1915 Cal.426 = (1914) 19 C.W.N. 221

that case no inquiry was directed and the determination of the political agent or such a State was regarded as sufficient, subject to the Government's powers of interference under Section 15 of the Act of 1903. A warrant issued by the Political Agent and its execution has been held to be an executive Act.[1] So also it was held that the legality of a warrant issued under Section 7 of the 1903 Act by the Political Agent of British India, could not be inquired into,[2] and it is no part of the duty of the High Court or other authorities to ascertain whether a prima facie case existed or not and that the responsibility rests with the officer by whom the warrant has been issued.[3]

Section 4(m) of the Indian Criminal Procedure Code defines judicial proceedings as including any proceeding in the course of which evidence is or may be legally taken on oath. The converse is not true. Not all proceedings in which evidence is taken on oath necessarily amount to judicial proceedings.[4] Under the Criminal Procedure Code, three modes of initiation of proceedings are envisaged embodied in Section 190, viz. (1) an aggrieved person setting the criminal law in motion by filing a complaint before

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1. Gu.li Shahu v. Emperor, A.I.R. 1915 Cal.426 at pp.426-427 = (1914) 19 C.W.N. 221. See also S.K. Agarwala, op.cit.,p.253.

2. Hansraj v. The Crown, A.I.R. 1926 Lahore 411. See also S.K. Agarwala, op.cit., p.253.

3. Giyan Chand v. King Emperor (1909) 3 P.R. 1909 Cr. See also Daddiprasad v. District Magistrate Yoetmal, A.I.R. 1924 Nagpur 313.

4. P.Rajangam, Sub Inspector of Police & Others v. State of Madras by Commissioner of Police, Madras & Others (1959) 1 M.L.J. 71 at p.104; In Re Sankarnarayana Rengan Reddiar (1962) 2 M.L.J. 256 at p.257.

a magistrate; (2) by information to police in cognizable offences; and (3) between an aggrieved party on the one hand, and accused on the other, viz. those cases where the magistrate cannot take cognizance except on the complaint of some person aggrieved, e.g. in the case of adultery on the complaint by the husband, or in the case of offences against public justice on the complaint of a public servant or with the previous sanction of the Government, as in cases of Indian Arms Act.

In Chapter II of the Indian Extradition Act,1962, the mode of making inquiry is provided in Section 7 and 9 of the Act and in Chapter III, the magistrate has to see that the 'backed warrant' is a proper and valid one and whether the offence is an extraditable one and whether the identity of the accused has been established. The question arises whether the magistrate works as a Court and whether his function is judicial or executive and his decision is judicial or not.

(1) Magistrate whether a court

Under the Act of 1962, it is only a magistrate (nominated by the Central Government under Section 5 of the Act), who would have jurisdiction to inquire into a crime if it is an offence committed within the local limits of his jurisdiction, who could be directed to inquire into an extradition case. Such a magistrate should inquire and decide whether a prima facie case is made out in support of the requistion for extradition of the fugitive criminal.

In conducting the extradition proceedings, the magistrate shall inquire into the case in the same manner

and with the same jurisdiction and powers,as nearly as may be, as the case were one triable by a court of sessions or High Court.[1] Thus,he should follow the procedure laid down in Chapter XVIII, Criminal Procedure Code as regards inquiry into cases triable by the Court of Sessions or High Court. It has been held that an inquiry under Section 7 of the Extradition Act by a magistrate is an inquiry by a criminal court.[2]

According to Halsbury's Laws of England,[3] originally the term 'court' meant among other meanings, the sovereign's place where justice is administered and further, has come to mean the person who exercises judicial functions under authority derived from the sovereign. All tribunals, however, are not courts in the sense in which the term is here employed, namely to denote such tribunals, as exercised jurisdiction over persons by reason of sanction of the law and not merely by reason of voluntarily submission to their jurisdiction. The question is whether the tribunal is a court; not whether it is a court of justice, for there are courts which are not courts of justice. In determining whether a tribunal is a judicial body, the facts that it has now been appointed by a non-judicial authority, that it had no power to administer an oath, that the Chairman has got a casting vote, and that a third party has a power

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1. Section 7 of the Indian Extradition Act, 1962.

2. In re Sankarnarayana, ibid. at p.257; See also Mabel Ferris alias Bai Aisha v. Emperor (1929) I.L.R. 53 Bom. 149; Lodhi v. Shyam Lal, A.I.R. 1950 All 100; In Re. Chockalingam, A.I.R. 1960 Madras 548 (cases under the 1903 Act).

3. Halsbury's Law of England, 3rd ed., Vol.IX at p.342.

to intervene are immaterial. The elements to be considered are:

1) the requirement of a public hearing, subject to a power to exclude the public in a proper case and
2) a provision that a member of the tribunal shall not take part in any decision in which he is personally interested, or unless he has been present throughout the proceedings.

From this it follows that the magistrate making inquiry under Section 7 and 9 of the Act is a Criminal Court clothed with judicial powers.

What is a judicial power? The Privy Council observed in Shell Co. of Australia v. Federal Commissioners:[1]

> "What is judicial power? Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in Huddart Parker & Co. v. Moorehead [2] where he says: 'I am of opinion that the words 'judicial power' as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subject", or between itself and its subjects; whether rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

Mere expression of opinion based upon legal evidence, taken on oath, having power to summon witnesses and compelling them to produce documents by a tribunal, having some of the trappings of a judicial tribunal, but lacking both finality

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1. Shell Co. of Australia v. Federal Commissioners L.R. (1931) A.C. 275 at p.295, followed in Brajnanda Sinha v. Jyoti Narain A.I.R. 1956 S.C. 66 at p.70.
2. Huddart Parker & Co. v. Moorehead (1909) 8 C.L.R. 330 at p.357.

and authoritativeness which are essential tests of a judicial prounouncements, does not render the tribunal a court.[1] A clear distinction must be drawn between a decision which by itself has no force and penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken, and which can be enforced proprio vigore.[2]

A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites:-

1) The presentation (not necessarily orally) of their case by the parties to the dispute;
2) If dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence;
3) If the dispute between them is a question of law, the submission of legal argument by the parties, and
4) A decision which disposes of the whole matter by a finding upon facts in dispute and application of the law of the land to the facts so found, including where required, a

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1. S.A. Venkataraman v. The Union of India and Another, A.I.R. 1954 S.C. 375; Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325; Brajnandan Sinha v. Jyoti Narain, A.I.R. 1956 S.C. 66 at p.70; Jugal Kishore Sita Marathi Central Co-op. Bank, A.I.R. 1967 S.C. 1494 at p.1499.

2. Shri Ram Krishna Dalmia and Others v. Justice Tendolkar, 1959 S.C.J. 147.

ruling upon any disputed question of law.[1]

Coke on Littleton and Stroud, defined the 'court' as the place where justice is judicially administered.[2]

Stephen has been quoted with approval by the Supreme Court in Brajnandan Sinha's case,[3] as under:

> "In every court, there must at least be three constituent parts - the actor, reus and judex; the actor or plaintiff, who complaints of an injury done, the reus, or the defendant; who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact; and to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy."

The definition in Section 3 of the Evidence Act,[4] is not exhaustive. By definition of the words 'court'[5] and the 'court of justice'[6] in the Indian Penal Code of 1860, the pronounce-

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1. Cooper v. Wilson L.R. (1937) 2 K.B. 309 at p.340, quoted with approval by Mahajan and Mukherjea JJ. in Bharat Bank Ltd.Delhi v. Employees of the Bharat Bank Ltd.Delhi, A.I.R. 1950 S.C. 188 at pp.195 and 207 respectively, and followed also in Maqbool Hussain v. State of Bombay, A.I.R. 1953, S.C.325 at p. 329, and Brajanandan Sinha, A.I.R. 1956 S.C. 66 at p.70.
2. Brajanandan Sinha v. Jyoti Narain, A.I.R.1956 S.C. 66 at p.69.
3. Brajanandan Sinha, ibid. at p.69.
4. Section 3 of the Indian Evidence Act, 1872, defines a 'court' as including all judges and magistrates, and all persons, except arbitrators, legally authorised to take evidence.
5. Section 19 of the Indian Penal Code,1860: The word 'judge' denotes not only every person who is officially designated as a judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against would be definite or a judgment which, if confirmed by some other authority would be definite, or, who is one of a body of persons, which body of persons is empowered by law to give such a judgment.
6. Section 20 of the Indian Penal Code,1860: The words 'court of justice' denotes a judge who is empowered by law to act,judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially.

ment of a definitive judgment is considered the sine qua non of a court and unless and until a binding and authoritative judgment can be pronounced by a person or body of persons, it cannot be predicated that he or they constitutea 'court'.[1] In order to constitute a 'court' in the strict sense of the term an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement.[2]

In Shell Co. of Australia,[3] the Privy Council enumerated certain negative propositions in relation to the subject:-

> "(1) A tribunal is not necessarily a court in this strict sense because it gives final decision;
> (2) Nor because it hears witnesses on oath;
> (3) Nor because 2 or more contending parties appear before it between whom it has to decide;
> (4) Nor because it gives decision which affects the right of subjects;
> (5) Nor because there is an appeal to a court;
> (6) Nor because it is a body to which a matter is referred by another body."

It was observed by the Privy Council that:

> "An administrative tribunal may act judicially but still remain an administrative tribunal as distinguished from a Court, strictly so called. Mere externals do not make a direction to an Administrative Officer by an ad hoc tribunal an exercise by a court of judicial power."

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1. Brajnandan Sinha v. Jyoti Narain, A.I.R. 1956 S.C.66 at p.69.
2. Brajnandan Sinha v. Jyoti Narain, A.I.R. 1956 S.C.66 at pp.69, 70.
3. Shell Co. of Australia v. Federal Commissioner of Taxation L.R. (1931) A.C. 275 at p.297.

The same principle was reiterated by the Supreme Court [1] where a test of judicial tribunal as laid down in a passage from Cooper v. Wilson [2] was adapted by the Supreme Court.[3]

So far as trial under Section 20 of the Extradition Act, 1962, where an offender is returned to India is concerned, the magistrate trying is a court as he would finally pronounce the judgment whether the accused is guilty of the offence charged or not.

In case of inquiry before a magistrate under Sections 7 and 9, the inquiry is also by a court because the magistrate can finally discharge the fugitive. In the case of recommendation of surrender of fugitive the proceedings made under the Criminal Procedure Code are also judicial and the fact that the matter has to be reported to the Central Government does not prevent the magistrate from being a court. If the Sessions Court accepts the revision under Section 435 Criminal Procedure Code in criminal cases against the orders passed by a magistrate, a reference has to be made under Section 439, Criminal Procedure Code to the High Court and it cannot be said that the order of the Sessions Judge is subject to references and is not final and therefore, not a judicial order by a court. Further, in cases where death penalty is imposed by the Sessions Judge, a reference is made to the High

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1. Bharat Bank Ltd. v. Employees of Bharat Bank Ltd., A.I.R. 1950 S.C. 188; Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325.

2. Cooper v. Wilson (1937) 2 K.B. 309 at p.340.

3. Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C.325; S.A. Venkataraman v. Union of India, A.I.R. 1954 S.C. 375; Brajnandan Sinha v. Jyoti Narain, A.I.R. 1956 S.C. 66 at p.70; Jugal Kishore v. Sita Marathi Central Co-op. Bank, A.I.R. 1967 S.C. 1494 at pp.1499, 1500.

Court for confirmation of the sentence by the High Court and the order of the Sessions Judge awarding death penalties is not a final one, but the Sessions Judge trying the case is a court and his order is a 'judicial order' and the proceedings are judicial in nature.

Shearer is of the opinion [1] that committal proceedings before a magistrate and trial before a judge and jury are conducted against a returned fugitive in all respects as though he has been found and arrested in Australia (like Section 20 of the Indian Extradition Act, 1962). The returned fugitive in Australia may not seek habeas corpus on the ground of any irregularity in the foreign proceedings leading to his extradition. The only benefit which he may claim from his status as an extraditee is that he may not be tried for offences other than those 'proved on facts' (compare Sections 21 and 31(c) of 1962 Act) upon which surrender was grounded until he has been given an opportunity of returning to the country from which he was extradited. This stipulation does not, of course, apply to offences committed subsequent to the surrender, nor does it apply where the fugitive waives his rights abroad and returns voluntarily to Australia, having been formally extradited. [2] Such a case of voluntary return would obviously not attract the provisions of any of the Constitutional Articles in India.

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1. Shearer, op.cit., p.568.

2. R. v. Corrigan, 1931 (1) K.B. 527; R. v. Gagnon (1956) 117 Canadian Criminal cases, 61.

(9) Extradition and Articles 72 and 161 of the Constitution

(a) Origin and History of Power of Pardon

Historically, in England, the King as the autocratic head of the Government always had the power to pardon. This was a part 'of that special pre-eminence which the King hath over and above all other persons, and out of the ordinary course of the common law, in the right of his royal dignity.'[1]

A pardon is said by Lord Coke to be a 'work of mercy, whereby the King, either before attainer, sentence or conviction or after forgiveth any crime, offence, punishment, execution, right, title, debt or duty temporal or Ecclesiastical.'[2]

The Common law (as to reprieves) is thus stated in Hale's pleas of the Crown:[3]

> "Reprieves or stays of judgments, or execution are of three kinds: viz. (1) Ex. mandate regis; (2) Ex. arbitrio judicis. Sometimes the judge reprieves before judgment, or where he is not satisfied with the verdict, or the evidence is uncertain; or the indictment insufficient or doubtful whether within clergy or in order to pardon or transportation; and these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, also their sessions be adjourned or finished, and this by reason of some common usage.[4] (3) Ex necessitate legis, which is in case of pregnancy, where a woman is convicted of felony or treason."

Blackstone thus expresses this prerogative:

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1. Blackstone: Commentaries (i) 239.

2. 3 Inst. 233.

3. Vol.2, Chapter 58, p.412.

4. 2 Dyer, 205-a, 73 Eng. Rep.452.

> "The only other remaining ways of avoiding the execution of the judgment are a reprieve or a pardon; whereof the former is temporary only, the latter permanent.
>
> 1. A reprieve (from *rependre*, to take back) is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first *ex arbitrio judicis*; either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the Crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of the goal delivery, although their session be finished and their commission expired, but this rather by common usage, than of strict right.
>
> Reprieve may also be *ex necessitate legis*, as, where a woman is capitally convicted and pleads her pregnancy, though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature in *favorem prolis*." [1]

After imposition of sentence, execution of the sentence may be suspended for a time which is known as respite, and may be granted by the King or by the Court.[2]

As the possessions of the Kings of England expanded and several new colonies came under their sway, the power of pardon which the Kings exercised came to be exercised by their representatives in the colonies and in America from them it went to the State Governors and to the President for Federal Offences. The same process was followed in India by various

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1. Blackstone: Book 4, Chapter XXXI, pp.394-395.

2. Orfields' *Criminal Procedure from Arrest to Appeal*, p.529.

enactments from time to time.[1] Both the power of pardon and power of reprieve which is a part of all comprehensive power of pardon are executive acts, and can be exercised at any time and in any circumstances untrammelled and without control and in the absolute freedom except that prescribed by the Constitution.[2]

The history of the prerogative of pardons and reprieves shows that the power of the executive in the matter of pardons and reprieves is of the widest amplitude and is plenary in nature and can be exercised at any time after the commission of the offence. The power of the executive is an act of grace and clemency.[3] It is a sovereign or Governmental power which in a monarchy is inherent in the King and in a Republic in the State or the People and which may, by the Constitution, be conferred on an officer or a department.[4]

The power of pardon is not subject to legislative control,[5] nor is it open to the legislature to change the effect of the pardon.[6] The executive may grant pardon for good reasons or bad or for no reason at all; its act is final

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1. Sections 54 of the Criminal Procedure Code of 1861, (Act XXV of 1861), Section 322 of the Criminal Procedure Code of 1872 (Act X of 1872), Section 401 of the Criminal Procedure Code of 1882 (Act X of 1882), Section 401(1) and (5), Criminal Procedure Code of 1898; Section 295(1) and (2) of the Government of India Act 1935, Article 72 and 161 of the Constitution of India.

2. Kapur J. in Nanavati v. State of Bombay, (1961) 2 S.C.J. 100 at pp.121-122.

3. Ex parte Wells, 15 Law Ed. 640 at pp.643,644: 18 How. 307 (1855).

4. Kapur J. in Nanavati's case, ibid: at p.124.

5. Ex parte Garland, 18 Law Ed. 366 at pp.370-371: 4 Wall 333 (1866).

6. United States v. Klein, 20 Law Ed. 519: 13 Wall 128 (1871).

and irrevocable. The courts have no concern with the reason which actuated the executive. This power is beyond the control of the judiciary;[1] Holmes, J. observed:[2]

> "Pardon is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment fixed."

Following Holmes J. it was observed in Sorrell's case[3] that clemency is the function of the executive and it is the function of the courts to construe the statute and not to defeat it as construed. Field J. in Garland's case held that the President's power was not subject to legislative control.[4]

The powers of pardon under Articles 72 and 161 are also not subject to legislative or judicial control.

The power of the executive can be exercised at any time in England, United States of America and India. The King, said Lord Coke, 'can forgive any crime, offence, punishment or execution either before or after attainer, sentence or conviction or after.'[5] According to Willoughby:

> "The power of pardon includes the right to remit part of the penalty as well as the whole and in either case it may be made conditional. The power may be exercised at any time after the offence is committed, that is, either before,

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1. 39 Am. Jur. 545, Section 43, Horwitz v. Connor, 6 Com. L.R. 1497.
2. Biddle v. Perovich, 71 Law Ed. 1161 at p.1163: 274 U.S. 480, decided on May 31, 1927.
3. Sorrells v. United States, 77 Law Ed. 413 at p.441. Decided on December 19, 1932.
4. Ex parte Garland, 18 Law Ed. 366 at p.370-371: 4 Wall 333 (1866).
5. 3 Inst. 233, Hawkin's Pleas of the Crown, Bk.2, Chapter 37.

during or after legal proceedings for punishment."[1]

Field J. in Garland's case also observed:[2] 'The law thus conferred is unlimited. ... it extends to every offence known to the law and may be exercised at any time after its commission.' In Section 401, Criminal Procedure Code, the words used are 'at any time'. This power before trial can be exercised by entering nolle Prosequi. Under Section 494, Criminal Procedure Code, Public Prosecutor with the consent of the Court in trials in courts other than the High Court and under Section 333, Criminal Procedure Code in cases tried before High Court the Advocate General can enter a nolle prosequi and this power is absolute and not subject to the control of court.

In the absence of constitutional restrictions, the power of pardon and reprieve whether conditional or unconditional may be exercised at any time after the commission of the offence either before legal proceedings are taken or during their pendency or after an appeal is filed and while the case is pending in the appellate court.[3] So the same law is applicable to reprieves as in pardons.[4]

(b) Constitutional Development of Power of Pardon, Amnesty or Pardon, Articles 72 and 161, and Extradition.

Power of amnesty and pardon is given to the Governor under Section 401, Criminal Procedure Code and Article 161 of the Constitution and to the President under

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1. Willoughby's Constitution of America, Vol. III, p.1492.
2. Ex parte Garland, 18 Law Ed., 366 at pp.370-371, supra: 4 Wall 333 (1866).
3. Ex parte Grossman, 69 Law Ed. 527 at pp.530,532,535: 267 U.S. 87, decided on March 2, 1925.
4. Rogers v. Peck, 50 Law Ed., 256. (1905) 199 U.S. 425.

Article 72. On 11 March, 1960, the power under Article 161 was used by the Governor of Bombay when he suspended the sentence passed by the Bombay High Court on Commander Nanawati of the Indian Navy. The suspension was until the appeal was filed in the Supreme Court against his conviction. Ultimately, reprieve was granted to him though his conviction was upheld by the Supreme Court.[1] In the Chambers Twentieth Century Dictionary, the following meaning is given for the word 'amnesty': 'A general pardon of political prisoners; an act of oblivion'. As understood in common parlance, the word 'amnesty' is appropriate only where political prisoners are released and not in cases of those who have committed felonies or murders. But in the case of Re Channugadu,[2] it was observed:

> "But it is clear from the G.O. that the intention of the Government is to pardon not only political prisoners but those convicted and sentenced to the extreme penalty of law as well as for various terms of imprisonment for non-political crimes involving moral turpitude. However, that be, we are not concerned with the impropriety of the term used. The fact remains that the intention was to release the prisoners convicted and sentenced to death/transportation for life or other terms of imprisonment."

Marshal C.J. in the case of Wilson,[3] traced the history of the subject of pardon in the Royal prerogative of the sovereign in Great Britain and stated that the United States has adopted the same privileges when Article II,

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1. Nanawati v. State of Bombay (1961) 2 S.C.J. 100: AIR 1961 SC 112.
2. Re Channagadu, A.I.R. 1954 Mad. 911.
3. United States v. Wilson (1863) 8 Law Ed. 640 at pp.643,644.

Section 2 of their Constitution invests the President with such power, and is in essence an executive function to be exercised by the Head of the State after taking into consideration matters which may not be germane for consideration before a court of law inquiring into the offence. At page 643, it was observed:

> "The constitution gives the President in general terms the power to grant reprieves and pardons for offences against United States of America. This power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bears a close resemblance; we adopt their principles respecting the operation and effect of a pardon and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it ...
>
> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws which exempt the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."

Relating to the exercise of powers of pardon by the United States President Taft C.J. has given an illuminating exposition of the law on the subject, and he is of the opinion that the extent of the power of pardon extends even to criminal contempts of courts.[1] Burdick[2] is an authority for the proposition that a pardon should be accepted by the person to whom it is tendered and then it would become effective. He is not bound to accept it, he can waive it in order to vindicate his innocence.

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1. Ex parte Grossman (1924) 69 Law Ed. 527: 267 U.S. 87 decided on March 2, 1925.
2. Burdick v. United States (1914) 59 Law Ed. 476: 236 U.S. 79 decided on January 25, 1915.

C.J. Taft in the case of Grossman,[1] has observed that in tendering pardon, the executive authority would act reasonably in order to afford relief from undue harshness or evident mistake in the operation or enforcement of criminal law.

As seen above, the practice of pardon in monarchical England was the same as is clear from Coke's reports and what has been stated in Halsbury's Laws of England.[2]

The framers of the Indian Constitution having before them the earlier precedent and practice under the British rule, as well as what obtained in monarchical Great Britain and in the republican United States intended to vest in the President, or the Governor the same power of pardon, mercy or reprieve as has been understood to inhere in the English Sovereign or statutorily invested in the United States President.[3]

The position previously obtaining in India was that this power was for the most part regulated by provisions of law, particularly the Criminal Procedure Code.[4] Accepting the recommendation of the Joint Select Committee of 1933-34, the Government of India Act, 1935, had by Section 295 of the Act, conferred on the Governor General acting in his discretionary power to suspend, remit or commute sentences of

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1. Ex parte Grossman (1924) 69 Law Ed. 527: 267 U.S. 87 decided on March 2, 1925.
2. Halsbury's Laws of England, 2nd Ed., p.477.
3. Re Channagadu, A.I.R. 1954 Madras 911 at p.915. Followed in State v. K.M. Nanawati, A.I.R. 1960 Bombay 502 at pp.506-8. See also Nanawati v. State of Bombay (1961) 2 S.C.J. 100.
4. Section 401 of the Criminal Procedure Code of 1898.

death. But apart from these statutory powers, the prerogative of the Crown was also delegated to the Governor General by the letters patent creating his office, empowering him to grant to any person convicted of any criminal offence in British India, a pardon either free or subject to such conditions as he thought fit.[1] After discussions in the Constituent Assembly on 17 September, 1949, on the amendments moved by Ananthasayanam Aiyangar, Gopala Swami Ayangar, Ambedkar and T.T. Krishnamachari, the Law of Pardon and reprieve was inserted in Articles 72 and 161 of the Constitution in its present form.[2] Thus, under Article 72 the President is given the power to grant pardons. According to this, in all Court martial cases, as well as cases involving the breach of a Union law where a punishment or sentence is inflicted on any person, the President may grant pardon or any other appropriate mercy such as reprieve, respite, remission or suspension or commutation of the sentence.[3]

Under the Constitution, the functions assigned to the Central and the State Executives are very broad, varied and miscellaneous. They exercise not only what may be termed as 'executive' functions but also in a limited sense, even judicial - as well as legislative functions, such as ordinance - making, rule-making powers.[4] Constitutional provisions confer powers and functions on the President and the Governors

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1. Letters Patent issued to the Governor General, 1937 - Rajagopola Ayangar - The Government of India Act, 1935,p.(IV).

2. See B. Shiva Rao, The Framing of India's Constitution, Vol.V, pp.367-371.

3. M.V. Pylee, Indias Constitution, p.165.

4. M.P. Jain: Indian Constitutional Law, Second Ed., (1970), pp. 128, 224, 225, 753.

but as they act on the advice of Ministers, the words 'Presidents' and 'Governors' should be treated as synonymous with 'Council of Ministers' or the 'Central Executive' or the 'State Executive' respectively.

Articles 72 and 161 confer one of the judicial powers upon the President (or Central Executive) and the Governor (or the State Executive) in the sense that they are empowered to grant pardons, reprieves, or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of offences. The President is empowered to exercise his powers in all cases, (a) where the punishment or sentence is by a Court martial; (b) where the punishment or sentence is for an offence against a law relating to a matter to which the Union's executive power extends, which would include matters relating to extradition also; and (c) of death sentence. This, however, does not affect any power conferred by law on any officer of the Union's armed forces to suspend, remit or commute a sentence passed by a Court martial, or the power exercisable by the State Executive to suspend, remit or commute a death sentence, or imprisonment for life in murder cases.[1]

Article 161 confers these judicial powers on the Governor or State Executive in offences against any law relating to a matter to which the Executive power of the State extends. The Governor's power, under any law in force, to suspend, remit or commute a death sentence has been saved by

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1. State of Bombay v. Nanawati, A.I.R. 1960 Bom.502, and Nanawati v. State of Bombay (1961) 2 S.C.J. 100: AIR 1961 SC 112.

Article 72(3). Such a power is conferred on the State Governments by Sections 401 and 402 of the Criminal Procedure Code. The power to grant pardon in a death sentence lies solely with the President, while power to grant a reprieve, respite or remission of a death sentence is available to both the President as well as the Governor, and the power in one does not exclude the power in the other.

Reprieve means stay of execution of sentence; respite denotes postponement of execution of sentence; pardon means to forgive, to excuse; remission reduces the amount of a sentence without changing its character, and commutation is changing the sentence to a lighter penalty of a different form.

As said above, a pardon is an act of grace which releases a person from punishment for some offence. A pardon may be either full, limited or conditional. A full pardon wipes out the offence in the eyes of law; a limited pardon relieves the offender from some but not all consequences of the guilt, and a conditional pardon imposes some condition for the pardon to be effective.

The Bombay High Court in Nanawati's case,[1] held that the power of pardon under Articles 72 and 161 can be exercised before, during or after trial, that if pardon can be granted during pendency of a judicial trial or proceeding, the other allied but lesser powers of reprieve, suspension of sentence, etc. can also be so exercised. The words in

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1. State of Bombay v. Nanawati, A.I.R. 1960 Bom. 502.

Article 161 are very wide and do not contain any limitation as to the time at which, the occasion on which, or the circumstances in which, the powers conferred by these Articles, 72 and 161, may be exercised; and that the powers having been conferred by the Constitution itself and being unqualified in terms, the court cannot put any fetters or restrictions on them; and that the power to suspend a sentence includes power to attach lawful conditions to it.

The Supreme Court, also in Nanawati's case,[1] held that Articles 72 and 161, which are very general in terms, deal with pardons, reprieves, respites and remissions of punishment for criminal offences. The power of the Governor to grant pardon, etc. to some extent overlaps the same power of the President, particularly in the case of a death sentence. It was further observed that the Governor may grant a full pardon at any time even during the pendency of the case in the Supreme Court in exercise of the 'mercy jurisdiction'. Such a pardon after conviction has the effect of completely absolving the accused from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the Head of the Executive, because the judiciary has no such 'mercy jurisdiction'.[2]

A combined reading of provisions of Articles 72(1)(a)(c)(3), 73(i)(a), 161, 162, 246(2) of the Constitution read with Section 401, 402 and 402A of the Criminal Procedure Code indicates that the State Government continues

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1. Nanawati v. State of Bombay (1961) 2 S.C.J. 100; AIR 1961 SC 112

2. Nanawati v. State of Bombay (1961) 2 S.C.J. 100; AIR 1961 SC 112

to enjoy the power of commuting a sentence of death. Since the expression 'State Government' means the Governor under the General Clauses Act under Section 402, Criminal Procedure Code, the Governor can commute a sentence of death under Section 402, Criminal Procedure Code. This power is kept intact by Clause (3) of Article 72.[1]

(c) Powers of Prerogatives of Mercy after Constitution in Extradition Proceedings by the Ex-Rulers of the Princely States

The Constitution specifically provided for the prerogative of mercy in respect of sentences of death in Articles 72, 161 and 238. Article 72 provides for the power of the President, Article 161 for the power of the Governor in a part A state, and Article 238(1) taken with Article 161 for the power of the Raj Pramukh of a B State. Prerogatives of the Maharajas of the old Princely States would be inconsistent with Articles 72, 161 and 238 of the Constitution. By the Code of Criminal Procedure Amendment Act, 1951 (Central Act 1 of 1951), Sections 401,402 and 402A are made applicable to all parts of India (except Jammu and Kashmir). In view of this, the prerogative of mercy in the old Princely States must be deemed to have been repealed or abrogated. Article 372 could not give continuance to those prerogatives as the continuance is only until altered or repealed or amended by a competent legislature.[2]

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1. Dwivedi J. in Parkasho v. State of U.P. & Others, A.I.R. 1962 All 151 at p.152, 153.

2. Jagannadha Das J. in Thaivalappil Kunju Varu Vareed v. State of Tra-Cochin, A.I.R. 1956 S.C. 142 at p. 145 Cl.

(d) Effect of Pardon granted in Extradition Proceedings by the President and Governors

It follows that under Articles 72 and 161 the Heads of the State is given statutory authority by means of an executive act to tender pardons and reprieves and these functions can be exercised before or after conviction. In many respects, the power of pardon and reprieves conferred under the Indian Constitution by Article 72 on the President and by Article 161 on the Governor of the State is very similar to the power of the President of the United States of America in granting pardons and reprieves. Apart from this, the wordings of the corresponding articles are also similar and such being the case, the decisions of the United States Supreme Court are useful in the decision of questions with respect to the power of pardon and reprieves conferred under Articles 72 and 161.[1]

The power of amnesty if used in a case in regard to an extradition offence, pardon being granted by applying the above-mentioned principle, the result will be that the request will be refused as the man is no more guilty of any offence, and he has a position of an innocent person in the words of Field J. in Garland's case, supra.

The power to grant pardon is purely an executive function.[2] The P.C. observed:

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1. Re Channugadu, supra.

2. Balmukand v. King Emperor, A.I.R. 1915 P.C. 29.

> "The tendering of advice to His Majesty as to the exercise of the prerogative of pardon is a matter for the executive Government. ... and is outside their Lordships' province."

In India, the celebrated trial of Commander Nanawati for murder ended when Nanawati, after conviction, was granted pardon.[1] This is why in Zacharia's case, supra, even after the judgments of the courts being against him, the Home Secretary refused extradition.

Finally, regarding validity and effectiveness of the power of pardon and reprieve, C.J. Taft in Grossman's case, observed:[2]

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular Governments, as well as in monarchies, to vest in some other authority than the Courts, power to ameliorate or avoid particular judgments. It is a check entrusted to the Executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make use of it must have full discretion to exercise it. Our constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."

Directly or indirectly, the same results are achieved, by virtue of Section 29 of the Indian Extradition

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1. Nanawati v. Bombay (1961) 2 S.C.J. 100; State v. Nanawati, A.I.R. 1960 Bombay 502.

2. Ex parte Grossman (1924) 69 Law Ed. 527.

Act by another road leading to the same path, in case of grant of pardon to the fugitive in extradition proceedings. Section 31 of the Act of 1962 is also relevant. Ultimately, the Central Government has the discretion to refuse to extradite the fugitive offender.[1]

Applying the above principles of amnesty or pardon, it follows that once prosectuion or punishment is barred by the law of amnesty or pardon, under Articles 72 and 161 of the Constitution or Section 401, Criminal Procedure Code, the situation is analogous to that where the act done is not a crime under the Indian legal system, and unless the offence is an offence under the Indian Law, then according to the 'principle of mutuality' or doctrine of 'double criminality' or 'non bis idem', one of the most essential ingredients in the proceedings of extradition is lacking. Even if there is a clause contrary to the power of amnesty or pardon in a treaty, then unlike the practice in some states, the treaty provisions cannot override Articles 72 and 161 of the Constitution of India.

There is a divergence of opinion in different courts in regard to international practice on the question whether the amnesty law passed by one State subsequent to the treaty of extradition with other States takes precedence over the treaty or leaves it unaffected. According to one view, it is recognised beyond doubt that, in the community of States, international law prevails over municipal law and so international agreement or conventions

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1. Hans Muller, supra, A.I.R. 1955 S.C. 367.

cannot be altered or abrogated by unilateral legislative action of one of the contracting parties.[1] But the other view is that (in criminal matters), the judicial authorities of a State are bound to give judgment according to the municipal law alone and that no limitation, upon the application of the legal rule, even if derived from an international relationship, can be taken into consideration by the judge unless it has been transmitted into a rule of municipal law.[2] The same view was upheld by the Supreme Court of Federal Germany in 1951, and it was observed:

> "Extradition must not be granted if, on the assumption of a reversal of the factual position, a prosecution could not, according to the provisions of a German law of amnesty, be launched, or a sentence executed, in respect of the offence which is intended to form the basis of extradition."[3]

Therefore, if the pre-Constitution treaties which are continued in India by virtue of Section 2(d) of the Indian Extradition Act, 1962, have a clause in those treaties contrary to the [illegible] the pardoning power, that clause would not be enforced by the courts in view of the cases of Ram Baboo Saksena,[4] Birma,[5] and Nanka.[6] In post- and pre-Constitution

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1. In Re Brooks, decided by the Supreme Court of Panama on 21 May, 1931, A.D. 1931-1932, Case No.5. See also Bedi, op.cit., p. 203, fn.170.

2. In Re Zanini, German Supreme Court, decided on 13 January,1936, A.D. 1935-1937, Case No.173. See also Bedi, op.cit., pp.202-203.

3. 18 Int. Law Reports 1951, Case No.103, p.331. See also Bedi, op.cit., p.203, n.172.

4. Dr. Ram Babu Saksena v. The State, A.I.R. 1950 S.C. 155.

5. Birma v. State, A.I.R. 1951 Raj. 127.

6. Nanka v. Government of Rajasthan, A.I.R. 1951 Raj.153.

treaties, the law of pardon and the actual pardon having been granted under Article 72 or 161 will prevail over the treaty clause.

CHAPTER VI

EXTRADITION ORDER BY MAGISTRATE OR CENTRAL GOVERNMENT - REVIEW BY SUPERIOR COURTS

(1) By Writ of Habeas Corpus

(a) General Principles

Every act done by the government or its officers must, if it is to operate to the prejudice of any person be supported by some legislative authority,[1] as the liberty of a person, an individual, is not something which can be disposed of indiscriminately in the absence of positive law.[2] The Constitution creates no executive prerogative to dispose of the liberty of the individual. Consequently, proceedings against him must be authorised by some positive law of the State.[3] It is not enough that statute or treaty does not deny the power to surrender, it must be found that statute or treaty confers the power.[4]

Where a person is arrested and detained in custody under the law relating to extradition, he is entitled to apply for a writ of habeas corpus if his detention is not in accord-

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1. Bennett Coleman & Co. Ltd. v. Union of India, A.I.R. 1973 S.C. 106, Para.27, per Ray J.; per Lord Atkin in Eshingbayi Eleko v. Officer Administering the Government of Nigeria, L.R.(1931) A.C. 662 at p.670, followed by Kania C.J. in A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 at p.40.

2. United States ex rel Karadzole v. Artukovic, 28 Int. Law Reports, p.326.

3. Birma v. State, A.I.R. 1951 Raj. 127, and Nanka v. Government of Rajasthan, A.I.R. 1951 Raj. 153.

4. Valentine et al. v. United States ex rel Neidecker (1936) 299 U.S. 5.

ance with law. The legislature has laid restrictions on the power of the executive to apprehend and send persons abroad to answer charges before foreign tribunal or court. After the coming into force of the Indian Constitution, in addition to the earlier safeguards, fundamental guarantees are provided by Chapter III of the Constitution.

The Extradition Act and the Criminal Procedure Code both being penal enactments, their terms must be strictly construed in favour of the accused persons whenever such constructions can be reasonably justified.[1] Therefore, a citizen who has committed certain kinds of offences, mentioned in the Treaty concerned with the requesting State or in the Second Schedule (including a supplementary schedule) to the Extradition Act, 1962, abroad, can be extradited, if the formalities prescribed by the Extradition Act are observed and complied with.[2] The right of a citizen not to be sent out to a foreign jurisdiction without strict compliance with the extradition law is a valuable right.[3]

A foreigner has no such right and he can be expelled without any formality beyond making of an order by the Central Government. But if he is extradited instead of being expelled, the formalities of the Act of 1962 must be complied with. Under the Act of 1962, warrants must be issued; there must be a magisterial inquiry and when there is an arrest, it is penal in nature, and when he leaves India, he does not leave as a

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1. Ram Pargas v. Emperor, A.I.R. 1948 All 129 at pp.130-131.
2. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367, supra.
3. Santabir Lama v. Emperor, supra, A.I.R. 1935 Cal. 122.

free man; the police in India hand him over to the police of the requesting State and he remains in custody throughout. In that event, therefore, the formalities of extradition must be complied with. There must be a magisterial inquiry with a regular hearing and the person sought to be extradited must be afforded the right and opportunity to submit a written statement to the Central Government and to ask, if he so chooses, for political asylum; also, he has the right to defend himself and the right to consult, and to be defended by a legal practitioner of his own choice.[1] As against the rights of citizens, a foreigner or alien, not being a citizen, is not entitled to any Fundamental Rights guaranteed by Article 19 of the Constitution, though he has the fundamental rights contained in Articles 20 to 22 of the Constitution. In extradition proceedings, if he is deprived of his personal liberty otherwise than by the 'procedure established by law', he can approach the High Court or the Supreme Court for his immediate release.[2] But in cases, such as Anwar's,[3] the Supreme Court has held that the writ of habeas corpus though a writ of right, is not a writ of course and its scope has grown to achieve its purpose of protecting individuals against erosion of the right to be free from wrongful restraint on their rightful liberty. But a prerequisite to entry into the country must have a proper legal sanction behind it and if a Pakistani enters Indian territory illegally, and if he is expelled, but not extradited, he cannot remain in India

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1. Art.22(1): Hans Muller, supra.
2. Anwar v. State of J & K, A.I.R. 1971 S.C. 337.
3. Anwar v. State of J & K, A.I.R. 1971 S.C. 337, ibid.

against the wishes of the Government and cannot enjoy any of the fundamental rights.[1]

A superior court in hearing a habeas corpus petition, is not a court of appeal and cannot go into the questions of fact arising from the order of the magistrate or Central Government. It can only determine whether there was such evidence as to give authority and jurisdiction to commit and whether the offence came within the purview of the treaty concerned or the Second Schedule to the Indian Extradition Act, 1962, and whether the procedure prescribed by the Extradition Act, 1962, was followed and whether the order of extradition was hit by the provisions of Sections 29, 31 and 32 of the Act. If the magistrate or Central Government had no jurisdiction to commit, if they wrongly assumed jurisdiction by ignoring the above-mentioned provisions, the superior courts will grant habeas corpus.[2] The court will not review the decision of the magistrate or the Central Government if there was evidence before them to justify commitment. A reasonable person's satisfaction is the test of evidence in the Supreme Court. The sufficiency of such evidence is a question for the magistrate to decide. But to see if the offence is a political offence, the courts, as in a preventive detention case, will examine the real nature of the evidence. If they reach the conclusion that the provisions of Sections 29 and 31 of the Extradition Act are violated, the court may set aside the order of commitment.[3] The Court will also review the

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1. Anwar v. State of J & K, ibid.

2. R. v. Governor of Brixton Prison, Ex parte Kolczynski (1955) 1 All E.R. 31.

3. R. v. Maurer (1883) Q.B.D. 513 and cases cited in Halsbury's Laws of England, Vol.16, p.576.

evidence given before the magistrate as to the nationality of the accused in cases when there is a treaty clause, like the Attentat clause; where the high contracting parties agree not to extradite nationals, as in the Indo-Nepalese Extradition Treaty, for the nationality of the accused [illegible] as a matter of fact is essential to the existence of the magistrates' jurisdiction.[1] The court will inquire into whether the crime charged is within the scope of the Extradition Act or the treaty or whether the crime is of a political character or whether there was evidence before the magistrate, upon which he could have exercised his discretion to commit.[2] Other instances in which the Courts would interfere may be enumerated: The offence must be extraditable and there must be a warrant in existence which ex facie is a valid warrant. If the executive exceeds its powers, the judiciary will restrain it, but otherwise the judiciary cannot interfere.[3] In Hadi Bandhu's case,[4] Shearer J. emphasised the desirability of the Government carefully considering the matter and cancelling the warrant of the Political Agent, if necessary. In Santabir's case,[5] it was held that a valid warrant was essential. But this does not mean that the Executive is under any legal compulsion to surrender the prisoner to the foreign

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1. Re Guerin (1888) 58 L.J. (M.C.) 42; (1889) 5 T.L.R. 188, R. v. Governor of Brixton Prison, Ex parte Guerin (1907) Sol. Jo.571.

2. Re Castioni (1891) 1 Q.B. 149; R. v. Governor of Holloway Prison, Re Siletti (1902) 71 L.J. (K.B.) 935; R. v. Governor of Brixton Prison, Ex parte Kolczynski (1955) 1 Q.B. 540 = (1955) 1 All E.R. 31.

3. Hadi Bandhu Prodhan v. Emperor, A.I.R. 1946 Patna 196 at p.198; Santabir Lama v. Emperor, A.I.R. 1935 Cal. 122 at p.124.

4. Hadi Bandhu Prodhan v. Emperor, A.I.R. 1946 Patna 196 at p.198.

5. Santabir Lama v. Emperor, A.I.R. 1935 Cal.122 at p.124.

State in such a case. It retains a discretion in the matter and may for reasons, which may appear to it valid, cancel any warrant which has been issued.[1] The Supreme Court in Hans Muller's case,[2] has held that, even if there is a requisition and good case for extradition, the Government is not bound to accede to the request and it is given an unfettered right to refuse. While interpreting the words 'The Central Government may if it thinks fit', found in Section 3(1) of the Indian Extradition Act, 1903, the Supreme Court held that,[3] if the Central Government chooses not to comply with the request for extradition made by a (Foreign State or a Commonwealth Country) requesting State, the person against whom the request is made, cannot insist that it should comply with the request, because the right is not his, and the fact that a request has been made does not fetter the discretion of the Government, to choose the less cumbersome procedure to expel a foreigner under the Foreigner's Act, 1946. Where the Court finds that the offence is not extraditable, the prisoner must be discharged.[4] Though the High Court should not ordinarily interfere in extradition proceedings, it is fully authorised to see whether there is a patent and palpable defect visible in the authority by which the person having custody detains a person. If the authority under which a

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1. Hadi Bandhu Prodhan v. Emperor, A.I.R. 1946 Patna 196 at p. 198 (In a case under the Extradition Act, 1903).

2. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367 at p.374.

3. Hans Muller, ibid., A.I.R. 1955 S.C. 367 at pp.374,376.

4. R. v. Wilson (1877) 3 Q.B.D. 42 at p.45.

person is being detained is on the face of it illegal and invalid, the High Court can certainly take notice of it and release the accused.[1] In a case of a person arrested and kept in custody for more than two months (under Section 10(3) of The Extradition Act of 1903, or Section 24 of the present Act, 1962), the detention of the prisoner is illegal, if no sufficient cause is shown to the contrary by the Central Government, the only order under the circumstances which the High Court could pass would be that the prisoner should be discharged from custody.[2] The Privy Council in Mathew's case,[3] held that the question whether a warrant issued by a political agent under Section 7 of the Extradition Act, 1903, complied with the rules made under the Act, cannot properly be made the subject of an enquiry by the court, but should be stated to the magistrate on an application to him to report the matter to the local Government[4] under Section 8A.[5] For

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1. Roshanlal v. Superintendent Central Jail, Lashkar, A.I.R. 1950 M.B. 83 Para.6.

2. Surajnarain v. Emperor, A.I.R. 1935 Pat. 419 at p.420.

3. Mathew v. District Magistrate, Trivendrum, A.I.R. 1939 P.C. 213 at p.218. The Political Agent stands here for the requesting state.

4. Section 19 of (The Indian) Extradition Act, 1903: "For the purpose of applying and carrying into effect in British India the provisions of the Fugitive Offenders Act, 1881, the following provisions are hereby made:
(a) the powers conferred on 'Governors' of British posessions shall be powers of the Central Government: ..."

5. Section 8A of (The Indian) Extradition Act, 1903, runs as under:
"(1) Notwithstanding anything contained in Section 7, subsection (2), or in Section 8, when an accused person arrested in accordance with the provisions of Section 7 is produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, and the statement (if any) of such accused person has been recorded, such Magistrate may, if he thinks fit, before proceeding further report the case to the Central Government and pending the receipt of orders on such report, may detain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required."

instance, one of the rules provided that the political agent shall in all cases before issuing a warrant under Section 7 of the Act, satisfy himself by preliminary inquiry or otherwise that there is a prima facie case against the accused person. If a suggestion were to be made that the political agent did not satisfy himself, it would not properly be a subject of an enquiry by the court on an application for habeas corpus, but should be stated to the magistrate on an application to report to the local Government under Section 8A of the Extradition Act, 1903.[1]

In Baijnath's case,[2] so also in Israr Hussain's case,[3] because there was no material before the British Indian Court regarding the procedure on which the political agent acted in issuing the extradition warrant, it was held that it did not follow that his act of issuing the warrant was illegal. But in Ram Parga's case,[4] it was held that, in a case where warrants were issued under Section 7 of the Extradition Act, 1903, by a subordinate court under the general orders of the political agent and the political agent had not applied his mind to the particular warrant, the warrant was illegal.

In the case of Re Arton,[5] it was held that the court had no jurisdiction to enquire whether the demand of surrender was made in good faith and in the interest of

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1. Mathew v. District Magistrate, Trivendrum, A.I.R. 1939 P.C. 213 at p.218.
2. Baijnath v. Emperor, A.I.R. 1931 Oudh 394.
3. Israr Hussain v. Emperor, A.I.R. 1939 All 730.
4. Ram Pargas v. Emperor, A.I.R. 1948 All 129.
5. Re Arton (1896) 1 Q.B. 108 at p.115.

justice. This is a discretionary matter in the magistracy or the Central Government in India in the present Act under Section 29 of the 1962 Act.

But the Government could interfere if the offence was of a political nature. In the case of Re Castioni,[1] the English Court held that the order of the magistrate, whether the offence for which he is making an order of commitment is an offence of a political character, is subject to review by the court on an application of habeas corpus. So also in the case of Re Meunier,[2] the British Court gave a similar dictum.

In habeas corpus proceedings arising out of orders for the extradition or rendition of fugitive offenders, the courts have now abandoned the pretence that the grounds for the award of the writ are exclusively confined to 'jurisdictional errors'. If the magistrate before whom the alleged offender is brought, decides to commit him to custody or the Central Government decides to extradite him, the prisoner may apply for habeas corpus. Although the High Court or the Supreme Court under Articles 226 and 227 and Article 32 of the Constitution respectively is not entitled like the divisional court in England to review the magistrate's decision on its general merits, or to receive additional evidence, designed to show that it was wrong;[3] it may award the writ on the ground that the magistrate applied a 'wrong legal

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1. Re Castioni (1899) 1 Q.B. 149 at p.160.
2. Re Meunier (1894) 2 Q.B. 415 at p.419.
3. R. v. Brixton Prison Governor, Ex parte Schtraks, L.R.(1964) A.C. 556.

test' in determining the burden of proof to be discharged or arrived at a conclusion on the facts which 'no reasonable person could have arrived at as a conclusion on the facts' notwithstanding that such mistakes do not go to jurisdiction.[1] Complicated court proceedings concerning the former Ghanian Minister, Mr. Armah, took place in Britain in 1966,[2] and this case has been referred to and approved by the Indian Supreme Court in the case of Jugal Kishore More.[3]

In habeas corpus proceedings under the Extradition Act, 1962, and the Fugitive Offenders Act, 1881, the Court reviews the proceedings before the magistrate, including the formal instruments for committal. Where, for example, there is no legal evidence or where the only evidence to show the accused's criminality was contained in a deposition made by his wife which is a privileged statement made between husband and wife and is inadmissible in evidence, under the Indian Evidence Act. A husband or wife is not competent to give evidence in support of the charge for which extradition is sought.[4]

Habeas corpus may be awarded on various other grounds such as when the offence is of a political character, absence of the rule of speciality in the laws of the requesting

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1. R. v. Brixton Prison Governor, Ex parte Armah (1966) 3 W.L.R. 828 (H.L.) per Lord Reid at pp.838-842.

2. R. v. Brixton Prison Governor, Ex parte Armah (No.2) (1966) 110, Sol.Jo. 978.

3. State of West Bengal v. Jugal Kishore More, A.I.R. 1969, S.C. 1171.

4. Ex parte Robichaud (1926) 39 Que.K.B. 359.

State,[1] lapse of time, want of good faith and the trivial nature of the offence, etc. enumerated in Sections 29 and 31 of the Indian Extradition Act, 1962, which are more readily classifiable as jurisdictional. So also under the Indian Act of 1962 and the English Fugitive Offenders Act, 1967,[2] habeas corpus may be granted on a number of grounds, e.g. that the offence is of a political character, that the request for the offender's return is in fact made in order to punish him because of his race, religion, nationality or political opinions, that the offence is not one specified in the Act or that it would be unjust or oppressive to return him because of the triviality of the offence or the lapse of time or because the accusation made against him is not made in good faith. Some of these issues go to the merits but the court may receive additional evidence for considering whether the magistrate was wrong in finding a prima facie case of guilt.

In India, The Extradition Act of 1962 contains the above-mentioned grounds as in the recent British Fugitive Offenders Act, 1967. The latter Act was the outcome of a white paper presented to the British Parliament by the Home Secretary on 24 May, 1966, which was the result of agreement between Commonwealth Law Officers and Ministers to bring into effect the new extradition arrangements within the Commonwealth to supersede the Fugitive Offenders Act, 1881,

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1. In Re Millet, decided on 13 January, 1937, A.D. 1938-1940, Case No.148; In Re Korn, decided on 25 March, 1935, A.D. 1935-1937, Case No.166; Fiscal v. Samper, decided on 22 June, 1934, A.D., 1938-1940, Case No.152.

2. The Fugitive Offenders Act, 1967 (Sections 4,8 and Schedule I)

and this was a scheme relating to rendition of fugitive offenders within the Commonwealth.[1] Under the scheme, a fugitive offender will be returned only if charged with a returnable offence listed in an annexe to the white paper and then only if the facts on which the request for his return were founded constitute an offence under the law of the country or territory in which he was found. The scheme includes a provision relating to an optional and conditional discretion in regard to the return of an offender likely to suffer the death penalty in the requesting country in which he was found. In the United Kingdom, the Fugitive Offenders Act, 1967, has been passed to give effect to the new agreements.[2] In Ghana, a fugitive criminal shall not be surrendered, if the offence he is charged with is of a political character and a criminal surrendered by another country is not triable for previous crimes, except with the consent of the Government of the country surrendering him; or if the criminal stays in Ghana despite an opportunity to leave.[3]

It should be noted that these grounds for refusing extradition found in the British Act of 1967 had already been codified in the Indian Extradition Act of 1962. The result is that grounds justifying the issue of a writ of habeas corpus are common to both countries. The decisions of British Courts bearing on these provisions will have a

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1. Commd. 3008.

2. See also the Extradition Act (Commonwealth countries) 1966, the Extradition (Foreign States) Act, 1966, Australia Acts Nos.75 & 76 of 1966, the Extradition Act, 1965, New Zealand Act, 1965, No.44.

3. The Extradition Act, 1960 (Amendment) Decree, 1966, N.L.C.D.65.

profoundly persuasive value in India.

Another case from Hong Kong may be mentioned. In the case it was alleged that the extradition proceedings were defective because the 'requesting Government was not represented' and that someone who had merely departed on some temporary business from the jurisdiction to which his return was requested is 'not a fugitive offender'. Both allegations were rejected in a judgment, which contains a full citation of authorities and makes the point that, in the exceptional circumstances such as those prevailing in the instant case, on account of the fact that the applicant was a solicitor, it was not essential for someone seeking habeas corpus to be represented by counsel.[1] In some respects, the case merits comparison with ex parte Hammond,[2] in which the English Divisional Court held that there must be an element of escape to justify the backing of an Irish warrant under Section 12 of the Indictable Offences Act, 1948. The effect of the decision seems to have been reversed by a recent legislation, The Backing of Warrants (Republic of Ireland) Act, 1965.[3]

The principles of double criminality can be illustrated by a decision of a superior court in England, which interpreted the provisions of Section 3(1)(c) of the new British Fugitive Offenders Act, 1967,[4] The applicant had

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1. Re Kenneth Alfred Evans, 1962 H.K. L.R. 266.
2. Ex parte Hammond (1964) 2 Q.B. 385.
3. Annual Survey of Commonwealth Law, 1965, p.211.
4. R. v. Governor of Brixton Prison, Ex parte Gardner (1968) 1 All E.R. 636.

been charged in New Zealand with obtaining money by falsely representing that a company would supply persons with goods, contrary to the New Zealand law, and he was arrested in England. As the alleged representation related to the future, it would not have constituted an offence against the law of England, and accordingly, the requirement under Section 3(1)(c) of the British Fugitive Offenders Act, 1967, that the returnable offence must be an offence under the laws of both New Zealand and United Kingdom was not satisfied and on this ground, the habeas corpus application succeeded. In India, the extradition offence has been defined as an offence mentioned in the treaty or in the Second Schedule to the Act and by necessary implication or intendment the doctrine of double criminality is adopted. Though the doctrine of double criminality has not been specifically mentioned as one of the grounds for refusal of extradition either under Section 29 or Section 31 of the 1962 Act, on this ground habeas corpus would be successful in India by virtue of Article 21 of the Constitution. The Mysore Chief Court observed:[1]

> "The act complained of must be a crime according to the criminal law of both countries; and no person should be extradited whose deed is not a crime according to the Criminal law of the State which is asked to extradite, as well as of the State which demanded extradition."

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1. Venkatarangiengar v. Government of Mysore, 12 Mys.L.J. 328, on 7 May 1934. (F.B.) decided (F.B.) See also Section 2(c) and 2(f) of The Indian Extradition Act, 1962, and the Second Schedule. See also S.K. Agarwala: International Law, Indian Courts and Legislation, p.215, fn. 1,2,3,4.

However, in a habeas corpus petition, the court would be reluctant to interfere with the discretion of the Central Government under Section 29 of the Indian Extradition Act of 1962. The House of Lords in Atkinson's case,[1] held that there is a complete discretion in extradition cases in the Secretary of State. In India, the counterpart will be the Central Government and it will be for the Central Government to decide whether in all the circumstances, the appellant should or should not be surrendered.

A habeas corpus petition failed in Australia on the ground that it is not unjust or oppressive to return an apprehended person to another State to answer a charge, merely because there is a reasonably arguable question of law as to his guilt.[2] But in the Armah case [3] dealt with above, the new régime in Ghana sought the rendition of the former High Commissioner in London on a charge of corruption. In the habeas corpus petition, the Divisional Court held that inasmuch as the British Government had recognised Ghana's continued membership of the Commonwealth, after the coup d'état and had despatched a High Commissioner to Accra, the provisions of the Act of 1881 governed rendition to Ghana, due to the Ghana (Consequential Provisions) Act. On the merits of the case, it was held that it would not be 'unjust and oppressive' to return the applicant and that the strong and probable presumption of guilt, which has to be established before the magistrate, meant only a prima facie case of guilt. On the last point, the House of

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1. Atkinson v. United States Government (1969) 3 All E.R.1317 at p.1327,H, per Lord Morris (H.L.).

2. Ex parte Khemper (1967) 1 N.S.W.R. 161.

3. R. v. Governor of Brixton Prison; Ex parte Armah (1966) 3 W.L.R. 23.

Lords subsequently disagreed with the interpretation of the Divisional Court, allowed the appeal and discharged the accused.[1]

The Supreme Court of India in the case of Jugal Kishore More, held that the extradition was valid only on the basis of 'reciprocity' and that the British Divisional Court in the case of Demetrious [2] had recognised the principle of rendition of the fugitive offender on the basis of 'reciprocity', holding that the protected State of Qatar, although not a British possession, was to be treated as such a possession for the purpose of operation of the Act to the extent that the Crown has jurisdiction there and the Act had been effectively extended to Qatar by an Order in Council, made under the Foreign Jurisdiction Act, so as to authorise rendition to and from Qatar 'on the basis of reciprocity'.

Some matters are, however, so important that the Minister - the Indian Central Government acts through a Minister, or Deputy Minister, to whom powers have been delegated in accordance with the business rules of the Secretariat made under Article 166 of the Constitution - must address himself to them personally, under Sections 8, 9(2) and 18 of the Indian Extradition Act, before an order of extradition is made against a fugitive criminal. Principles of natural justice must be observed; the Minister must consider the representations made by the accused (if any). If necessary, the Minister would hear the accused

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1. R. v. Governor of Brixton Prison, Ex Parte Armah (1966) 3 W.L.R. 828 (H.L.), Head Note 2 at p.830A.

2. R. v. Secretary of State for Home Affairs Ex parte Demetrious (1966) 2 W.L.R. 1066 at pp.1070, A,B, 1072, A, B, per Lord Parker C.J.

or his counsel orally. This course is necessary because the orders drastically affect the liberty of the person,[1] and discretionary orders extraditing fugitive criminals fall within this category. The order must not be arbitrary but should be considered to be quasi-judicial in nature, and as such amenable to the jurisdiction of the superior court to be reviewed.[2]

Two interesting decisions of British Courts on rendition, may also be mentioned. In R. v. Aubrey Fletcher, it was held that the sole office of Section 19 of the Extradition Act, 1870, is to ensure that an accused will not be tried after his surrender for a crime other than that for which he hasbeen extradited. It does not inhibit the prosecution from proving facts additional to those contained in the depositions filed for the purpose of extradition. Seemingly, the depositions are only admissible for the limited purpose of determining whether the crime for which he is being tried, while normally different from that named in the warrant, appeared on the facts before the court which ordered extradition.[3] Salmon L.J. referred to Corrigan's case,[4] where extradition was sought on charges of false pretences, but the indictment ultimately charged thirteen counts of fradulent conversion. This was held to be valid though, as in fact, the accused

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1. R. v. Chiswick Police Station Superintendent Ex parte Sackasteder (1918) 1 K.B. 578 at pp.585, 586 and 591,592.

2. R. v. Brixton Prison Ex parte Enahoro (1963) 2 Q.B. 455 at p.466.

3. R. v. Aubrey Fletcher Ex parte Ross Munro (1968) 1 All E.R.99.

4. Rex v. Corrigan (1931) 1 K.B. 527.

surrendered himself voluntarily; the judgment seems to be a dictum only.

In the second decision, R. v. Governor, of Brixton Prison Ex parte Gardner, it was held that the principle of mutuality applied under the British Fugitive Offenders Act, 1967. It must be shown, not only that the general description of the offence falls within Schedule I to the Act, but also that the act or omission constituting the offence would, if it took place in the United Kingdom constitute an offence.[1]

The corresponding 'rule of speciality' in the Indian Extradition Act has been very specifically mentioned in Sections 21 and 31(c) and in both the sections, the words 'extradition offence proved by the facts on which his surrender or return is based' have been used. In spite of the enumerative method used in the Second Schedule to the Act, facts will be taken into consideration to see whether the offences in question are the same or similar in terms of their ingredients, though bearing different names under the laws of the requesting State. In the United Kingdom, United States of America, Canada and Australia, the courts would examine the nature and ingredients of the offence and would not go by the name of the offence used in the Extradition Act or treaty, and if on the facts the ingredients are found to be the same, a habeas corpus application would be dismissed.

Section 2(c) of the Indian Extradition Act of 1962, read with the Second Schedule contains the law on the doctrine

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1. R. v. Governor of Brixton Prison Ex parte Gardner (1968) 1 All E.R. 636.

of 'mutuality' or 'double criminality', applied and interpreted in the second case. The first essential of the doctrine of 'mutuality' is fulfilled by Section 2(c)(i) and (ii) of the Act and the second essential by the opening lines of the Second Schedule. According to Section 2(c)(i)(ii) it would be evident that the general description of the offences fall within the Second Schedule to the Act. The words 'The following list of extradition offences is to be construed according to the law in force in India on the date of the alleged offences' used in the Second Schedule, and the enumeration of the offences in the Schedule which are offences under the Indian Penal Code and other laws therein mentioned, would show that the offences mentioned in the Second Schedule would constitute offences in India and the test laid down by the English case in Gardner would be satisfied. There are two aspects to the question whether the offence for which a requisition has been made, is an offence in the requesting State or not. It is but natural that the Indian Government as well as the treaty State will agree for extradition of such offences as are punishable in both the territories, although they may be called by different names and may have varying punishments and modes of punishment. Similarly, enumeration of extradition offences in the Second Schedule would enable the non-treaty foreign States, including the Commonwealth countries, to be forewarned as to the crimes for which the Government of India will permit extradition. Such States obviously ask for the extradition of only such fugitives as have been accused of one of the enumerated crimes. The requesting State will make a requisition

only when the fugitive criminal has committed a crime according to its municipal law, otherwise the necessity of requisition for surrender would not arise.[1] Habeas corpus may obviously be filed on the grounds of doctrine of mutuality or double criminality or rule of speciality.

A question may arise in interpreting the provisions of Section 2(c)(i) and (ii) of the Extradition Act, 1962, whether the enumeration of offences in these two clauses viz. in treaty under Section 2(c)(i) and Second Schedule under Section 2(c)(ii), and their application to the two classes of people similarly situated infringe Article 14 of the Constitution, the 'equal protection' or 'the equality before law' clause. This point may obviously be raised in a habeas corpus petition, because the jurisdictional question would be affected. Ultimately, if the answers were in the affirmative, then the extradition would not be in accordance with 'procedure established by law' and the extradition could be challenged as an infringement of Article 21 of the Constitution.

Under Section 2(c), there are two categories of offences, one fixed by treaty or the 1962 Act. The list of new extraditable offences may be enlarged and, added to and supplemented both in the treaty and the Second Schedule by subsequent notifications, as required by Sections 3 and 12 of the Act of 1962. Extraditions can be requested by, and made to the treaty States in regard to the offences mentioned in the treaty and to the non-treaty States, which

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1. R.C. Hingorani: The Indian Extradition Law, p.34.

would include Commonwealth countries, in regard to the offences mentioned in the Second Schedule, the treaty and supplementary additions, if any. The Second Schedule would include additional offences added to the Second Schedule. The discrimination arises from the vagueness in the language of Section 2(c)(ii) in regard to a Commonwealth country, with extradition arrangement and one with no extradition arrangement. In the former case, Chapter III with a more favourable procedure would be applicable, and in the latter case, the procedure prescribed in Chapter II would be applicable, a less favourable and more stringent provision requiring the establishment of a prima facie case. Grouping by Order in Council made under the Fugitive Offenders Act, 1881, in regard to contiguous Commonwealth countries has not been adopted wholly under the new Act, and the case of Jugal Kishore More,[1] or C.G. Menon [2] would not be helpful in resolving this question. The Madras High Court in C.G. Menon [3] had held that the two procedures provided under the Fugitive Offenders Act under Chapter I and II were contrary to Articles 13 and 14 of the Constitution; the Supreme Court in appeal did not think it necessary to decide this question and upheld the judgment on another point, but that judgment was dissented from indirectly, in Jugal Kishore More's case, but the two procedures were, however, upheld.

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171, supra.

2. State of Madras v. C.G. Menon, A.I.R. 1954 S.C. 517.

3. In re C.G. Menon and Another, A.I.R. 1953 Madras 729 at pp. 739, 740.

In the case of a Commonwealth country that has extradition arrangements with India, the possibility of enumeration of new extraditable offences cannot be ruled out and generally a list will be appended to the extradition arrangement, which will be given the force of law by a notification under the appropriate section of the Extradition Act. Otherwise the proceedings may be set aside in habeas corpus proceedings as being an infringement of Article 21 of the Constitution.

Under English law, it is almost certain that the following statutory provisions will be held wholly to exclude judicial review, viz. Section 5 of the Extradition Act, 1870, relating to Orders in Council that apply the provisions of the Act to any Foreign State. This section provides that an Order in Council applying the Act to a Foreign State 'shall be conclusive evidence that arrangements referred to comply with the requirements of this Act ...' and the validity of such an order shall not be questioned in any legal proceedings whatsoever.[1] Similarly, by virtue of the provisions of the Indian General Clauses Act, 1897, the production of a copy of the Government of India Gazette in which the notifications under Sections 3 and 12 have been made will be due proof. Non-compliance in the provisions of Sections 3 and 12 may be a valid ground to set aside the order of extradition in habeas corpus proceedings.

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1. S.A. de Smith: Judicial Review of Administrative Action, 2nd ed., p.350.

The arbitrary power may be challenged by the affected fugitive on the ground that the Central Government can discriminate between a fugitive under Section 3(1)(a)(b) and Section 3(2) and pick and choose and abuse its powers in regard to one class of fugitives with another situated in similar circumstances; and also may complain about the Central Government applying the Act to one country and not to another on its whims and thus differentiate between a fugitive from one country and the fugitive of another country under Section 3(1) and 3(2), and lastly the Central Government may make modifications, exceptions, conditions, and qualifications and favour one country and not another in the implementation of treaties and thus may discriminate between a country and a country and ultimately, affecting the rights of a national of India, or a national of the requesting State or a national of a third country.

So far the Central Government in exercise of its power under Section 36 of the Act, has not framed rules to carry out the purpose of this Act. A petition for habeas corpus brought on the ground that, unless the rules are framed with adequate details for the purposes of Section 36(2), the Act cannot be applied for extradition of fugitive offenders, may fail, because even if no rules are framed, the provisions of the Act would apply. The Extradition Act, 1962, is a self-contained code and certain provisions of the Criminal Procedure Code of 1898, have been made applicable to it.

In habeas corpus proceedings, a question could be raised as to whether a law under which extradition proceedings are being taken or an extradition order is passed, is

valid law or not?[1]

A habeas corpus petition has succeeded on the ground of undue delay in extradition, which resulted in the discharge of the fugitive.[2] Unless sufficient cause could be shown to the contrary under Section 24 of the Indian Extradition Act, 1962, a habeas corpus petition would succeed if the accused is not surrendered within two months.

Extradition proceedings would be invalid if taken under a law infringing the 'equal protection clause' or 'equality before law', or on the ground of a rule being inconsistent with the Act or enlarging the scope of the Act, or the powers given to the Central Government under rules without any guidance, conferring arbitrary, unbridled and uncontrolled discretion, in infringement of Article 14 of the Constitution. It would be seen that, while the extradition court is still considering the question whether the extradition proceedings disclose an extraditable crime, a writ for habeas corpus on the ground that no extraditable offence is disclosed will not issue, as that is a question primarily for the extradition court to decide.[3] Where a prisoner is brought before a competent tribunal, charged with an extradition offence and remanded for the express purpose of bringing forward further evidence by which that accusation is to be supported, it is not competent for the Court on a habeas corpus motion to treat the remand warrant as a nullity and to proceed to adjudicate upon the case,

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1. In re C.G. Menon, A.I.R. 1953 Madras 729.

2. R. v. Governor of Brixton Prison, ex Parte Campbell, 1956, The Times, 12 July. Also, Re Naranjan Singh (1961) 2 All E.R. 565.

3. United States v. Gaynor, (1905) A.C. 128 (P.C.).

as though the whole evidence were before it.[1]

(b) Successive Habeas Corpus Petitions

Formerly, there was a controversy [2] between the different High Courts in India whether successive applications would lie for the issue of habeas corpus or not. The Calcutta High Court was of the view that they do lie, but the High Courts of Allahabad, Bombay, Madras, Nagpur and Patna and East Punjab were of the view that they did not. There was also a controversy as to whether criminal res judicata applied to such petitions. In the case of Ghulam Sarwar[3], Chief Justice Subba Rao, speaking for the Court, held that the writ of habeas corpus was a great constitutional privilege and there was no higher duty than to maintain it unimpaired. It has been described as a magna carta of British liberty. It is now incorporated in Articles 32 and 226 of the Constitution. Considering whether successive petitions lie or not, the Court analysed the decisions of English Courts[4] and American Courts [5] and observed that so far as the High Courts in India were concerned, the division bench of a High Court could not set aside an order of another

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1. United States v. Gaynor, ibid.

2. Ghulam Sarwar v. Union of India, A.I.R. 1967 S.C. 1335 at p. 1337.

3. Ghulam Sarwar, ibid. at p.1337.

4. Re Hastings No.2 (1958) 3 All E.R. 625, and Re Hastings No.3 (1959) 1 All E.R. 698.

5. Edward M. Fau v. Charles Nola, 9 Law Ed. 859; Frank v. Mangum, 237 U.S. 306; Wong Doo v. U.S., 68 Law Ed. 999; Harmon Metz Waleu v. James A. Johnston, 68 Law Ed. 1302; Salinger v. Loisel (1923) 265 U.S. 224; U.S. v. Shaughnessy and Others (1954) 347 U.S. 260.

Division bench.

But unlike England, in India the person detained can file an original petition for enforcement of his fundamental right to liberty before the Supreme Court (under Article 32 of the Constitution), and that the order of the High Court in the said writ is not res judicata as held by the English and American courts either because it is not a judgment or because the principles of res judicata are not applicable to a fundamentally lawless order and the Supreme Court has to decide the petition on merits.[1]

The Supreme Court has also held that in proceedings under Article 32 of the Constitution of India in habeas corpus writ before the Supreme Court, the doctrine of res judicata does not apply so the principle of constructive res judicata too does not apply. It was observed:[2]

> "If the doctrine of res judicata is attracted to an application for a writ of habeas corpus, there is no reason why the principle of constructive res judicata cannot also govern the said application for the rule of constructive res judicata is only a part of the general principles of the law of res judicata, and if that be applied the scope of the liberty of an individual will be considerably narrowed. ... If the doctrine of res judicata be applied, the Court, though is enjoined by the Constitution to protect the right of a person illegally detained, will become powerless to do so. That would be whittling down the sweep of the Constitutional protection."

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1. Ghulam Sarwar v. Union of India, A.I.R. 1967 S.C. 1335 at pp. 1337, 1338.

2. Ghulam Sarwar v. Union of India, A.I.R. 1967 S.C. 1335 at pp. 1337, 1338.

However, Bachawat J.[1] in a separate judgment observed that the previous dismissal of a habeas corpus petition by the High Court may be taken into consideration under Order 35 RR 3 and 4 of the Supreme Court Rules before issuing a rule nisi and that the petitioner would not have a right to move the Supreme Court under Article 32 more than once on the same facts.

The resultant position is that the person to be extradited can move the High Court only once under Article 226 and also can come to the Supreme Court in original habeas corpus petition after the judgment of the High Court and that judgment would not be res judicata, but in the Supreme Court no successive petitions will be allowed.

As for the British view on this question, the decision in Stallmann [2] in extradition proceedings may be referred to. The petitioner had earlier been discharged in extradition proceedings taken against him by an Indian court (High Court of Calcutta),[3] when it found that he was not given adequate opportunities by the magistrate to produce evidence in his defence. The British court held that this discharge in extradition proceedings by the Calcutta High Court did not amount to the accused having been 'tried, punished or discharged'.

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1. Ghulam Sarwar, ibid. at p.1341.

2. Rex v. Governor of Brixton Prison, Ex parte Stallmann (1912) 3 K.B. 424.

3. Rudolf Stallmann, I.L.R. 38 Cal.547, and In re Stallmann, I.L.R. 39 Cal.164.

(2) Review of Extradition Orders by Superior Courts under Section 491 Criminal Procedure Code

Before the Constitution of India came into force, the petition for habeas corpus lay to the High Court under Section 491, Criminal Procedure Code. Even after the coming into force of the Constitution, High Courts in India have continued to exercise their powers under this section.

In an application under Section 491 of the Criminal Procedure Code, filed by a person detained under the Extradition Act, 1903, the Judicial Commissioner of Sind held that the court had no power to investigate into the proceedings of the political agent (Resident, Western Rajputana States), who issued the warrant under which the applicant had been arrested.[1] In dealing with the question of the scope of Section 491, Criminal Procedure Code, the court observed,[2] as follows:

> "The proceedings by way of habeas corpus are proceedings calling upon a person having custody of a prisoner to produce him and demonstrate under what authority he holds him in custody. If the authority be a legitimate authority binding on the officer complying with it, he is bound to obey the order of that authority, and the court cannot interfere. All this court can do is to see that there is no patent defect visible in the authority by which the person having custody detains a person. Had it, for instance, been the case that the warrant was not issued over the name of the Resident, but over that of some inferior agent or had the warrant not been duly sealed, or had it been directed to a wrong officer, then, no doubt the

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1. Jamna v. Emperor, A.I.R. 1926 Sind 126 at p.127 (D.B.)

2. Jamna v. Emperor, ibid. at p.127.

> warrant being informal, would not justify the detention of the petitioner. Again, if the warrant had directed the ar rest of a European British subject, and such a person were so detained, that again will be an error which we will be entitled to correct. Or again, if a warrant mentions an offence which is not an extraditable offence within the meaning of the Act, there again the warrant would have been invalid, and this court would have directed that the person detained should be set at liberty. But further than that we do not think that the aid of this court can be invoked."

The above case shows that the order of detention can be scrutinised by the court for the purpose of seeing whether the detention is legal. The case also shows that, in regard to the arrest and detention under the Extradition Act, 1903, the court cannot go further than examine the regularity of the proceedings on the face of the record. The case also contains general observations about the power of the court in habeas corpus proceedings to go beyond the order of detention in considering whether the detention is illegal. It seems doubtful whether these last general observations in the Sind case represents the correct legal position. They express the position under English common law with reference to habeas corpus. But the Judicial Commissioner's court in the above case was dealing with an application under Section 491, Criminal Procedure Code. Since the decision of the Privy Council,[1] it is settled that prior to the coming into force of the present Constitution of India, the High Courts in India had no powers to issue the common law writs of habeas corpus, but their power arose solely under the

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1. Mathew v. District Magistrate, Trivendram, A.I.R. 1939 P.C. 213 at p.217.

provisions of Section 491, Criminal Procedure Code.[1] The words of the section do not justify any limitation, as mentioned by the Sind Judicial Court in the Jamna's case, on the power of the High Court in deciding whether the detention was legal or not. Further, even assuming that the court was entitled to apply principles of English law to applicants under Section 491, Criminal Procedure Code, the courts seem to have overlooked the fact that even in England, the old principle was found to be unsatisfactory and under the Habeas Corpus Act, 1816, the return of writ cannot be in dispute except in some specific categories of cases.

The question then arises whether the old common law rule, of treating the return to the writ as indisputable is applicable to the jurisdiction to issue writs of habeas corpus under Article 226 and 32 of the Constitution. In a long catena of decided cases on the law of extradition, beginning with the cases of C.G. Menon,[2] Hans Muller,[3] J.K. More,[4] and Anwar Ali,[5] and Ghulam Sarwar,[6] neither the Supreme Court nor the High Court seem to regard themselves as bound by any such rule that precludes them from disputing

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1. Regarding difference of opinion in High Courts in India, whether revision lies in extradition proceedings, see S.K. Agarwala, op.cit., pp.253-257. Also, see Hari Sankar Prasad v. District Magistrate, Darjeeling (1971) 75 S.W.N. 470.

2. State of Madras v. C.G. Menon, A.I.R. 1964 S.C. 517.

3. Hans Muller v. Superintendent, Presidency Jail, Calcutta, A.I.R. 1955 S.C. 367.

4. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171.

5. Anwar v. State of J & K, A.I.R. 1971 S.C. 337.

6. Ghulam Sarwar v. Union of India, A.I.R. 1967 S.C. 1335.

the return to the writ of habeas corpus. The old common law rule seems to be a technical one. As the rule operates to restrict the power of the court to do complete justice, there seems very little reason for its importation into India.

The Supreme Court or the High Court would go to the extent of examining the true nature and character of the order under which the offender is under arrest.

In exercise of its jurisdiction under Section 491, Criminal Procedure Code, the Rajasthan High Court interfered in two extradition cases and set aside the orders of extradition. In the case of Birma,[1] the question before the High Court was whether a treaty entered into between the Dholpur State Government, an erstwhile native State in India, and the British Government but which was not incorporated in the municipal law of Dholpur State regarding extradition of fugitive offenders, could be regarded as having the force of law within the meaning of Article 21 of the Constitution and whether in view of the provisions relating to Fundamental Rights provided in the Constitution of India, the arrest and detention of Birma could be considered legal. Placing reliance upon Halsbury's Laws of England, and other cases,[2] the Divisional Court held that:[3]

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1. Birma v. State, A.I.R. 1951 Raj. 127.

2. Vol.6, Part V, at paras. 678, 679; Parliament Belge (1879) 4 P.D. 129; Walker v. Baird (1892) A.C. 491, 61 L.J.P.C. 92; Mangilal v. Sarkar judgment in court of Final Appeal, Udipur (referred in this case and in the case of Nanka), and Re Arton (1896) 1 Q.B. (No.1) 108.

3. Birma v. State, A.I.R. 1951 Raj. 127, Head Note A and B, para. 11.

> "Treaties which are part of international law do not form part of the law of the land, unless expressly made so by the Legislative authority ... The Extradition treaty made between the former Dholpur State and the British Government not having been incorporated into the laws of that State by legislative enactment, cannot be regarded as a part of the municipal law of Dholpur State and the detention of a person under the provisions of such treaty cannot be said to be according to the procedure established by law within the meaning of Article 21 of the Constitution and, as such, is invalid. The practice of surrendering fugitive criminals, in accordance with the treaty followed by the Dholpur State till the time of the merger, cannot be deemed to be a law that can be continued under Article 21 of the Constitution."

Following this decision of Birma, another Divisional bench of the Rajasthan High Court in Nanka,[1] (decided on 9 August, 1950, after coming into force of the Constitution) accepted the petition filed under Section 491, Criminal Procedure Code, on the same grounds as in the earlier case and held that as the treaty between Dholpur State and the British Government remained a treaty only and was never incorporated in the municipal law of that State, it was merely an executive Act of the Maharaja and was not the 'procedure established by law' within the meaning of Article 21 of the Constitution, and therefore, the petitioner could not be deprived of his personal liberty and he was entitled to be released unconditionally. The Court also held that the fact that the Maharaja, who executed the treaty, was also the legislative authority, will not make it binding on the subject and the subject cannot be bound by a mere treaty of

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1. Nanka v. G'ment of Rajasthan, A.I.R. 1951 Raj. 153 at p.155.

extradition, not incorporated in the municipal law of his State simply because it has been incorporated into the municipal law of another State or because there is a statutory law regarding extradition in the latter State. The necessary corollary from the judgment is that a treaty, even if incorporated as a municipal law of another State or because there is law of extradition in another State (requesting State), would not bind the subject of the requested State. In Ram Babu Saksena's case,[1] it was held by the Supreme Court that a detention in accordance with the provisions of the Extradition Act, 1903, cannot be questioned although it may not be covered by the extradition treaty.

The question of law and powers of interference by superior courts have now been well settled by the Supreme Court in the case of Anwar v. State of J & K.[2] The petitioner was a Pakistani infiltrator, who entered the territory of India illegally. While dismissing his habeas corpus petition, the Court observed:[3]

> "Habeas corpus, though a writ of right is not a writ of course. Its scope has grown to achieve its purpose of protecting individuals against erosion of the right to be free from wrongful restraint on their rightful liberty."

An alien cannot have a right to move about freely in India without a proper legal sanction and if a foreigner is to be expelled by the Central Government, the courts would not, on the authority of Hans Muller's case and Anwar's case, interfere.

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1. Ram Babu Saksena v. State, A.I.R. 1950 S.C. 155 at p.157, para.8, per Patanjali Sastri J.

2. Anwar v. State of J & K, A.I.R. 1971 S.C. 337.

3. Anwar v. State of J & K, A.I.R. 1971 S.C. 337 at p.342, per Dua. J.

If the foreigner, however, is to be extradited, then he can claim the protection under Articles 20, 21 and 22 of the Constitution. The Supreme Court refused to interfere against the order of expulsion in Anwar's case, on the ground that his entry into India was illegal, as he had no fundamental right under Article 19 of the Constitution, and he could not avail himself of Articles 20, 21 and 22 of the Constitution. As he had illegally entered the territory of India, and India as a sovereign State, was at liberty to expel a foreigner, these articles were not available to him.[1]

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1. Anwar v. State of J & K, A.I.R. 1971 S.C. 337.

(3) Power of the High Court to Review Orders of the Magistracy under Sections 435 and 439 Criminal Procedure Code in its Revisional Jurisdiction

Orders passed under Section 3 of the Indian Extradition Act, 1903, are revisable under Section 439 Criminal Procedure Code. The earlier dictum of the Calcutta High Court in Rudolph Stallmann's case,[1] holding that a magisterial inquiry regarding extradition is not subject to appellate or revisional jurisdiction, is no longer an accepted principle of law. Appeal does not lie but revision does. The Punjab High Court in the case of the Russian sailor Tarasov,[2] interfered in revision. The revision may be available to the offender and to the demanding State also, on the grounds of jurisdiction and the court can examine the matter in regard to correctness, legality and propriety of the orders, on which grounds a revision petition under Sections 435 and 439, Criminal Procedure Code can be brought before the High Court. The basic reason for the applicability and availability of the revisional jurisdiction of the High Court is that since the nominated magistrate, under Section 5 read with the other sections of the 1962 Act, functions as a committing magistrate and while acting under Section 25, dealing with bail application is exercising the same powers and jurisdiction as a Sessions Judge, it is but natural that the relevant provisions of Criminal Procedure Code and Indian Constitution should be

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1. Rudolph Stallmann v. Emperor, I.L.R. ,38 Cal.547; See also S.K. Agarwala, op.cit., pp.253-257 for conflicting opinions of High Courts regarding powers of revision in extradition proceedings under Act of 1903.

2. J.N. Saxena: Extradition of a Soviet Sailor (notes and comments (1963) 57 A.J.I.L., pp.883-888. S.K. Agarwala: International Law, Indian Courts and Legislature, pp.219,242; R.C.Hingorani, The Indian Extradition Law, p.43, f.n.8 ; p.55, f.n.39,p.56.

applicable to extradition proceedings.[1]

If the accused is dissatisfied with the magistrate's order made under Section 7, sub-section 4, Section 9 and Section 17(i), he can move the High Court under Articles 226 and 227 of the Constitution,[2] or can move the High Court in its revisional jurisdiction under Sections 435 and 439 Criminal Procedure Code. The accused can also move the Supreme Court under Article 32 of the Constitution directly, without going to the High Court first. The High Court considers the fugitive's ground for challenging the committal order, or order of detention or remand or refusal of bail. The grounds mentioned in Section 31 of the Act of 1962 can be taken and the High Court will pass such orders as it 'deems fit'. The words 'deem fit' give the High Court very wide and extensive powers for exercising a supervisory or revisional jurisdiction. If the fugitive is dissatisfied with the order of the High Court he may go in special appeal under Article 136 of the Constitution, if leave is granted by the Supreme Court. But whether the case is under examination before the High Court or before the Supreme Court, the question of Fundamental Rights of the petitioner will be thoroughly examined, including Article 21 to see if the extradition is made under the 'procedure established by law' and not otherwise.

In case the fugitive is discharged, there is no appeal provided under the Extradition Act, but the demanding

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1. See Sec.8(1) and 25 of the Indian Extradition Act, 1962.

2. Harishanker Prasad v. District Magistrate, Darjeeling (1971) 75 C.W.N. 470.

State may petition for revision of the magistrate's order under Sections, 435, 439 of the Criminal Procedure Code, and for writs of certiorari and mandamus under Article 226 of the Constitution for quashing the order of discharge and for a mandamus or direction to the magistrate or the Central Government for extraditing the fugitive in accordance with law. The Punjab High Court entertained a Soviet petition under Article 226 and Section 439, Criminal Procedure Code against the order of a Delhi Magistrate, discharging a Russian fugitive for want of Soviet Law regarding the rule of speciality. Chief Justice Falshaw ordered the production of the relevant Soviet law in fulfilment of Section 31(c) of the Indian Extradition Act, 1962 (Chief Justice Falshaw's order dated 7 March, 1963).[1] This is based on the principle that a person extradited for one offence cannot be tried for another, so long as he is not freed from the restraint involved in the extradition process.[2] The House of Lords held[3] about the remedy available to a requesting state:

"If an error of law leads to a decision adverse to a foreign state then, in my view, the magistrate has a discretion in a proper case to do what on request the magistrate did in this instance i.e. to state a case."

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1. J.N. Saxena: Extradition of a Soviet Sailor (1963) 57 A.J.I.L. 883; S.K. Agarwala, ibid., pp.219, 242; R.C. Hingorani: The Indian Extradition Law, p.76, f.n.96.

2. United States v. Rauschur (1886) 119 U.S. 407.

3. Atkinson v. United States Government: (1969) 3 All E.R. 1317 at p. 1331, letter F, per Lord Morris. (H.L.): See also observations of Lord Morris at p. 1327, letter I.

(4) Powers of High Court under Section 561 A, Criminal Procedure Code in Extradition Proceedings

It is well settled that if accepting the allegation in the complaint or first information report no case is made out the proceedings can be quashed by the High Court under Section 561 A, Criminal Procedure Code.[1] The High Court's general power of review, revision, or reconsideration of orders made in criminal appeals or criminal revision petitions can be exercised under Section 561 A to (i) give effect those orders; (ii) to prevent any abuse of the process of court; or (iii) to secure the ends of justice.[2]

The Supreme Court observed [3] in regard to the exercise of powers by a High Court under Section 561 A, Criminal Procedure Code:

> "The inherent power of the High Court saved by Section 561 A of the Criminal Procedure Code could be exercised to quash proceedings in a proper case either to prevent the abuse of the process of the Court or otherwise to secure the ends of justice. The following were some of the cases where the proceedings could and should be quashed: (a) where the allegations in the first information report or the complaint did not make out the offence alleged; (b) where there was no legal evidence adduced in support of the charge or the evidence adduced clearly or manifestly failed to prove the charge."

The High Court under Section 561 A, Criminal Procedure Code

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1. R.P. Kapur v. State of Punjab, A.I.R. 1960 S.C. 866; Narainlal v. Shiva Prakash (1971) Cr.L.J. 96.

2. Mahesh v. State, 1971, A.L.J. 668.

3. Per G.K. Mittar and A.N. Grover JJ. in Union of India v. Lt. Col. G.K. Apte and The State of Assam v. Major B.S. Talwar, A.I.R. 1971 S.C. 1533 at p.1537.

can go into the question as to whether there is any legal evidence. The finding of the High Court that the evidence came from tainted sources and is not reliable, means what can be described as 'no case to go to the jury'.[1] And this is exactly the position in cases of extradition, and therefore, if the High Court finds that there was 'no case to go to the jury' or fit for committal, and there was no legal evidence or evidence was tainted, then in exercise of the inherent powers under Section 561 A, Criminal Procedure Code, the High Court will set aside the order of the magistrate.

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1. Rajendra Nath Mahato v. Deputy Superintendent of Police, Purenia, A.I.R. 1972 S.C. 470.

(5) Revision of the Orders of the Magistrate under Article 227 of the Constitution

The District Magistrate acting under Section 7(4) of the Indian Extradition Act, 1962, is regarded as a tribunal within the meaning of Article 227 of the Constitution. The order passed by the District Magistrate under Section 7(4) is revisable by the High Court under Article 227 of the Constitution.[1] It has not so far been decided whether such an order made under Sections 8 and 18 of the Act would be revisable under Article 227. In Hari Shankar, the question whether there was jurisdiction in the High Court under Section 439,Criminal Procedure Code, to revise the order passed by the District Magistrate acting under Section 7(4) of the 1962 Act, was answered by Mr. Justice R.N. Dutta in the affirmative and by Mr. Justice Sarma Sarkar in the negative.

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1. Hari Shankar Prosad v. District Magistrate, Darjeeling (1971) 75 C.W.N. 470.

(6) Application under Section 10 of the Fugitive Offenders Act, 1881.

An application under Section 10 of the Fugitive Offenders Act, 1881, can be made as an alternative to a petition for habeas corpus. Section 29 of the Indian Extradition Act, 1962, corresponds to Section 10 of the Act of 1881. Under Section 29 of the Act of 1962, powers have been given to the Central Government, whereas under the Act of 1881 the Court of Appeal had original jurisdiction to entertain applications under Section 10. Even if an application for habeas corpus is unsuccessful, the Court of Appeal has original jurisdiction to entertain the application under Section 10 of the Act of 1881.[1] The British Court dealing with the punctuation under Section 10 of the Fugitive Offenders Act, 1881, and the difficulties that might be caused having regard to the words 'or otherwise' in the section, said:

> "Upon reflection one cannot help thinking that the words 'or otherwise' in the fourth line leave it to the discretion of the Court to make the order in any case upon any ground where, having regard to the distance and facilities for communication, and to all the circumstances of the case, it appears to the court that it would be oppressive or too severe a punishment to return the fugitive immediately."[2]

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1. R. v. Governor of Brixton Prison, Ex parte Savarkar, 1910 (2) K.B. 1056 (C.A.); De Demko v. Home Secretary L.R. (1959) A.C. 654, per Lord Reid at pp.661, 662 (H.L.); R. v. Governor of Brixton Prison Ex parte Armah (1966) 3 W.L.R. 828 at pp.859,H, 860A, per Lord Pearce (H.L.).

2. R. v. Governor of Brixton Prison, Ex parte Waite, 1927, The Times, 22 Feb. Cited by Ohene-Djan, infra, at p.183.

This case confirmed the courts' absolute discretion when dealing with application under Section 10 of the Fugitive Offenders Act, 1881.[1] The House of Lords in Atkinson's case, held that there is a complete discretion in extradition cases in the Secretary of State.[2]

Henderson's case [3] demonstrate the unwillingness of the Court to apply Section 10. It was observed:

> "An order under Section 10 of the Act, would be made for release of a fugitive only where it appeared that the contemplated proceedings, although perhaps, lawful by the law of the country concerned, would be conducted in a way contrary to natural justice, or if it appeared that the charges were trivial and the punishment awarded in being returned was out of all proportion to the gravity of the alleged offence."

The Court further observed that:

> "the difficulties which the applicant would experience in presenting his defence, due to the delay involved in the case, were matters for the consideration of the tribunal dealing with the case, and factors which would be considered by the tribunal of any civilised country when dealing with a criminal matter."

However, instituting proceedings, resulting in the fugitive being prejudiced in his defence, was held to be a good ground for discharge.[4] On the question of

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1. I.L. Ohene-Djan: Unpublished Ph.D. Thesis of London University, 1965, The Fugitive Offenders and the Law of Extradition in the Commonwealth, at p.183.

2. Atkinson v. United States Government (1969) 3 All E.R. 1317 at p.1327,H, per Lord Morris (H.L.).

3. Henderson v. Secretary of State for Home Affairs (1950) 1 All E.R. 283, Head note (1), D,E.

4. R. v. Governor of Brixton Prison, Ex parte Campbell, 1956, The Times, 12 July, Ohene-Djan, p.183, supra.

refusal on account of passage or lapse of time (Section 31(b) of the Extradition Act of 1962), Lord Parker observed:[1] that Teja could not invoke Section 8(3) of the 1967 Act because the passage of time, since the alleged offence, was not the result of any neglect on the part of the Indian Government but was mainly caused by Teja's conduct. It was further observed [2] that there was no evidence that the judiciary in India was going to be prejudiced adversely to the applicant by reason of press comment and debates in Parliament there, it was very doubtful whether the court, in deciding whether it would be 'unjust or oppressive' to return him on the ground, was entitled to take into account as part of the circumstances anything which did not flow from, or was unconnected with, the passage of time.

Regarding the interpretation of words 'political opinion' in Section 4(1)(b)(c) of the 1967 Act, Lord Parker held [3] that although Teja had been the centre of political controversy in India and attacks had been made in Parliament and elsewhere in complete disregard of the sub judice principle, there was no evidence that Teja had at any time entered the political arena, and therefore, it could not be said that he was liable to prosecution for his political views and even giving the widest possible interpretation, paragraphs (a) (c) of Section 4(1) of the 1967 Act had no application to the present case.

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1. R. v. Governor of Pentonville Prison, Ex parte Teja, (1971) 2 All E.R. 11 at p.23C.

2. R. v. Governor of Pentonville Prison, Ex parte Teja, (1971) 2 All E.R. p.11 at p.23e.

3. R. v. Governor of Pentonville Prison, Ex parte Teja, (1971) 2 All E.R. 11 at p.22G.

CHAPTER VII

(1) Inter-Commonwealth Rendition and Special Procedure for Commonwealth Countries with Extradition Arrangements

(a) Introduction

The Indian law on extradition rested on the Indian Extradition Act, 1903, which was intended to provide for convenient administration of the Extradition Acts of 1870, 1873, and the Foreign Jurisdiction Act, 1881, enacted by the British Parliament. By an Order of Council of 7 March, 1904, it was declared that Chapter IV of the Indian Extradition Act, 1903, may be considered as part of the Fugitive Offenders Act, 1881.[1] The effect of such incorporation was that there was also provision for 'inter-colonial backing of warrants' within the groups of'British possessions' to which Part I of the Fugitive Offenders Act, 1881, had been applied by Order in Council. In such groups, a more rapid procedure for the return of fugitive offenders between possessions of the same group was in force. Where in a 'British possession' of a group to which Part II of the Act applied, a warrant was issued for the apprehension of a person accused of an offence punishable in that possession and such person is or was suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession if satisfied that the warrant was issued by a person having lawful authority to issue the same, was bound

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1. J.N. Saxena, 'India - The Extradition Act, 1962' (1964) 13 I.C.L.Q., pp. 116-138 at p.117; R.C. Hingorani: The Indian Extradition Law (1969), p.17.

to endorse such warrant, and the warrant so endorsed, with the jurisdiction of the endorsing magistrate, the person named in the warrant, and to bring him before the endorsing magistrate or some other magistrate in the same possession. If the magistrate before whom he was brought was satisfied that the warrant was duly authenticated and was issued by a person having lawful authority to issue it, and the identity of the prisoner was established, he could order the prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to deliver into custody of the persons to whom the warrant was addressed or of any one or more of them, and to hold in custody and conveyed to the possession, there to be dealt with according to law as if he had been there apprehended.[1]

The effect of these Acts was that the fugitive could be delivered to the Commonwealth countries and British colonies, which were categorised as non-foreign States, without the formality of establishing a prima facie proof of guilt or prima facie evidence. French and Portuguese possessions in India were, however, not treated as foreign States.[2] Extradition requests between India and the French possessions were governed by the 1815 Treaty [3] which stipulated for surrender without proof of prima facie evidence against the fugitive. The British Extradition Act of 1870 was made applicable to India in pursuance of its

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at pp.1176, 1177.

2. In Re Muthu Reddi, 59 M.L.J. 278: whether Pondicherry and Chandernagore were non-foreign States under the Act of 1903, see S.K. Agarwala, op.cit., pp.197, 198.

3. S.K. Agarwala, op.cit., p.198.

Section 17, and the Fugitive Offenders Act, 1881, was made applicable to India on the basis of Section 32 of the Act. In conformity with the British enactments, the Indian Act also differentiated between foreign and non-foreign States. Foreign States were those which did not form part of the British Commonwealth or its colonies. Commonwealth countries and British colonies were categorised as non-foreign States. Princely States in India were also not treated as foreign States. Chapter II of the Indian Extradition Act, 1903, regulated extradition proceedings in respect of foreign States, while Chapter III governed extradition proceedings in respect of non-foreign States. So are the provisions of the present Extradition Act, 1962, which make Chapter III applicable to extradition proceedings to Commonwealth countries with extradition arrangements, and Chapter II applies to extradition of fugitive criminals to foreign States and to Commonwealth countries to which Chapter III does not apply, i.e. to Commonwealth countries with no extradition arrangements with India.

The Extradition Acts in Britain affects British subjects as well as aliens. The British Extradition Act, 1870, as amended, provides that the Crown may, subject to certain instructions and formalities, hand over to any State with which reciprocal treaty has been made, any persons (whether British subjects or aliens) who have been found guilty of committing in that State any offence covered by the Extradition Acts. There is no prerogative power to seize an alien in Britain and hand him over to a foreign

State.[1] So also in India, if a person is to be extradited then all the formalities under the Extradition Act are to be completed, the executive of the Union Government has no power to capture or seize an alien and hand him over to the foreign Government.[2] Of course, he may be expelled or deported under the Foreigner's Act, 1946. The Foreign State, in return, undertakes to surrender to the United Kingdom persons who have committed extraditable crimes in British territory. The Act of 1870 enables the Crown to make an Order in Council directing that the Extradition Acts shall apply to any given State. So are the provisions made under Sections 3 and 12 of the Indian Extradition Act for the application of that Act to foreign States and this is done by the Central Government by publication of the Notification in the Government Gazette of India.

When extradition is desired, the accused can be arrested either by a Bow Street Magistrate's warrant issued on the order of the Home Secretary, or by a warrant of a justice of peace issued upon information on oath in the ordinary way. The Act provides its own Code of Procedure. The Bow Street Magistrate receives the extradition order and documents from the Home Office, and decides whether or not there is sufficient evidence to allow the case to proceed.[3]

Section 3 of the British Act of 1870 provides

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1. Forsyth: Cases and Opinions on Constitutional Law, pp.369-370; East India Co. v. Campbell (1794) 27 E.R. 1010; Mure v. Kaye (1811) 4 Taunt.43.129 E.R. 239.

2. Hans Muller's Case, supra, A.I.R. 1955 S.C. 367.

3. R. v. Metropolitan Police Commissioner v. Savundranayagan (1955) Crim. L.R. 309; R. v. Governor of Brixton Prison, Ex parte Frenettee, The Times, 19 March, 1952.

that a person is not to be surrendered for 'an offence of a political character'. An offence is political only when there are two parties in the State each striving to impose its Government on the other. Thus,[1] where a native of the Swiss canton of Ticino had committed murder during an insurrection and escaped to England, he was not surrendered. But the mere fact of the prisoner being accused of murder in a political disturbance does not itself justify the refusal of an order of his extradition, and an explosion caused by an anarchist is not a political offence within the Act.[2] On the other hand, in the case of Ex parte Kolczynski,[3] the members of a Polish trawler took charge of the ship, putting the master under restraint, and steered her into an English port because they feared that they would be punished for their political opinions if they returned to Poland. The offences were committed in order to escape from political tyranny. The Poles were successful in their application for habeas corpus, the Divisional Court holding that they were entitled to the protection of Section 3 of the Act. But the exact scope and extent of 'offence of a political character' has, even now, not been defined by the House of Lords in the recent case of Tzu-Tsai Cheng.[4] When a Bow Street Magistrate commits a prisoner for surrender, such surrender cannot take place for 15 days, or such further time as a habeas corpus application (if applied for) may

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1. In re Castioni (1891) 1 Q.B. 149.

2. Re Meunier (1894) 2 Q.B. 415.

3. R. v. Governor of Brixton Prison, Ex parte Kolczynski (1955) 1 Q.B. 540.

4. Tzu-Tsai Cheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204.

take.[1] Section 12 of the Act of 1870 provides that if a fugitive criminal is not conveyed out of the Kingdom within two months after committal for surrender by the Bow Street Magistrate, or if a writ of habeas corpus is issued after the decision thereon, any Judge of the Superior Court may, upon the prisoner's application and upon proof that the Home Secretary has had reasonable notice of such application, order the discharge of the fugitive from custody,[2] unless sufficient cause is shown to the contrary. If the fugitive is not discharged, he is surrendered under the warrant of the Home Secretary. In the case of Schtraks, where the charges involved were perjury and child stealing, the case had become a political issue in Israel but that did not make it an offence of a political character. The idea behind the latter phrase, said Viscount Radcliffe is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or Government of the country.[3] The offence that is of a political character should be vis-a-vis the State requesting extradition.[4] This is the procedure for surrender of fugitives to foreign States.

The Fugitive Offenders Act, 1881, makes provision for the arrest and surrender of persons of any nationality accused of crimes to which the Act applies, when they flee

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1. Extradition Act, 1870, Section 11, Section 31(e) of the Indian Extradition Act, 1962.

2. Compare Section 24 of the Indian Extradition Act, 1962.

3. Schtraks v. Government of Israel (1964) A.C. 556 (H.L.).

4. Tza-Tsai Cheng v. Governor of Pentonville Prison (1973) 2 All E.R. 204 (H.L.); Reld on R. v. Governor of Brixton Prison, Ex parte Schtraks, L.R. (1964) A.C. 556 (H.L.).

from one part of Her Majesty's Dominion to another part. The Act continues to apply not only between the United Kingdom (which for this purpose, includes the Channel Islands and the Isle of Man) and colonies and other British dependencies but the Act may be extended to Protectorates and Protected States by Order in Council under the Foreign Jurisdiction Act, 1890,[1] and also between them and independent Commonwealth countries. The act applies to treason, piracy, and any other criminal offence which is punishable for twelve months or more in the place where it was committed, even though it is not an offence in England.[2] In this respect, it differs from the Indian Act inasmuch as the offence must be punishable according to the laws of both countries. Also, trivial offences would justify refusal of extradition. The Act does not exclude political offences, but a superior court may discharge a fugitive by reasons of the trivial nature of the case, if the application of his return is not made in good faith in the interests of justice, or if, having regard to all the circumstances of the case, it would be unjust or oppressive or too severe a punishment to return him.[3] In Zacharia's case, the Home Secretary exercised his discretion not to hand the appellant over to Cyprus. Under Section 10 of the Act of 1881, the Court of Appeal has original, but not appellate jurisdiction to grant relief

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1. R. v. Secretary of State for Home Affairs, Ex parte Demetriou, (1966) 2 Q.B. 194.

2. Section 9 of the Fugitive Offenders Act, 1881.

3. Section 10 of the Fugitive Offenders Act, 1881. Also see R. v. Ex parte Naranjansingh (1962) 1 Q.B. 211; Zacharia v. Republic of Cyprus, L.R. (1963) A.C. 634 (H.L.)

under that Section.[1] Similar provisions will be found in Sections 29 and 31 of the present 1962 Indian Extradition Act. Application under the Fugitive Offenders Act, 1881, is made through the Home Office, and arrest is made by warrant of a magistrate.[2] The detainee has 15 days to apply for habeas corpus (Section 5) and if he is not sent out of the country within one month thereafter, he may apply to a superior court to release him. In India, a detainee can apply to the High Court under Article 226 of the Constitution or can go in revision before the High Court under Section 439, Criminal Procedure Code, against the order of the magistrate or can apply to the Supreme Court under Article 32 of the Constitution.

The Fugitive Offenders Act, 1881, is a relic from the time when the Crown was considered indivisible. The anomaly that it does not exclude political offences was brought out in Ex parte Enahoro,[3] where a chief who was head of an opposition party in Nigeria was detained under the Act for return to Nigeria to answer a charge of treasonable felony. Habeas corpus under Section 10 of the Act had been refused and the Home Secretary intended to return him to Nigeria, being satisfied that he would be allowed to be defended by counsel of his own choice; but the Home Secretary delayed returning him, pending a debate in the House of Commons.

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1. De Demko v. Home Secretary, L.R. (1959) A.C. 654 per Lord Reid at pp.661-662. See also R. v. Governor of Brixton Prison, Ex parte Armah (1966) 3 W.L.R. 828 at pp.859H, and 860A, per Lord Pearce (H.L.); R. v. Governor of Brixton Prison, Ex parte Savarkar (1910) 2 K.B. 1056 (C.A.).

2. Diamond v. Minter (1941) 1 K.B. 656.

3. Ex parte Enahoro (1963) 2 Q.B. 455, supra.

Enaharo then applied for habeas corpus under Section 7, as he had been detained for more than one month, but the Divisional Court held that this was reasonable and lawful and dismissed the application.[1]

In regard to the law relating to inter-Commonwealth rendition, Rama Swami J. in Re Chockalingam's case observed:[2]

> "Thus, we arrive at this position; viz. that at the time of passing of the Extradition Act, 1903, there were three enactments side by side, viz. (1) Parliamentary Extradition Act applicable with British Treaty and Order in Council; (2) Indian Extradition Act, Chapter III, applicable for any country to which Item 1 does not for the time being apply, and (3) Fugitive Offenders Act, 1881."

"The English Extradition Act, 1870, Chapter II , and the Indian Extradition Act, 1903, Chapter III, exhaust all the countries. The Fugitive Offenders Act is a special Act which made special provision for one category out of Chapter III. Chapter III is the genus (not foreign States and fugitive offenders), and Chapter IV is the species, prescribing a special procedure for British possessions formed into a group by reason of their contiguity or otherwise.

As Chapter III would apply to any country in the world so long as the Parliamentary Extradition Act does not apply, it is a complete Indian enactment on the subject of extradition supplementing the Parliamentary Extradition Act, wherever the latter is not applicable or even became not

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1. For similar provision, see Section 24 of the Indian Extradition Act, 1962 - Note on the Enahoro Case (1963) 12 I.C.L.Q. 1364.

2. Ramaswami J. In re Chockalingam, A.I.R. 1960 Madras 548 at p.556.

applicable. We have to bear in mind the significant words 'Foreign State for the time being'."

It was further observed that:

> "The preamble of the Indian Act states that it is an Act to amend the law in cases to which the Parliamentary Extradition Act does not apply for the time being. The words 'for the time being' make the meaning of Foreign State ambulatory and as a necessary result make the meaning of the words 'State not being a Foreign State' in Sections 7 and 9 ambulatory. On this basis, the Fugitive Offenders Act is a law relating to a species, viz. British Dominions, out of the genus, being the larger category, namely, any State not being a State to which the Parliamentary Extradition Act applies.
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> In these circumstances, the logical conclusion is that Dominions are also within the ambit of Chapter III. The reason why the Fugitive Offenders Act is applicable to Dominions was because it is a special provision relating to Dominions. But for this provision, these Dominions also would be within the ambit of Chapter III (of the Extradition Act of 1903). Therefore, when a special provision fails, because the Fugitive Offenders Act is held inapplicable to India after 1950, the case of Dominions would be governed by Chapter III."[1]

Part II of the Fugitive Offenders Act, 1881, provides that in groups of contiguous British possessions to which that part may be applied by Order in Council, a more rapid procedure for the return of the fugitive offenders between possessions in the same group may be in force. The warrant is 'backed' in the possession in which the fugitive is found and he is sent for trial without any hearing in

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1. Rama Swami J. In Re Chockalingam, A.I.R. 1960 Madras 548 at p.556 (F.B.).

that possession.[1] In C.G. Menon, which was later overruled, the Fugitive Offenders Act, 1881, was held by the Indian Supreme Court,[2] not to be applicable to India after the coming into force of the Constitution of India and after India became a Republic. The Madras High Court in Chockalingam held that even though the provisions of the Fugitive Offenders Act, 1881, were no longer in force in India, the extradition of the fugitive to Ceylon was legally permissible under the provisions of Sections 7 and 9 of Chapter III of the Extradition Act of 1903.[3]

In spite of the Supreme Court judgment in C.G. Menon's case (supra) Anantanarayanan J. in Chockalingam's case observed:[4]

> "Again we are unable to see how any other construction is possible, since that would really involve the assumption of a total vacuum in the law relating to Extradition and Extradition procedures governing this country, and all other countries in relation to this country, of the comity of nations; for the argument would equally strike down not merely the Act itself but all previous treaties and international agreements. We have no hesitation in holding that the Indian Extradition Act, 1903, and Chapter III thereof, do survive, and are part of the Law of this country, as saved by the effect of Article 372 of the Indian Constitution."

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1. Rama Swami J. In Re Chockalingam, A.I.R. 1960 Madras 548 at p.555.

2. State of Madras v. C.G. Menon, A.I.R. 1954 S.C. 517.

3. In Re Chockalingam, A.I.R. 1960 Madras 548, Rama Swami J. at p.558, and Anantanarayanan J. at p.564.

4. In Re Chockalingam, A.I.R. 1960 Madras 548 at p.564.

The Indian Supreme Court's decision in C.G. Menon was overruled by the Court in Jugal Kishore More, where it was held that the Fugitive Offenders Act, 1881, was in force by virtue of Section 1(i) of the India (Consequential Provisions) Act, 1949,[1]

(b) Extradition to Commonwealth Countries under Chapter III of the Act of 1962

Extradition includes not only the decision of surrender but also the procedure by which the accused or convicted persons of one State are delivered by the latter to the former.[2] But the divergent views of States on the legal position of Dominions and colonies have deeply influenced the procedural provisions relating to extradition. Under the laws of States which consider colonies or possessions as the overseas departments,[3] there is a single procedure for extradition of the fugitive criminals, because a request from one colony to another or the parts of the Empire is deemed to be a request from one department to another of the same office. On the other hand, the British Empire has historically evolved itself as an association of self-governing dominions and colonies enjoying

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1. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171.

2. Savarkar Arbitration counter-case of the Government of His Britannic Majesty, 1911 (Comnd.9761), pp.14-15, cited in C. Parry, ed. A British Digest of International Law, (London, 1965), Part VI, Chapter 17, p.443.

3. Amos J. Peaslee, Constitutions of the Nations, Vol.II, The Hague, 2nd ed. (1950), The Constitution of the French Republic of 28 September, 1916, Section III. See also Political Constitution of the Portuguese Republic, 1 August 1935, Vol.III.

uninterrupted and complete internal independence, with the Imperial Parliament at Westminster exercising overall supremacy. Consequently, prior to the attainment of the status of international personality by a certain number of Commonwealth countries the British Empire had developed in the historical process two distinct procedures for surrendering the fugitive offenders found within its jurisdiction. One was, with respect to the procedure to be adopted, for the extradition of the fugitives from one part of the Empire to other parts, which might be called 'inter-colonial rendition',[1] 'Commonwealth interse law',[2] or 'intra-Commonwealth Extradition'.[3] The other was international controlling the relations between the Commonwealth countries and foreign States. The former is based on the Fugitive Offenders Act, 1881, enacted by the Imperial Parliament at Westminster and extended to all parts of the Empire which were subject to the overall supremacy of the British Parliament. The latter, on the other hand, is the direct result of some treaty arrangement between the two contracting parties in accordance with rules of international law.

Apart from the question of grouping Commonwealth countries by geographical considerations, the scheme of extradition linking members of the Commonwealth is an example of a multiple arrangement springing from common political heritage; the use of English language; the Constitutional

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1. W.J. O'Hearn: 'Extradition', Canadian Bar Rev., Vol.8 (1930), p.175.

2. Robert E. Clute: 'Law and Practice in Commonwealth Extradition' A.J.C.L., Vol.8 (1959) p.15.

3. Paul O'Higgins: 'Extradition within the Commonwealth',(1960) I.C.L.Q., Vol.9, p.491.

relationship between the legislative, executive and judicial branches of the Government, the adversary system of criminal procedure code; rules of evidence; the writ of habeas corpus which are all common traditions and which considerably simplify the common ground upon which to base measures of co-operation as to the extradition of the fugitive criminals. The Fugitive Offenders Act, 1881, was passed at a time when all parts of the Empire owed allegiance to a single sovereign and a political crime was committed in some way against the sovereign and this is why treason was one of the offences specifically named as extraditable in the Act. After the countries under the domination of the British rule either became 'Republics within Commonwealth' or 'Realms in the Commonwealth', modifications were required in the laws of extradition.

Commonwealth countries that may have extradition arrangements with India are to be treated under Chapter III of the Act of 1962 to a simplified procedure for extradition. Other Commonwealth countries that may not have such specific arrangements came under Chapter II of the Act of 1962.

Regarding political offence, Section 32 made Sections 29 and 31 of the present Indian Extradition Act, 1962, applicable even to Commonwealth countries. These sections mentioned that a fugitive will not be extradited for 'offences of a political character'. Since the Indian Act of 1962 was heavily influenced by the British Extradition Act of 1870, and since the same words 'offences of a political character' occur in the 1870 Act, English authorities will be amazing authorities on the interpretation of the words used in the Indian Extradition Act of 1962. The Indian Extradition Act of 1903 differed from the Indian Act

of 1962 in several respects. The principle of speciality, double criminality were introduced for the first time in extradition in relation to the Commonwealth. Contrary to the 1881 Act, the enumerative method is used in the definition of an extraditable offence, though in treaties with different countries, the definitions are indicative rather than exhaustive. It seems in bilateral treaties between India and other countries, The European Extradition Convention of 1957 is adopted as a model or at least much resemblance will be found in those treaties.

Resort to alternative methods of rendition may be contemplated in the absence of an extradition treaty with the state desiring to prosecute, where the legislation of the State of Asylum requires a treaty as a pre-condition of extradition. The negotiation, signature and satisfaction of an extradition treaty necessarily occupy considerable time and an individual case that arises before must be disposed of sooner. These considerations culminated in the procedure for rendition under Chapter II of the Act of 1962 for extradition of fugitives to Commonwealth countries with no extradition arrangements and foreign States with no treaties.

(c) Procedure for Extradition to Commonwealth Countries under Chapter III of the Act of 1962

A common procedure was adopted in regard to the extradition of fugitives from one part of His Majesty's Dominions to another in the Indian Extradition Act of 1903, and the Fugitive Offenders Act, 1881. In the Indian Act of 1962, a similar procedure is laid down for inter-Commonwealth extradition. By virtue of Section 17(1) of the Act

for extradition to Commonwealth countries that have extradition arrangements with India, to which Chapter III has been made applicable only two prerequisites are necessary before extradition. They are: (1) The magistrate before whom the fugitive is brought, is satisfied on inquiry that the endorsed warrant for the apprehension of the fugitive criminal is duly authenticated and (2) the offence of which he is accused of or has been convicted is an extraditable offence. On the fulfilment of these two prerequisite conditions, the magistrate shall commit the fugitive to prison to await his return and shall forthwith send the Central Government a certificate of committal. In this chapter the identity clause has been inserted in Sections 15 and 16. The clause seems to be the basis for the foundation of acceptance or entertainment of the requisition from the requesting State and the warrant is to be backed only if the Central Government is satisfied about the authenticity of the warrant and competency of the authority validly issuing it with perfect jurisdiction.

On the other hand, the Indian Extradition Act, 1903 (Chapter II) which provided for the extradition of fugitive criminals to foreign States, and in the present Act of 1962 extradition to foreign States and to Commonwealth countries to which Chapter III does not apply, require documents as part of the evidence necessary to establish a prima facie case against the person claimed.[1] Under the British Extradition Act of 1870, a prima facie case was obligatory in

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1. See Sections 7, 9, 10 of the Indian Extradition Act, 1962; Canadian Extradition Act, 1952, Article 18 (1b); English Extradition Act, 1870, Section 10; U.S. Criminal Code and Criminal Procedure, Sec.651.

every case. This prima facie requirement is a feature of the law of extradition in the Common Law countries. A prima facie case' means at first blush or at first sight, a complete case against the accused ... in order to prove a prima facie case, there must be evidence direct or circumstantial on each element.'[1] The justification for requirement of a prima facie case, is that it operates as a protection for the individual. He will not be removed to another country which may be hundreds and thousands of miles away, with the inevitable disturbances to his life and employment, in a strange land with no friends, no fund for defence, unless there are very good grounds justifying such removal. Above all, it prevents the removal to another State of an individual who may be merely suspected of a criminal offence. Paul O'Higgins has quoted two instances demonstrating this danger.[2] The Federal Republic of Germany requested the extradition from the United Kingdom of Mrs. Elga Kronenberg in 1965. During the proceedings before the Bow Street Magistrate, Counsel informed him that this lady was arrested at a Hyde Park Hotel two years ago and was taken to Ireland by the Irish Police without the concurrence or order passed by any court in England. She then remained in Ireland awaiting trial for 18 months and she left shortly before the trial was due to come in. The Court observed 'It is a monstrous state of affairs that this lady should have been arrested without appearing before a Court in England'. The second instance

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1. W.J. O'Hearn, 'Extradition', 8 Can. Bar. Rev. 1930, p.175 at pp.180-181.

2. Paul O'Higgins: The Irish Extradition Act, 1965, (1966), I.C.L.Q., Vol.15, p.369 at p.377.

referred to was as follows: Allegations were made that a person who was brought back from England on a 'backed warrant' in 1961, has been held in custody in Ireland for six weeks and ultimately released for lack of evidence, was brought back to Ireland in 1964 on the same charge.

Ireland has, however, by Section 22 of the Irish Extradition Act, 1965, dropped the requirement of production of prima facie evidence before surrender. Section 22 provides that a requirement of production of prima facie evidence can be included specially in an extradition arrangement with any State, in which event the Irish courts would not permit surrender in its absence. In modern practice, there does not seem to be any good grounds or reasons in favour of dropping the requirement of the production of prima facie evidence before surrender. This may probably rest in part on the suggestion about the suspicion of inadequacy of proceedings under other systems of law, but in modern practice, this suspicion seems to have no foundation as would be evident that the British Parliament included such a requirement in the procedure for surrender under the Act of 1870 and the Fugitive Offenders Act, 1881, and so did the Indian Extradition Act, 1903, Chapter II, and the present Extradition Act of 1962 in Chapter II.

It is true that there is no rule of international law which requires that a prima facie case ought to be made out before a fugitive is surrendered, but the rule rests on the need to safeguard the individual from unwarranted surrender. A prima facie case, therefore, must be established that the fugitive committed the act he is charged with.

But the policy in this field has not been consistent.

The quantum of proof required for a prima facie case varied according to the country requesting extradition, or the country which was asked to extradite. For example, if the crime has been committed in Canada,[1] in order to justify the prisoner's committal for extradition, the evidence thus laid before the Extradition Judge or Commissioner must be such as would justify the prisoner's committal for trial. Strict proof of prima facie case was, and is necessary under Chapter II of the present Act of 1962.

In Part II of the Fugitive Offenders Act, 1881, and the Indian Extradition Act, 1903, Chapter III, and in Chapter III of the Indian Extradition Act, 1962, no prima facie proof is necessary for a committal of the accused. Only the identity of the accused and the extraditability of the offence has to be established. A warrant issued by a competent authority and evidence, usually of the police officer, to prove the warrant and to identify the person was sufficient in these statutes. Rendition under the British Fugitive Offenders Act, 1881, and the Indian Extradition Act, 1903, and 1962, falls somewhere between extradition in international law terms and the intra-Commonwealth practice, a combination of two methods of extradition, namely, the executive and the facultative or judicial method. The executive method seems to have been adopted for the purposes of Chapter III of the new Act and facultative or the judicial method for extradition under Chapter II of the Act, and more precisely, somewhere between these two methods falls rendition under the 1962 Act.

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1. Re Pennsylvania and Levi (1897) 6 Que Q.B.151; Utah v. Peters (1936) 2 W.W.R.9; Re Insull (1934) O.W.N. 194.

The return of the fugitive under Chapter II of the Indian Extradition Act, 1962, is more analogous to extradition procedure under the Law of nations and is similar to that laid down in Sections 10 of the British Extradition Act, 1870, and Section 3 of the Indian Extradition Act, 1903. The procedure adopted by Chapter III is, in spirit, the same as provided by the Fugitive Offenders Act, 1881, by Sections 13 and 14. One of the main differences affecting the nature of extradition inquiry lies in the matter of proof of guilt which is the main difference between Chapter II and III of the 1962 Act. Under Chapter II, the magistrate may expend considerable effort on proof of guilt before a fugitive offendor is returned. He has to be satisfied by evidence that there is a prima facie case against the offender; but the return of a fugitive under Chapter III is extremely informal with little concern as to proof of guilt, the need for such evidence having been dispensed with. All that is required is the satisfaction of the magistrate about the authenticity of the endorsed warrant and as to the offence being an extradition offence. So there is substantial and material difference in the procedures for surrendering a fugitive criminal prescribed by the two chapters of the Act. The reason for adopting these two different procedures in Chapters II and III will be obvious from the speech of the then Law Minister, who while introducing the Extradition Bill in the Indian Parliament (Lok Sabha) on 17 August, 1961, said:[1]

> "It was felt absolutely necessary that we must amend the law relating to extradition at least to enable our Government to get the criminals who

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1. Parliamentary Debates, 17 August, 1961.

> have gone over to Commonwealth countries, especially Pakistan and neighbouring countries."

The procedure adopted in Chapter III dealing with the return of fugitive criminals to Commonwealth countries with extradition arrangement is akin to the 'Backing of the warrants' or 'Endorsement and Execution of warrants' in the British Extradition Act, 1870, the British Fugitive Offenders Act, 1881, or the Irish Extradition Act, 1965. Under Chapter III, no proof or prima facie evidence of guilt is necessary, but if the Central Government is satisfied the warrant was issued by a person having lawful authority, it will endorse such a warrant for the apprehension of the accused and such an endorsed warrant shall be sufficient authority to apprehend the person named in the warrant and to bring him before the magistrate in India.[1] This represents the executive method adopted in the Extradition Act, 1962, but in any case as the executive action of extradition is within the sole discretion of the Minister or executive wing of the Government, such a provision is not arbitrary, especially when the same matter is subject to the magisterial scrutiny in the presence of the accused person as laid down by Section 17(1) of the Act.

It is not clear whether the matters referred to in Sections 29[2] and 31[3] of the Act of 1962 are justiciable. Section 29 begins with the words, 'If it appears to the Central Government that by reason of the trivial nature of the

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1. Section 15 of the Indian Extradition Act, 1962; see also Jugal Kishore More, supra, A.I.R. 1969 S.C. 1171.
2. Section 29 of The Extradition Act, 1962, Appendix 1 p.595.
3. Section 31 of The Extradition Act, 1962, Appendix 1.p.596.

case ... etc.',which suggests that the primary responsibility for decision is with the Central Government. Chapter V, which is the 'Miscellaneous' chapter, is not as specific as Chapters II and III (of Sections 7(3) and 17 respectively) in empowering the magistrate or any other court to inquire into the matters referred to by it. However, Section 31 [1] which applies to both the Commonwealth and foreign States is clearly within the Courts' jurisdiction and not exclusively in the Central Government's area of discretion.

Of course, surrender or extradition of fugitive offenders under Chapter III is just as much extradition in the international legal sense as surrender to any other State under Chapter II.

While introducing the Extradition Act of 1962, the Indian Law Minister justified the difference in the procedures under Chapter II and Chapter III as having reference to 'reciprocity' and certain geographical factors. The latter ground was the subject matter of challenge under Articles 13 and 14 of the Constitution in C.G. Menon's case before the Madras High Court under the old Act of 1903. Rajgopalan J. observed that:[2]

> "The need for offering evidence to show that prima facie the offender is guilty of crimes with which he has been charged by the country asking for his extradition has been well recognised. Though it may not be an integral part of the law of extradition of every State in relation to every other State, it is certainly a normal feature, and one can even say, almost a universal feature of extradition laws. To dispense with such a need, there must, in my opinion, be some basis, better than

1. Section 31 of The Extradition Act, 1962, Appendix 1, p.596.
2. In Re C.G. Menon, supra, A.I.R. 1953 Madras 729 at p.736.

> geographical contiguity alone, if the test of 'equal protection of laws within the territory of India' specifically provided for by Art.14 of the Constitution is to apply."

The provisions of the Act providing for different procedures were held to be violative of Article 14 of the Constitution.[1] In appeal against that judgment, the Supreme Court did not express any opinion on that point as the matter was decided on another ground.[2] The question whether reciprocity can satisfy the test of reasonableness of classification that underlay Parts I and II of the Fugitive Offenders Act, 1881, was left open by the Madras High Court [3] itself as that question did not arise in that case, but it was observed that there can be circumstances of valid classification which would be possible under Article 14.[4] Hingorani [5] is of the opinion that classification is based on reasonable grounds, as the requirement of proof of prima facie evidence is dispensed with on the ground of reciprocity and it is restricted to Commonwealth countries which have extradition arrangements with India, and therefore, such a dispensation of prima facie proof is a permissible classification and does not violate Article 14. V.N. Shukla is also of the same view.[6]

Because of the Supreme Court's decision in

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1. In Re C.G. Menon, ibid. at pp.739, 740. See also R.C. Hingorani, op.cit., p.82.
2. State of Madras v. C.G. Menon, A.I.R. 1954, S.C. 517, supra.
3. In Re C.G. Menon, A.I.R. 1953 Madras 729 at p.735.
4. In Re C.G. Menon, ibid. at p.736.
5. R.C. Hingorani, op.cit., pp.82, 83.
6. V.N. Shukla, The Constitution of India, 1964, pp.23-24.

C.G. Menon,[1] a stalemate was created in India. Since the Fugitive Offenders Act, 1881, could not be used, the Central Government had to issue executive instructions to the magistrates regarding the procedure to be followed in extraditing fugitive criminals to the Commonwealth countries and this state of affairs continued until the Indian Extradition Act of 1962 came into force. In J.K. More,[2] the inter regnum arrangements were approved and held valid by the Supreme Court and the instructions were held not to fetter the judicial discretion of the magistracy. Being, as it were, a family arrangement, the Fugitive Offenders Act, 1881, did not include the safeguards usually provided in international extradition, such as are embodied in the principles of double criminality and speciality, non-extradition of political offenders.

The Indian Extradition Act of 1962, while repealing the earlier Acts on the subject, tried to maintain the principles of reciprocity, geographical nearness, in order to bring harmony and avoid discrimination, inserted Section 32 which made the provisions of Sections 29 and 31 applicable to Chapter III also and thus set at rest the whole controversy revolving around the British Act of 1870 with respect to political offences, unjust and oppressive results by rendition and also resolved the controversy arising on account of the procedure provided under Chapters I and II of the Fugitive Offenders Act, 1881. The House of Lords,[3]

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1. State of Madras v. C.G. Menon, A.I.R. 1954 S.C. 517.
2. State of West Bengal v. Jugal Kishore More, A.I.R. 1969 S.C. 1171 at p.1182.
3. Keane v. Governor of Brixton Prison (1971) 2 W.L.R. 1243.

while considering the provisions of the Backing of Warrants (Republic of Ireland) Act, 1965, held that the Act of 1965 made no provision requiring a magistrate to inquire whether a prima facie case has been made out. It was observed by Lord Pearson at page 1247,

> "in my opinion, Section 2 and Schedule to the Act do not provide for any inquiry by a magistrate into the merits of charges on this point. I agree with the decision of the Divisional Court in the present case and in the previous decision in Reg. v. Metropolitan Police Ex parte Arkin."[1]

Thus, there is a remarkable change in the present Act from the old practice that existed in most Commonwealth countries, including India. All the safeguards mentioned in Section 32 of the Indian Act of 1962 were not available under the Fugitive Offenders Act, 1881. Section 32 specifically mentions that those safeguards will be available equally to all fugitives, whether they are from a foreign State or a Commonwealth country with or without extradition arrangements. The insertion of these provisions are in consonance with current judicial pronouncements, like the observations of English courts in Mubarak Ali's case,[2] and the case of Zacharia,[3] also in line with academic opinions.[4] But in spite of all the efforts by the legislature, there

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1. Reg. v. Metropolitan Police Ex parte Arkin (1966) 1 W.L.R. 1593.

2. Re Government of India and Mubarak Ali Ahmed (1952) 1 All E.R. 1060 at p.1063.

3. Zacharia v. Republic of Cyprus (1962) 2 All E.R. 438.

4. See Paul O'Higgins: 'Extradition within the Commonwealth', (1960) I.C.L.Q. 491; Robert E. Clute: 'Law and Practice in Commonwealth Extradition', (1959) 8 A.J.C.L. p.15 at pp.27,28.

can be more improvements to secure equal opportunities for all fugitives in defending themselves. For example, though Sections 29 and 31 have been made applicable to Chapter III also, but the right to submit explanation before the magistrate has been given under Chapter II and not under Chapter III, and thus it may be said that while an offender falling under Chapter II has an opportunity to satisfy the judiciary or the executive regarding the political nature of his crime or other allied matters mentioned in Sections 29 and 31, one falling under Chapter III will have to look for such relief mainly to the executive. Further, under Section 30 of the new Act, wide powers to surrender the fugitive have been conferred upon the Central Government. In cases where concurrent requisitions or demands are made by different States for the same offender for the same or different offences, the Central Government may in its discretion surrender the fugitive to any State it thinks fit. This discretion is not accompanied by any guiding policy or definite criteria. In order to avoid any apprehensions of arbitrary powers on behalf of the Central Government, a definite policy should be laid down by further amendment of the Act in this direction. At present, it is apparent that under Section 30 of the 1962 Act, the Government of India's policy is to decide each case of simultaneous requisitions on its own merits. The Act as it stands, does not curtail the discretionary power of the Central Government by incorporating such principles into the Act as the priority of the request, gravity of the offence, nationality of the offender, the penalty to be imposed, etc.

APPENDIX I

THE EXTRADITION ACT, 1962

An Act to consolidate and amend the law relating to the extradition of fugitive criminals.

Be it enacted by Parliament in the Thirteenth year of the Republic of India as follows:

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.

(1) This Act may be called the Extradition Act, 1962.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.

In this Act, unless the context otherwise requires, -

(a) "Commonwealth country" means a commonwealth country specified in the First Schedule and such other commonwealth country as may be added to that Schedule by the Central Government by notification in the Official Gazette and includes every constituent part, colony or dependency of any Commonwealth country so specified or added;

(b) "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy but the term "person accused" includes a person so convicted for contumacy;

(c) "extradition offence" means -

(i) in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State;

(ii) in relation to a foreign State other than a treaty State or in relation to a commonwealth country an offence which is specified in, or which may be specified by notification under, the Second Schedule;

(d) "extradition treaty" means a treaty or agreement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty or agreement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India;

(e) "foreign State" means any State outside India other than a commonwealth country, and includes every constituent part, colony or dependency of such State;

(f) "fugitive criminal" means an individual who is accused or convicted of an extradition offence committed within the jurisdiction of a foreign State or a commonwealth country and is, or is suspected to be, in some part of India;

(g) "magistrate" means a magistrate of the first class or a presidency magistrate;

(h) "notified order" means an order notified in Official Gazette;

(i) "prescribed" means prescribed by rules made under this Act; and

(j) "treaty State" means a foreign State with which an extradition treaty is in operation.

3. Application of Act.

(1) The Central Government may, by notified order, direct that the provisions of this Act other than Chapter III shall apply -

(a) to such foreign State or part thereof or

(b) to such commonwealth country or part thereof to which Chapter III does not apply;

as may be specified in the order.

(2) The Central Government may, by the same notified order as is referred to in sub-section (1) or any subsequent notified order, restrict such application to fugitive criminals found, or suspected to be, in such part of India as may be specified in the order.

(3) Where the notified order relates to such a treaty State -

(a) it shall set out in full the extradition treaty with that State;

(b) it shall not remain in force for any period longer than that treaty; and

(c) the Central Government may, by the same or any subsequent notified order, render the application of this Act subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State.

CHAPTER II

EXTRADITION OF FUGITIVE CRIMINALS TO FOREIGN STATES AND TO COMMONWEALTH COUNTRIES TO WHICH CHAPTER III DOES NOT APPLY

4. Requisition for surrender.

A requisition for the surrender of a fugitive criminal of a foreign State or a commonwealth country may be made to the Central Government -

(a) by a diplomatic representative of the foreign State or commonwealth country at Delhi; or

(b) by the Government of that foreign State or commonwealth country communicating with the Central Government through its diplomatic representative in that State or country;

and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of the foreign State or commonwealth country with the Government of India.

5. Order for magisterial inquiry.

Where such requisition is made, the Central Government may, if it thinks fit, issue an order to any magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.

6. Issue of warrant for arrest.

On receipt of an order of the Central Government under section 5, the magistrate shall issue a warrant for the arrest of the fugitive criminal.

7. Procedure before magistrate.

(1) When the fugitive criminal appears or is brought before the magistrate, the magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers, as

nearly as may be, as if the case were one triable by a court of session or High Court.

(2) Without prejudice to the generality of the foregoing provisions, the magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State or commonwealth country and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal is accused or has been convicted is an offence of political character or is not an extradition offence.

(3) If the magistrate is of opinion that a prima facie case is not made out in support of the requisition of the foreign State or commonwealth country, he shall discharge the fugitive criminal.

(4) If the magistrate is of opinion that a prima facie case is made out in support of the requisition of the foreign State or commonwealth country, he may commit the fugitive criminal to prison to await orders of the Central Government, and shall report the result of his inquiry to the Central Government, and shall forward together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government.

8. Surrender of fugitive criminal.

If, upon receipt of the report and statement under sub-section (4) of section 7, the Central Government is of opinion that the fugitive criminal ought to be surrendered to the foreign State or commonwealth country, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant.

9. Power of magistrate to issue warrant of arrest in certain cases.

(1) Where it appears to any magistrate that a person within the local limits of his jurisdiction is a fugitive criminal of a foreign State or commonwealth country he may, if he thinks issue a warrant for the arrest of that person on such information and on such evidence as would, in his opinion, justify the issue of a warrant if the offence of which the person is accused or has been convicted had been committed within the local limits of his jurisdiction.

(2) The magistrate shall forthwith report the issue of a warrant under sub-section (1) to the Central Government and shall forward the information, and the evidence or certified copies thereof to that Government.

(3) A person arrested on a warrant issued under sub-section (1) shall not be detained for more than three months unless within that period the magistrate receives from the Central Government an order made with reference to such person under section 5.

10. Receipt in evidence of exhibits, depositions, and other documents and authentication thereof.

(1) In any proceedings against a fugitive criminal of a foreign State or commonwealth country under this Chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence.

(2) Warrants, depositions or statements on oath, which purport to have been issued or taken by any court of justice

outside India or copies thereof, certificates of, or judicial documents stating the facts of, conviction before any such court shall be deemed to be duly authenticated if -

(a) the warrant purports to be signed by a judge, magistrate or officer of the State or country where the same was issued or acting in or for such State or country;

(b) the depositions or statements or copies thereof purport to be certified, under the hand of a judge magistrate or officer of the State or country where the same were taken, or acting in or for such State or country, to be the original depositions or statements or to be true copies thereof, as the case may require;

(c) the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a judge, magistrate or officer of the State or country where the conviction took place or acting in or for such State;

(d) the warrants, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State or country where the same were respectively issued, taken or given.

11. Chapter not to apply to commonwealth countries to which Chapter III applies.

Nothing contained in this Chapter shall apply to fugitive criminals of a commonwealth country to which Chapter III applies.

CHAPTER III

RETURN OF FUGITIVE CRIMINALS TO COMMONWEALTH COUNTRIES WITH EXTRADITION ARRANGEMENTS

12. Application of Chapter.

(1) This chapter shall apply to any such commonwealth country to which, by reason of an extradition arrangement entered into with that country, it may seem expedient to the Central Government to apply the same.

(2) Every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V shall, in relation to any such commonwealth country, apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement.

13. Liability of fugitive criminals from commonwealth countries to be apprehended and returned.

Where a fugitive criminal of any commonwealth country to which this Chapter applies is found in India, he shall be liable to be apprehended and returned in the manner provided by this Chapter to that commonwealth country.

14. Endorsed and provisional warrants.

A fugitive criminal may be apprehended in India under an endorsed warrant or a provisional warrant.

15. Endorsed warrant for apprehension of fugitive criminal.

Where a warrant for the apprehension of a fugitive criminal has been issued in any commonwealth country to which this Chapter applies and such fugitive criminal is, or is suspected to be, in India, the Central Government may, if satisfied

that the warrant was issued by a person having lawful authority to issue the same, endorse such warrant in the manner prescribed, and the warrant so endorsed shall be sufficient authority to apprehend the person named in the warrant and to bring him before any magistrate in India.

Provisional warrant for apprehension of fugitive criminal.

16. (1) Any magistrate may issue a provisional warrant for the apprehension of a fugitive criminal from any commonwealth country to which this Chapter applies who is, or is suspected to be, in or on his way to India, on such information and under such circumstances as would, in his opinion, justify the issue of a warrant, if the offence of which the fugitive criminal is accused or has been convicted had been committed within his jurisdiction and such warrant may be executed accordingly.

(2) A magistrate issuing a provisional warrant shall forthwith send a report of the issue of the warrant together with the information or a certified copy thereof to the Central Government, and the Central Government may, if it thinks fit, discharge the person apprehended under such warrant.

(3) A fugitive criminal apprehended on a provisional warrant may, from time to time, be remanded for such reasonable time, not exceeding seven days at any one time, as under the circumstances seems requisite for the production of an endorsed warrant.

Dealing with fugitive criminal when apprehended.

17. (1) If the magistrate, before whom a person apprehended under this Chapter is brought, is satisfied on inuqiry that the endorsed warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence of which the person is accused or has been convicted is

an extradition offence, the magistrate shall commit the fugitive criminal to prison to await his return and shall forthwith send to the Central Government a certificate of the committal.

(2) If on such inquiry the magistrate is of opinion that the endorsed warrant is not duly authenticated or that the offence of which such person is accused or has been convicted is not an extradition offence, the magistrate may, pending the receipt of the orders of the Central Government, detain such person in custody or release him on bail.

(3) The magistrate shall report the result of his inquiry to the Central Government and shall forward together with such report any written statement which the fugitive criminal may desire to submit for the consideration of that Government.

18. Return of fugitive criminal by warrant.

The Central Government may, at any time after a fugitive criminal has been committed to prison under this Chapter, issue a warrant for the custody and removal to the commonwealth country concerned of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant.

CHAPTER IV
SURRENDER OR RETURN OF ACCUSED OR CONVICTED PERSONS FROM FOREIGN STATES OR COMMONWEALTH COUNTRIES

19. Mode of requisition or form of warrant for the surrender or return to India of accused or convicted person who is in a foreign State or commonwealth country.

(1) A requisition for the surrender of a person accusednor convicted of an extradition offence committed in India and who is or is suspected to be, in any foreign State or a commonwealth country to which Chapter III does not apply, may be made by the Central Government -

(a) to a diplomatic representative of that State or country at Delhi; or

(b) to the Government of that State or country through the diplomatic representative of India in that State or country; and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State or country.

(2) A warrant issued by a magistrate in India for the apprehension of any person who is, or is suspected to be, in any commonwealth country to which Chapter III applies shall be in such form as may be prescribed.

20. Conveyance of accused or convicted person surrendered or returned.

Any person accused or convicted of an extradition offence who is surrendered or returned by a foreign State or commonwealth country may, under the warrant of arrest for his surrender or return issued in such State or country, be brought into India and delivered to the proper authority to be dealt with according to law.

21. Accused or convicted person surrendered or returned by foreign State or commonwealth country not to be tried for previous offence.

Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State or commonwealth country, that person shall not, until he has been restored or has had an opportunity of returning to that State or country, be tried in India for an offence committed prior to the surrender or return, other than the extradition offence proved by the facts on which the surrender or return is based.

CHAPTER V
MISCELLANEOUS

22. Liability of fugitive criminals to be arrested and surrendered or returned.

Every fugitive criminal of a foreign State or commonwealth country shall, subject to the provisions of this Act, be liable to be arrested and surrendered or returned, whether the offence in respect of which the surrender or return is sought was committed before or after the commencement of this Act, and whether or not a court in India has jurisdiction to try that offence.

23. Jurisdiction as to offences committed at sea or in air.

Where the offence in respect of which the surrender or return of a fugitive criminal is sought was committed on board any vessel on the high seas or any aircraft while in the air outside India or the Indian territorial waters which comes into any port or aerodrome of India, the Central Government and any magistrate having jurisdiction in such port or aerodrome may exercise the powers conferred by rthis Act.

24. Discharge of person apprehended if not surrendered or returned within two months.

If a fugitive criminal who, in pursuance of this Act, has been committed to prison to await his surrender or return to any foreign State or commonwealth country is not conveyed out of India within two months after such committal, the High Court, upon application made to it by or on behalf of the

fugitive

criminal and upon proof that reasonable notice of the intention to make such application has been given to the Central Government, may order such prisoner to be discharged unless sufficient cause is shown to the contrary.

Release of persons arrested on bail.

25. In the case of a person who is a fugitive criminal arrested or detained under this Act, the provisions of the Code of Criminal Procedure, 1898, relating to bail shall apply in the same manner as they would apply, if such person were accused of committing in India the offence of which he is accused or has been convicted, and in relation to such bail, the magistrate before whom the fugitive criminal is brought shall have, as far as may be, the same powers and jurisdiction as a court of session under that Code.

Abetment of extradition offences.

26. A fugitive criminal who is accused or convicted of abetting any extradition offence shall be deemed for the purposes of this Act to be accused or convicted of having committed such offence and shall be liable to be arrested and surrendered accordingly.

Lawfulness of, and retaking on escape from, custody under warrants.

27. It shall be lawful for any person to whom a warrant is directed for the apprehension of a fugitive criminal to hold in custody and convey the person mentioned in the warrant to the place named in the warrant, and if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of India may be re-taken upon an escape.

28. Property found on fugitive crimal.

Everything found in the possession of a fugitive criminal at the time of his arrest which may be material as evidence in proving the extradition offence may be delivered up with the fugitive criminal on his surrender or return, subject to the rights, if any, of third parties with respect thereto.

29. Power of Central Government to discharge any fugitive criminal.

If it appears to the Central Government that by reason of the trivial nature of the case or by reason of the application for the surrender or return of a fugitive criminal not being made in good faith or in the interests of justice or for political reasons or otherwise, it is unjust or inexpedient to surrender or return the fugitive criminal, it may, by order, at any time stay any proceedings under this Act and direct any warrant issued or endorsed under this Act to be cancelled and the person for whose arrest the warrant has been issued or endorsed to be discharged.

30. Simultaneous requisitions.

If requisitions for the surrender of a fugitive criminal are received from more than one foreign State or commonwealth country or from any foreign State and any commonwealth country, the Central Government may, having regard to the circumstances of the case, surrender the fugitive criminal to such State or country as that Government thinks fit

31. Restrictions on surrender.

A fugitive criminal shall not be surrendered or returned to a foreign State or commonwealth country -

(a) if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made, with a view to try or punish him for an offence of a political character;

(b) if prosecution for the offence in respect of which his surrender is sought is according to the law of that State or country barred by time;

(c) unless provision is made by the law of the foreign State or commonwealth country or in the extradition treaty with the foreign State or extradition arrange - ment with the commonwealth country, that the fugitive criminal shall not, until he has been restored or has had an opportunity of returning to India, be detained or tried in that State or country for any offence committed prior to his surrender or return, other than the extradition offence proved by the facts on which his surrender or return is based;

(d) if he has been accused of some offence in India, not being the offence for which his surrender or return is sought, or is undergoing sentence under any conviction in India until he has been discharged,

whether by acquittal or on expiration of his sentence or otherwise;

(e) until after the expiration of fifteen days from the date of his being committed to prison by the magistrate.

32. Sections 29 and 31 to apply without any modification thereof.

Notwithstanding anything to the contrary contained in Section 3 or Section 12, the provisions of sections 29 and 31 shall apply without any modification to every foreign State or commonwealth country.

33. Act not to affect the Foreigners Act, 1946.

Nothing in this Act shall affect the provisions of the Foreigners Act, 1946, or any order made thereunder.

34. Application of Act to Republic of Ireland.

The provisions of this Act shall apply in relation to the Republic of Ireland in the like manner and subject to the like conditions as they apply in relation to a commonwealth country.

35. Notified orders and notifications to be laid before Parliament.

Every notified order made or notification issued under this Act shall, as soon as may be after it is made or issued, be laid before each House of Parliament.

36. Power to make rules.

(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:

(a) the form in which a requisition for the surrender of a fugitive criminal may be made;

(b) the form in which a warrant for the apprehension of any person in a commonwealth country to which Chapter III applies may be made;

(c) the manner in which any warrant may be endorsed or authenticated under this Act;

(d) the removal of fugitive criminals accused or in custody under this Act and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them;

(e) the seizure and disposition of any property which is the subject of, or required for proof of, any alleged offence to which this Act applies;

(f) the form and manner in which or the channel through which a magistrate may be required to make his report to the Central Government under this Act;

(g) any other matter which has to be, or may be, prescribed;

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

37. (1) The Indian Extradition Act, 1903, and any law corresponding thereto in force at the commencement of this Act in the territories which, immediately before the 1st day of November, 1956, were comprised in Part B States and the North East Frontier Agency and Tuensang District (Extradition) Regulation, 1961, are hereby repealed.

Repeals and savings.

(2) The ExtraditionActs, 1870 to 1932 and the Fugitive Offenders Act, 1881, in so far as they apply to and operate as part of the law of India, are hereby repealed.

THE FIRST SCHEDULE

[See section 2(a)]

The following are commonwealth countries:

1. Commonwealth of Australia.
2. Canada.
3. Ceylon.
4. Cyprus.
5. Federation of Malaya.
6. Ghana.
7. New Zealand.
8. Nigeria.
9. Pakistan.
10. Sierra Leone.
11. Singapore.
12. Tanganyika.
13. United Kingdom.

THE SECOND SCHEDULE

[See section 2(c)(ii)]

Extradition offences in relation to foreign States other than treaty States or in relation to commonwealth countries

The following list of extradition offences is to be construed according to the law in force in India on the date of the alleged offence. Wherever the names of the relevant Acts are not given, the sections referred to are the sections of the Indian Penal Code (45 of 1860):

1. Culpable homicide (sections 299 to 304).
2. Attempt to murder (section 307).
3. Causing miscarriage and abandonment of child (sections 312 to 317).
4. Kidnapping, abduction, slavery and forced labour (sections 360 to 374).
5. Rape and unnatural offences (sections 375 to 377).
6. Theft, extortion, robbery and dacoity (sections 378 to 402).
7. Criminal misappropriation and criminal breach of trust (sections 403 to 414).
8. Cheating (sections 415 to 420).
9. Mischief (sections 425 to 440).
10. Forgery, using forged documents and other offences relating to false documents (sections 463 to 477A).
11. Offences relating to coins and stamps (sections 230 to 263A).
12. Sinking or destroying a vessel at sea or attempting or conspiring to do so.

13. Damaging or destroying an aircraft in the air or attempting or conspiring to do so.

14. Assault on board a vessel on the high seas or an aircraft in the air outside India or the Indian territorial waters with intent to destroy life or to do grievous bodily harm.

15. Revolt or conspiracy to revolt by two or more persons or board a vessel on the high seas or an aircraft in the air outside India or the Indian territorial waters against the authority of the master or the pilot in command.

16. Smuggling of gold, gold manufactures, diamonds and other precious stones or of any narcotic substance [section 167, entry 81 in column 2 of schedule, Sea Customs Act, 1878 (8 of 1878)].

17. Immoral traffic in women and girls [sections 4, 5, 6 and 8 of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956)].

18. Any offence which if committed in India would be punishable under any other sections of the Indian Penal Code or any other law, and which may, from time to time, be specified by the Central Government by notification in the Official Gazette either generally for all foreign States or for all commonwealth countries or specially for one or more such States or countries.

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