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PAPER ON

# THE DEFINITION OF CRIMES IN EXTRADITION TREATIES.

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# THE MANNER IN WHICH ACTS WHICH FORM THE SUBJECT OF EXTRADITION IN EXTRADITION TREATIES SHOULD BE DESIGNATED:

## WHETHER ACCORDING TO PUNISHABLE DEEDS OR TO THE SPECIFICATION OF CERTAIN CRIMINAL ACTS: IN THE LATTER EVENT, UNDER THE DETAILED OR COLLECTIVE NOMENCLATURE OF THE PENAL CODES OF THE STATES ENTERING INTO SUCH TREATIES RESPECTIVELY.

By Dr DÉNES BERINKEY.

THE respective Penal Codes of some States appear to exhibit certain degrees of variation in respect of their construction of the scope of criminal acts. Since, then, the recent trend of the law bearing upon extradition is, that this should only be granted mutually in the case of crimes of a nature regarded by the laws of both the contracting parties as serious, the determination of the question as to how criminal acts should be specified in these treaties assumes an aspect of special importance.

I refer to this specification because the literature upon the subject almost uniformly favours this method as opposed to that which defines extraditable criminal acts in a negative sense by the process of elimination.

I do not consider it necessary to make any comparison of these methods from the point of view of positive value or even of expediency. I propose rather to confine myself to the examination of the question as to whether, given the method of specification as a base for the form of extradition treaties, the single or double specification be preferable.

In so far as any idea of correctness be involved I had better, without further preface, make known the views which colour my elucidation of the question.

Extradition proceedings ordinarily begin with the arrest of the subject of such proceedings. This rule strikes so

deeply at the principle of individual liberty, that we ought to demand that this freedom should be restricted for the shortest possible space of time. In other words we should require that the duration of the period of preliminary arrest of the person whose extradition has been demanded, should be short; which would premise and ensure the rapid carrying-out of the extradition proceedings. This rapidity naturally depends upon various circumstances. As, for instance, whether the nationality of the prisoner, and the place where the criminal act was perpetrated, as alleged, are or are not factors making against extradition. It depends, again, upon the punctual communication to the other State interested, of the request for extradition, backed up by all particulars of importance, and, finally, upon the questions as to whether or not the terms of the treaty are sufficiently clear to render a rapid and final decision possible, and whether extradition in the concrete case under review be permissible having regard to the nature of the crime.

Rapid procedure alone will enable extradition to fulfil its purpose, and only by this means may we hope to see the scope of extraditable criminal acts extended. If in some one or other State, extradition proceedings are habitually unduly prolonged, it will follow, as a matter of course, that the circle of extraditable criminal acts will be very much circumscribed; not only so, it will, in reality, restrain a State, in terms of a more widely extended Treaty, from demanding extradition in a concrete case when it is apparent that the duration of the period of preliminary detention will be out of all proportion to the punishment meted out for the original offence.

Again, rapid procedure alone will conduce to the due preservation of personal freedom, and only by its means shall we come within sight of the ideal end of extradition; that end which may be best summarised in the words of Beccaria: "The conviction that there is no land howsoever small wherein real crimes may find forgiveness, would be a very effective weapon to prevent them."

I have suggested that the text of an extradition treaty, if clear and unequivocal, might contribute to rapidity of procedure. Some explanation may, perhaps, be needed on this head.

If extraditable offences be so specified in the Treaty that the legal authorities of the State demanding extradition and

those of the other contracting power to whom the demand is addressed are able rapidly, and without any request for further enlightenment, to come to a decision as to whether there be any bar in the nature of the act itself against extradition, the former authorities may present their demand without delay, and the latter will have no shadow of excuse for the prolongation of the proceedings.

It is true that extradition treaties contain clauses providing for the asking for further information whenever a doubt arises as to whether the specific crime falls within the scope of the agreement, but practice teaches us that these requests and the replies thereto passing through the usual diplomatic channel are responsible for the considerable loss of time, and serve to lengthen the period of preliminary detention. In my humble opinion, we should endeavour as far as practicable to render this demand for additionable information superfluous. The position may be better illustrated by example of a concrete case.

A Magyar citizen steals, say, a thousand crowns from his wife in Hungary and escapes to Roumania. In terms of the Magyar Penal Code proceedings must be instituted by the injured party herself (§ 342, Law v. of 1878). She institutes criminal proceedings when it is discovered that the alleged thief is staying in Roumania. Extradition proceedings must be begun, and the Court must first determine, in accordance with the provisions of § 475, Law xxxiii. of 1896, whether extradition be necessary, and again, whether it be practicable. Let us say that the Roumanian Penal Code is not at hand, or that if it be, that the Court does not understand Roumanian. It can only refer to Article II. of the Extradition Treaty concluded with Roumania, which Article was incorporated with Law xi. of 1902, and specifies extraditable crimes.

Point 22 deals with *theft*. The examining Judge and the Court, therefore, demand the extradition of the alleged thief, and, pending this, if there be grounds for suspecting an attempt to escape, an order for his arrest. Arrest may be demanded and acceded to by telegraph, although the crime, according to § 307 of the Roumanian Penal Code, is not indictable and entails no punishment. Thus extradition would be *ultra vires*, since the preliminary condition is wanting that the crime shall be punishable in terms of the codes of both contracting parties, and, in the concrete case

under review, that it shall entail loss of liberty for a year at least, and possibly longer. In this case, then, the arrest of the alleged thief was unjustifiably demanded ; personal freedom was unnecessarily restricted by compliance with such demand.

Examples to the contrary effect are not wanting. Cases arise in which the text of a treaty is not sufficiently perspicuous to enable us to say with certainty if an offence be an extraditable offence or not ; or when, in terms of the literal text, a demand for extradition may not be preferred, or, if preferred, not entertained, yet according to the spirit of the treaty the demand is both just and allowable.

For example, in our Extradition Treaty with Norway and Sweden incorporated with Law xxiv. of 1871, embezzlement is not specified as an extraditable offence. Embezzlement committed by public officials is specifically mentioned (ii. 10) ; the deduction being that simple embezzlement is not extraditable, although in terms of Chapter 22 of the Swedish Penal Code, the crime thus known to us is called " deception," and deception is an extraditable offence under the Treaty.

It may be observed from the two examples before cited that the method of drawing up extradition treaties, now in vogue, as far as concerns the specific enumeration of extraditable offences, is neither exhaustive nor precise, that is to say, it does not sufficiently take into account the essential differences which may appear in the respective Penal Codes of the parties to the contract.

As a corrective, by means of a clear specification of extraditable offences, as before insisted upon, we should strive for that degree of precision which would obviate undue interference with personal liberty, and, at the same time, ensure that the refugee criminal does not escape the due punishment for his acts. The question now arises which method would be preferable for the exact definition of extraditable crimes.

We see, from the above, how far the customary form of enumerating these offences in treaties corresponds to the end in view ; scarcely, if at all. Most of the treaties known to us in their enumeration of offences employ the criminal law terminology of both of the contracting parties indifferently, and this jumble is responsible for much of the resultant confusion. Only obscurity can attend the method of

specification which embodies two forms of legal terminology. If we examine the Extradition Treaties made by Hungary with other States, a clear illustration of what has been advanced is furnished. Certain crimes are specified in the Treaties which are not recognised as such by the Magyar Penal Code (parricide, child murder, suicide, poisoning, abuse of trust, rape, &c.). On the other hand, we find generalisations and grouping of crimes which betray a certain correspondence to those known to the other contracting party, with a view to facilitate the determination of extraditable offences. We can thus observe the varying degrees of difference between the Penal Codes of two States in the specification of offences as ordinarily resorted to in Treaties, and we can note how in practice the theory of clear enunciation is not upheld.

That fact alone should cause us to examine the question as to whether the detailed enumeration of offences, together with a unification of terminology peculiar to the Penal Codes of the two contracting States, might not, in practice, attain its end.

It is certain the unified nomenclature will comprise expressions which in part mean one thing and in part another. As, for example " embezzlement " and " abuse of confidence," which occur side by side in Law xxxiv. of 1882, and ii. p. 26, denote two things which are not wholly the same ; it may thus be doubtful whether the additional significance which attaches to one term in excess of the meaning common to both could furnish cause for extradition. And this extra element may have a special name in the criminal terminology of another State, specified or not, as the case may be, in the extradition treaty. In short, the definition of the limits of extradition obligations makes a thorough examination of the question necessary. The tribunals could hardly be entrusted with this examination, when by the very nature of the case, expedition is required in making arrangements for the arrest and extradition of a criminal who has fled abroad.

These difficulties increase when, as is possible after the making of the extradition treaty, the Penal Code of either undergoes modifications. To see that this is no imaginary case it is only necessary to observe that our Treaties with France, the United States of America, Sweden, Norway, Italy, Russia, Montenegro, and Great Britain were concluded before the promulgation of Law v. of 1878, and that in some of

these States, namely, in Italy and Russia, the Penal Codes have been essentially altered since the conclusion of the Treaties. As concerning these States, therefore, the determination of the extent of the obligations undertaken in the extradition treaties is by no means so simple, since, if we subscribe to the opinion of Lammasch (*Auslieferungspflicht u. Asylrecht*, 1887, p. 125, § 20), that the alteration of the Penal Codes cannot alter the extent of the obligations incurred in terms of the extradition treaties, we stand in the position, specifically towards Italy, of being obliged to revert to an examination of the provisions of the Sardinian Penal Code, and to the ancient criminal law of Hungary. By the light of these we must decide, for instance, whether the receipt of stolen property constitutes an extraditable offence as between the two countries cited, when that crime is not specified *expressis verbis* in the extradition treaty (xxvi. 1871). It is scarcely possible to saddle an examining judge, occupied with urgent work, with such trying intellectual work.

I have no desire to enter upon an exposition of the propositions of Lammasch, nor of the arguments against. I adduce the point merely as ancillary to an effort to throw light upon the difficulties which attend the present system of enumerating those crimes which form the subject of extradition treaties.

These difficulties in part remain, if we do not accept the dictum of Lammasch, since, by the very nature of the case, it will not be very easy to determine what, in the nomenclature of the new Penal Code, exactly corresponds to what in that of the old Code which governed the drawing-up of the treaty.

These difficulties show, moreover, at the same time, the unsuitability of the methods of enumeration employed to-day; indeed, they may be said to be directly due to such.

In my opinion it is not expedient to use mixed terminology in the specification of extraditable offences.

The question now arises whether it be possible to avoid the difficulties above adverted to by arranging extraditable crime in double columns, each entry in the nomenclature of the one State finding its exact parallel in that of the other.

As an illustration, if, taking the Penal Code at present valid as a basis, we enter into an extradition treaty with Austria, and Austria wish to include deception as an extraditable crime, this offence would be so stigmatized

on the one side. Now, agreeably to the nomenclature of of the Magyar Civil Code, "deception" would include and comprise Deception, Perjury, Falsification of Documents, Illegal Appropriation. These, then, would form the equivalent of deception on the other side. In such manner all extraditable offences might be specified.

This method has the undoubted advantage that it labels extraditable crimes for each of the contracting parties with the name which each bears in each of the Penal Codes. All doubts as to the scope of the obligations covered by the treaty would be for ever set at rest.

This is true only at first blush.

Abiding by our illustration, if we examine all those elements which in the Austrian Penal Code are described under the generic term "deception," we shall find certain crimes which our law classes as misdemeanors—which are not held to be extraditable. Further, that the offences which go to constitute the Austrian "deception" do not exhaust the list which constitutes "deception" in the terminology of the criminal law of Hungary, which list is put in one column as a set-off to the other. Thus double enumeration may offer approximate but not absolute accuracy, since of the crimes enumerated on both sides all should not be regarded as extraditable offences at which the specifications point, but only those quite common to both lists. It would simply mean that we must name the same offence upon, let us say, the Magyar side very often, to secure that on the other, say the Austrian side, we should be able to determine inextraditable offences from amongst the crimes under different denominations but, according to Magyar terminology, comprised under the same denomination.

In this manner, however, of always denoting those crimes on the one side, which correspond to those represented by, say, X, on the other, repetitions will be unavoidable, as will be certain limitations by reason of the obscure breaking-up, which is a consequence of repetition.

A contemplation of these detailed short-comings in procedure should lead us nearer to a solution of the question under consideration, since, if we cannot by the former method attain to complete exactitude, the cause is that in the specification we aimed at putting the crime or crimes upon one side corresponding to those on the other: a course which, supposing that the respective Penal Codes of the

contracting Powers vary very much as regards nomenclature, entails repetitions and needless obscurity.

It would be much more exact, therefore, to cause to appear the series of extraditable acts on the one side as it appears on the other, if the enumeration were on the one side as on the other in the series of chapters of the Penal Code in question, and so independent of the enumeration on the other side. We should thus be within sight of our end, which is to place beyond all doubt the sphere of extraditable offences. It is not at all necessary that the crime or crimes corresponding to the crime called deception on the one side shall be enumerated on the other side under the same clause as deception is denoted on the former side. It is quite sufficient, and corresponds to the purpose in view, if the sum total of the extraditable offences enumerated on the one side correspond to the sum total of the same on the other.

We must not lose sight of our principal aim in the interests of the acceleration of extradition procedure, which is to ensure that exact information as to whether a crime be an extraditable offence or not be furnished to the authorities of the two States between whom proceedings lie. By following the procedure above sketched we are enabled to attain this object. For instance, the Magyar Court, by a reference to the list of crimes specified, which correspond to those set out in our Penal Code, can at once determine whether or not an offence is extraditable or not. In such event the Magyar Court need not be at pains to examine into the question as to how such an act is qualified in terms of the law of the other State; it need only look at its own Magyar side of the specification of extraditable offences, and form its judgment accordingly. During the preliminary negotiations of extradition treaties it would be necessary to bring into harmony as accurately as possible the scope of those crimes which it is intended shall form the subject of extradition; if this were done, and the double enumeration above foreshadowed employed, the position of the authorities on both sides would be more easy and their labours considerably lightened.

Of course, the simple enumeration of the crimes themselves, even if arranged according to the above detailed method, would not be sufficient for the exact determination of the scope of extraditable crimes. Facts which supply no basis for extradition should be kept out. How this could

best be done is a minor point, but perhaps by reference to the chapter of the law or by a description thereof.

In my view this method has the advantage over that which would denote extraditable crimes in the treaty according to facts, since it is much shorter than the latter. This will be more obvious with respect to those crimes from whose scope no facts are to be excluded.

Finally, I conclude that it would be desirable that the extraditable acts be enumerated in double form in the treaties in keeping with the series of crimes appearing in the Penal Codes of the contracting Powers, and excluding facts which cannot serve as a basis for extradition, special attention being paid to the duty of supplying the authorities on both sides with exact and trustworthy information on all issues.