Extradition to foreign courts: are our laws fair?

Not for nothing does Lady Justice carry a set of scales: balance is the *leitmotif* of modern law. The importance of weighing the competing interests of liberty and security has grown as a natural consequence of legislative encroachment upon the domain of human rights – for when rights are in play, intuitions as to fairness tend to pull at once in different directions. This is the essence of the problem with extradition: justice makes opposing demands. On one hand, globalisation and technological evolution have combined to erode the conception of national borders as barriers, so territorial boundaries should no longer impede the proper enforcement of law. On the other hand, due process is of eternal importance in any state which professes to adhere to the rule of law. As always we seek balance: this essay shall argue that the scales are at present tipped in favour of national security, but that it will not take much to right them.

A court which senses the violation of a human right typically reacts by weighing the severity of that breach against its social utility. Our opening enquiry should accordingly ask whether present extradition laws really desecrate some fundamental liberty. The most likely source of unfairness – and the most contentious feature of current treaties – is their frequent omission of any demand for *prima facie* evidence of wrongdoing in order to legitimate the extradition of a suspected criminal. Is that unjust? The standard defence trundled out in Parliament[1] asserts that it is not, because the countries concerned will conform to basic standards of fairness in their treatment of the extradited suspect. But that answer must be examined against the intrinsic

[1] The Home Office, *Government Response To The First Report From The Home Affairs Select Committee, Session 2002-03: Extradition Bill*, 3rd March 2003

unfairness of extradition. The arrest and deportation of a person is itself a deprivation of liberty and as such it cannot be rationalised by any assurance that (once overseas) the suspect will not be undeservedly subjected to additional sanctions. That a foreign nation purports to adhere to some canon of human rights is inadequate justification for the initial invasion of freedom – inadequate because it is unclear that every state observes religiously its obligation to protect rights, and inadequate because even the most scrupulously principled of nations will find that decisions to seek extradition are charged with political concerns. As it stands the law authorises the forcible removal of a person on the basis of untested suspicions, and for that reason it is (at first glance) unfair.

The possibility remains that the unfairness inherent in extradition is the necessary means to a commendable social end. Perhaps the goal is to augment international law enforcement. Extradition plugs the gaping loophole that let malefactors evade justice by crossing borders, and a low evidentiary threshold expedites the process – since the abolition of the *prima facie* proof requirement, the time it takes to bring a suspect to trial abroad has plummeted from thirty months to seven.[2] The corollary of a more stringent set of rules is a greater probability that offenders will be punished: so the present system better deters extraterritorial wrongdoing. Such concerns of efficiency and deterrence are important and impressive – but they are dangerous justificatory theses, because taken to their logical conclusions they rationalise even the punishment of the innocent. (If a low standard of proof deters crime, why not abandon altogether the need for evidence?) Arguments from practicality are *ex post facto* rationalisations:

[2] The Home Office, *Memorandum Responding To Points Raised By Witnesses To The Home Affairs Committee Enquiry Into The US-UK Extradition Treaty*, 8th December 2005

they elucidate the advantages of streamlined extradition procedures, but they cannot satisfactorily delimit the law or explain the reach of its rules.

The real rationale for the rules of extradition is readily understood: the law is built on trust. Put shortly, "trusted extradition partners do not require *prima facie* evidence from each other".[3] At first that might sound like a weak basis on which to legislate, but in truth it is not: international trust fosters solidarity and harmony, and laws which aim to secure peace are surely virtuous. A global culture of rights will not grow from the belligerent imposition of values on one country by another; its seeds must be sown in trust. It may seem counterintuitive but it is incumbent on Britain as a protector of freedom to delegate a degree of responsibility to foreign nations to decide for themselves what is fair – then always to lead by example, putting the protection of liberty foremost amongst our own ideals. But we must be able to expect the same in return, for solidarity cannot be unilateral: trust without reciprocity is naivety, and on an international level it smacks of capitulation. What is more, trust should not be blind to moral absolutes. It is important to retain certain basic protections for human rights; these are compatible with the delegation of responsibility so long as they do not emasculate the decision-making power granted to the trusted partner. Those measures should guarantee some minimum standard of due process. They should establish dual criminality as a precondition for extradition: the conduct-guiding function of law is undermined if British courts can sanction the penalisation of actions which do not fall foul of our legal norms. For similar reasons some formal assurance should be given that cross-border malfeasance will be dealt with by English courts where practicable; where it applied this rule would mitigate the rigours of any disparity in sentencing

[3] Charles Clarke MP, *Letter In Reply To Simon Carr*, 24th April 2006

between Britain and its treaty partners. Those rudimentary safeguards would make the outsourcing of criminal procedures altogether more palatable.

The conclusion must be that British extradition laws are unfair in places. They are unfair where they entrust to foreign countries responsibility for the protection of liberty without requesting the same faith in return – for, while the pursuit of global harmony is a sound basis on which to relax principles, solidarity cannot be sustained without reciprocity. They are unfair, moreover, where they fail to lay down basic protections for suspected criminals. The law must, in its pursuit of the diplomatic profits of interdependence, remember the importance of due process. It is just good sense in international relations to do as F.P. Dunn advised: "trust everybody, but cut the cards."[4]

Andrew McIntyre

[4] Finley Peter Dunn, *Mr. Dooley's Philosophy* (New York: R.H. Russell, 1900)