NEW FEATURES OF THE EXTRADITION ACT AND OTHER EXTRADITION ISSUES *

"I should like to repeat a comment which I made in R.v. Director of Prisons and anor. Exparte Morally (24.10.75, as yet unreported), that after almost sixteen years of independent status the Act of 1881 is still the statute which governs proceedings of this nature in this country. Much of the time spent during the argument was due to the antiquity of the legislation. We were told by learned counsel for the respondent that at a meeting of Commonwealth Law Ministers held in 1966 a model scheme of legislation for the surrender of fugitives as between members of the Commonwealth was considered and adopted. Several countries, we were told, have since enacted legislation to give effect to the scheme. After twelve years, the only steps we have taken, as counsel for the respondent said, is that "we are in the process of considering enactment". I find it difficult to understand the reason for the delay."

For my sins I was the hapless counsel to whom Chief Justice (as he then was) Smith referred in the quoted passage from a case[1] heard by the Supreme Court in 1978. To say that one is in the process of considering some kind of action is more often than not a diplomatic camouflage for inaction. In the instant case the deliberative process did not yield legislation until fourteen years later in 1991, and thus, to the justified annoyance of Chief Justice Smith and many others blessed with his appropriate sense of the national good, as important an aspect of this country's foreign relations as extradition was conducted for the first twenty-nine years of its independence on the basis of the U.K. 1870-1935 Extradition Acts and the U.K. 1881 Fugitive Offenders Act. In fact, as with so many other aspects of national life, it was our relationship with the U.S.A. that really prompted action, and it was not until negotiations for a new Extradition Treaty with the USA

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1. R.v. Commissioner of Correctional Services exparte Raphael Dillion and Errol Williams Suits Nos. M41 and 42/77.

commenced in 1981 that momentum for the drafting of the new legislation really developed, since the new Treaty was wholly inconsistent with the 1870 Extradition Act. The Extradition Treaty with the USA was signed in 1983 and entered into Force in 1991. Extradition traffic with other countries is by far the heaviest with the USA, and Jamaica is more a Requested than a Requesting State - a factor that ought to have an appropriate influence in the formulation of a policy, and the enactment of legislation, on extradition.

Jamaica thus inherited the U.K.'s dichotomous approach to extradition, whereby extradition to foreign States was governed by the Extradition Act and rendition to Commonwealth countries was effected under the Fugitive Offenders Act. In 1966 a Commonwealth Scheme for the rendition of fugitive offenders was adopted. The Scheme is non-binding, and Commonwealth countries are expected to enact legislation to give it effect. The non-conventional, non-reciprocal character of the Commonwealth Scheme has been criticized.[2] The Scheme (hereafter "the Commonwealth Scheme") was amended in 1990.

The 1988 U.K. Criminal Justice Act made fresh provisions for Extradition.

The U.K. enacted an Extradition Act in 1989 which consolidated enactments relating to extradition under the Criminal Justice Act, 1988, the Fugitive Offenders Act, 1967, and the Extradition Acts 1870 to 1935. The various U.K. Statutes, the Commonwealth Scheme and the Extradition Treaty with the U.S.A. are the relevant antecedents of the Act.

In this Paper I propose to examine some of the new features of the 1991 Extradition Act (hereafter"the Act") which was designed to reflect modern approaches to extradition. I will also comment on some other extradition issues. But I wish first to comment on the general approach to extradition and its place in the criminal process.

There is a body of opinion that sees extradition as merely part of an administrative process of acquiring custody over a

2. See Article by the author entitled, "The Commonwealth Scheme for the Rendition of Fugitive Offenders - a Critical Appraisal of Some Essential Elements, 1984 International and Comparative Law Quarterly Volume 33, Part 3, page 614.

fugitive, and thus de-emphasizes protection for the fugitive; on the other hand, another view sees the extradition process as part of penal law and emphasizes protective safeguards for the fugitive.[3]

While the general trend[4] appears to favour a liberal interpretation (the cooperative approach) of extradition treaties to give effect to their purpose of facilitating extradition, it would seem beyond argument that an extradition statute, being of a penal character, must be construed strictly and in favour of the liberty of an individual. It is well put by Lord Simon of Glaisdale: "It follows that the positive powers under the Act [i.e. to extradite] should be given a restrictive construction and the exceptions from those powers a liberal construction."[5]

Time does not allow for detailed and exhaustive comments on particular sections of the Act and other extradition issues. A relatively summary approach will be adopted.

A

Question of the Elimination of the Distinction in the Treatment of Commonwealth and Foreign States

The inherited dichotomous approach in the treatment of Commonwealth States and Foreign States created many artificial distinctions in extradition law relating to fugitives from Commonwealth States and those from so-called Foreign States. It has been said that "a fugitive offender is a fugitive offender is a fugitive offender; his character, status and the treatment he should receive should not depend on the status of the country from which he is fleeing and which has requested his surrender."[6] In some respects the regime for fugitive offenders from Commonwealth States was more favourable than it was for those from foreign States, while in other

3. See Sharon Williams - Extradition to a State that Imposes the Death Penalty - 1990 Canadian Yearbook of International Law p.117 at p. 118-122.

4. See Government of Belgium v Postlewaite (1987) 2 AER 985. It must be noted that treaties are not part of the law of Jamaica, unless they have been implemented by statute or unless, perhaps, their provisions reflect customary international law.

5. Regina v. Governor of Pentonville Prison, exparte Cheng (1973) 2 AER 204, 217.

cases, the situation was the opposite. The Paper will highlight this phenomenon.

The expectation was that the new Extradition Act would provide a single, integrated unified regime for extradition. But, alas, what we have is a single Act which, while for the most part establishes a single regime, yet retains certain distinctions between Commonwealth and foreign States. The substantive law in the Act is essentially the same for both Commonwealth and Foreign States, for example, the several restrictions on surrender in Section 7. But the distinction between the two types of States is still retained in that the definition of an extradition offence in respect of a Commonwealth State is different from the definition of an extradition offence in respect of a foreign State.

By virtue of Sections 3 and 5, the Minister designates Commonwealth States, and an extradition offence is one which is, inter alia, an offence that is punishable with imprisonment for a term of two years or any greater imprisonment. This follows the preferable "length of sentence" approach in Section 9 of the 1881 Fugitive Offenders Act, as distinct from the "list of offences" approach of the 1970 - 1935 U.K. Extradition Acts. The length of sentence approach is also reflected in the Model UN Treaty on Extradition contained in the 1990 UN General Assembly Resolution 45/116.

By virtue of Sections 4 and 5 the Minister may by order apply the provisions of the Act to a foreign State with whom an extradition treaty has been concluded, and an extradition offence is, inter alia, an offence which is provided for by the extradition treaty with that State. Thus one has to see how the treaty defines an extradition offence; it may or may not utilize the length of sentence approach, as does the Extradition Treaty with the U.S.A. One could argue, however, that if the Government of Jamaica wants uniformity it will ensure that its extradition treaties utilize the length of sentence as distinct from the list of offences approach. In any event such a

6. Supra Note 2 at page 625; for other comments on the need for the reform of Jamaican Extradition Law, see, "Extradition: Jamaican Case Law and the Need for Reform", Patrick Robinson. West Indian Law Journal, May 1978 page 15.

policy should not be difficult to achieve since most modern extradition treaties use the length of sentence approach. The 1990 Commonwealth Scheme employs that approach. It is submitted, however, that the simpler and better approach is that taken in Section 2 of the 1989 UK Extradition Act, which, while maintaining the distinction between Commonwealth and foreign States, adopts a unified definition of an extradition crime in respect of both types of States as one which, inter alia, is punishable with imprisonment for a term of 12 months of any greater imprisonment.

General Restrictions on Extradition

It is in the area of restrictions on extradition that the Act covers new ground which is most protective of the liberty of the fugitive. It is significant that most of the several restrictions on extradition constrain equally the Minister in the exercise of his discretion as to extradition under Section 12, the Court of committal which conducts the extradition hearing to determine whether to commit the fugitive to await Extradition under Section 10 (5), and the Supreme Court on an application for habeas corpus under Section 11. All these restrictions are reflected in Article 3 of the U.N. Model Treaty on Extradition, as well as the Commonwealth Scheme. Section 7 provides for eight restrictions on extradition, six of which are new. Of the new restrictions, five are mandatory, and one is discretionary.

B.

Sections 7 (b) and (c)

These Sections prohibit extradition where it appears to the Minister, the court of committal or to the Supreme Court on an application for habeas corpus -

> (b) "that the request for extradition, though purporting to be on account of the extraditable offence, is in fact made for the purpose of prosecuting him or punishing him on account of his race, religion, nationality or political; or

(c) that he might, if extradited, be denied a fair trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions".

These provisions convey the developments that occurred in political and legal thought following atrocities of the Second World War. The concept of non-discrimination is reflected in the 1948 American Declaration on the Rights and Duties of Man; the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the 1966 U.N. Covenant on Civil and Political Rights, the 1969 American Convention on Human Rights and the 1981 African Charter on Human and Peoples Rights.

The concept of non-discrimination, which is also reflected in the 1990 Commonwealth Scheme, is of fundamental importance to Jamaica, bearing in mind its colonial history and the fact that the Jamaican diaspora includes several countries where discrimination on the basis of race still exists. The Jamaican Government insisted on corresponding provisions in its Extradition Treaty with the USA. (See Article 3 (2) (b) and (c). It is encouraging to see that a challenge to extradition was recently made, albeit unsuccessfully, on the ground that, if extradited to the USA, the fugitive might not receive a fair trial.[7]

7. R v Superintendent of Prisons General Penitentiary exparte Richard Daley Suit No. 44/93; in that case, the Supreme Court; in dismissing the ground of appeal based on Section 7 (1) (c) applied the following test of Lord Parker set out in Fernandes v Government of Singapore and others (1971) 2 AER 691: "has the applicant satisfied us that there are substantial grounds for thinking that he might if extradited be dealt with in a particular way?" An appeal is pending in this case.

C.

Section 7 (1) (a)

This Section, which prohibits extradition for offences of a political character, is not new. What is new is SEction 7 (6) which in effect provides that the non-extraditability of offences of a political character does not apply to an offence which is extraditable pursuant to a multilateral treaty -

(i) "to which Jamaica and the approved States are parties;

(ii) the purpose of which is to prevent or repress a specific category of offences; and

(iii) which imposes on States an obligation either to extradite the person sought or to submit the matter to the competent authorities for decision as to prosecution".

This provision conforms with the modern trend to treat as non-political, offences set forth in aut dedere aut judicare treaties such as the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

D.

Section 7 (1) (d)

This Section prohibits extradition if the offence of which the fugitive is accused is statute barred in the Requested State. Article VI of the Extradition Treaty with the USA also prohibits extradition in similar circumstances.

The Commonwealth Scheme and the 1989 UK Extradition Act do not prohibit extradition on the ground of lapse of time, no doubt because the common law as a general rule does not acknowledge the concept of statute barred crimes. Article 3 (e) of the Model UN Extradition Treaty probibits extradition if the offence is barred on that ground under the law of either the Requested or Requesting State.

E.
Section 7 (1) (e)

This Section prohibits extradition of a person whose extradition is prohibited by any law in force in Jamaica. I am not aware of any such law, except, of course, the Constitution, whose provisions will, generally, prevail over any conflicting law. The provision appears to have been included ex abundanti cautela.

F.
Section 7 (2)

This Section prohibits extradition for an offence when the fugitive if charged with that offence in Jamaica would be entitled to be discharged under any rule of law relating to previous acquittal or conviction. This provision is in conformity with the 1989 U.K. Extradition Act, the Commonwealth Scheme and the U.N. Model Treaty on Extradition. However, it is not reflected in the Extradition Treaty with the USA, since the USA insisted that it only recognized the double jeopardy rule in wholly domestic situations; it did not recognize that rule as having an international aspect; Jamaica was not able to persuade the USA to include this rule, which is reflected in Article 14 (7) of the U.N. International Covenant on Civil and Political Right, which, concededly, has been construed by some authorities as being confined to trials within a single jurisdiction.

Interestingly, the Draft Statute for an International Criminal Court[8] prepared by the International Law Commission and presented to the present forty-ninth session of the United Nations General

8. See Report of the International Law Commission on the work of its forty-sixth session. Official Records - Forty-Ninth Session Supplement No.10 (A149/10).

Assembly, makes provision in Article 42 for the non bis in idem (double jeopardy) rule on a basis that does not confine its application to trial within a single jurisdiction.

G.

Section 7 (3)

This Section reflects the speciality rule; it prohibits extradition unless there is an assurance from the requesting State, or its law provides, that the person extradited, will only be tried for certain offences committed prior to his extradition without being given the opportunity to leave the Requesting State.

The speciality rule is a cornerstone of the law of extradition; it is reflected in the 1989 U.K. Extradition Act, the Commonwealth Scheme and the U.N. Model Treaty on Extradition. Significantly, while it was included in the 1870 Extradition Act which dealt with foreign States, it was not included in the 1881 Fugitive Offenders Act, perhaps on the basis that as between parts of Her Majesty's dominions extradition was a "family domestic matter", and thus the required assurance was not needed.

H.

Section 7 (5)

This Section empowers the Minister to refuse to extradite a fugitive on the ground that the fugitive is a citizen of Jamaica. The provision does not prohibit the extradition of citizens; it gives a discretionary power to refuse their extradition - an approach that is consistent with the Commonwealth Scheme, the UN Model Treaty on Extradition and the Extradition Treaty with the USA. Many States, particularly those in continental Europe and Latin America, do not extradite their nationals. The 1989 U.K. Extradition Act does not provide any discretion to refuse the extradition of a national.

It seems to me, however, that unless Jamaica intends to become a refuge for criminals, steps should be taken to ensure that where Jamaica refuses to extradite a national, the case is submitted to the Director of Public Prosecutions for a decision as to prosecution. Since the offence would have been committed outside Jamaican territory, extra-territorial jurisdiction is involved, and legislat

is required.

Article VII (3) of the Extradition Treaty with the USA requires that, where a person is not extradited on the ground of nationality, the Requested State, if it has jurisdiction over the offence, shall submit the case to its authorities for a decision as to prosecution. The position is that, absent legislation, there is at present no jurisdiction in Jamaica over such an extra-territorial offence.[9] Article 9 (2) of the U.S.A./Mexico Extradition Treaty has a provision similar to Article VII (3) of the Extradition Treaty with the U.S.A.

Significantly also,Article 4 (2) (a) (ii) of the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances obliges a Party to take the measures necessary to establish its jurisdiction over the proscribed offences when the alleged offender is present in its territory and it does not extradite him to another Party on the ground that the offence was committed by a national. Jamaica will shortly be acceeding to this Convention, and will therefore have to enact legislation to give effect to this treaty obligation. It would seem to me that such legislation should relate not only to drug offences, but to any case in which extradition is refused by Jamaica in relation to any extraditable offence on the ground that the person is not a national.

I.

ABDUCTION

In 1990 Humberto Alvarez Machain, a Mexican national was forcibly kidnapped from his medical office in Guadelajara, Mexico and flown to Texas, where he was arrested by U.S. D.E.A. Officials. D.E.A. agents were responsible for his abduction. Alvarez Machain had been indicted in the USA for participating in the kidnap and murder of a US DEA special agent and a Mexican.

9. For a decision on Jamaica's lack of extra-territorial jurisdiction in respect of murder, see R V Commissioner of Correctional Services, exparte Orville Cephas No. 2 14 JLR p.72.

The U.S.A. Supreme Court [10] held that, notwithstanding the abduction, Alvarez-Machain could be tried in the U.S.A. Mexico argued that the abduction was a breach of the USA/Mexico Extradition Treaty. The Supreme Court held that the abduction was not in contravention of that Treaty, since it neither in express nor implied terms prohibited abduction, and that all that the Treaty did was to provide for certain specified procedures to be followed pursuant to an extradition request.

Justice Stevens, joined by Justices Blackman and O'Connor, wrote a strong dissenting opinion.

The Supreme Court referred to the history of the negotiation of the USA/Mexico Extradition Treaty, and pointed out that language which would have prohibited trials of abducted persons had been considered and drafted in 1935 by the Havard Law School, but was not included in the Treaty. The language which is taken from Article 16 of the Draft Convention on Jurisdiction with Respect to Crime, reads:

> "In exercising jurisdiction under this Convention no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by by such measures".

Harvard Research in International Law, 29 American Journal of International Law 442 (Supp. 1935).

It seems to me that, in view of the allegations of abduction of Jamaicans from Jamaican territory by USA agents in the past and the likelihood of recurrence of such conduct, it would be wise for Jamaica to seek an amendment of its Extradition Treaty with the USA to include in it the above quoted provision, or something akin to it. The principles of international law violated by the USA in the abduction are sovereignty and territorial integrity. Small,

10. For a report of this case, see 31 International Legal Materials (I.LM) p.900, and for a discussion of the case, see Lowenfield, US Law Enforcement Abroad. The Constitution and International Law (1990) 84 American Journal of International Law (AJ I.L) 444; Kidnapping by Government Order: a Follow-up (1990) 84 A.J.I.L. p.712

militarily weak countries like Jamaica are always prone to a violation of their territorial integrity in circumstances similar to the Alvarez-Machain case. The maxim, male captus bene detentus should not be allowed to have any application in the relationship, extradition or otherwise, between Jamaica and another State.

J.

Section 8

The authority to proceed is roughly equivalent to the order of the Secretary of State issued under Section 7 of the 1870 Extradition Act to a police magistrate signifying that a requisition for surrender has been made and requiring him to issue a warrant for the fugitive's arrest.

It is significant that this Section, which corresponds to Section 7 (4) of the 1989 U.K. Extradition Act, empowers rather than requires the Minister to issue an authority to proceed on receipt of an extradition request. Thus, although the request may be properly made pursuant to a treaty, the Minister may decide not to act upon it. This emphasizes that extradition is essentially a political, executive act at the start (the authority to proceed under Section 8 (3)) and at the end (the Minister's power to order extradition under Section 12 (1)) with an intervening judicial process to ensure certain safeguards for the fugitive. Of course, the Minister's refusal to issue an authority to proceed, which could be a reflection of Jamaica's foreign relations with its treaty partner, could be a breach of the relevant extradition treaty.

K.

Section 10 (5)

This Section provides for the standard of prima facie evidence for the making of an order committing the fugitive to await his extradition following an extradition hearing by a Resident Magistrate. The prima facie test is reflected in the 1870 Extradition Act and 1989 UK Extradition Act.

It must be noted, however, that this test differs from the standard of proof set by the 1881 Fugitive Offenders Act which in Section 5 called for evidence that "raises a strong or probable

presumption that the fugitive committed the offence". The case of R v Director of Prisons exparte Morally (1975) 14 J.L.R.1, followed the decision in Armah v Government of Ghana [1966] 3 AER 177, and confirmed that the standard of "strong and probable presumption" was higher than the prima facie test. Significantly then, under the old law fugitives from the Commonwealth received greater protection than those from foreign States in this respect.

An important development is that the Commonwealth Scheme provides for the prima facie test, but allows for its replacement on the basis of arrangements between Commonwealth States whereby the fugitive may be committed to await extradition if -

a. "the contents of the record of the case received under the Annex whether or not admissible in evidence, under the law of the requested party, and any other evidence admissible under the law of the requested part, are sufficient to warrant a trial of the charges for which rendition has been requested;

b. the fugitive's return is not precluded by law, but otherwise will order the fugitive to be discharged".[11]

Jamaica vehemently opposed the replacement of the prima facie test by the simple production of the record of the case. The proposal for the replacement was advanced at several Commonwealth Law Conferences by the UK, Australia and some other countries, evidently, to achieve conformity with the 1957 European Convention Extradition. The compromise solution was to entrench the prima facie test in the Scheme, but also Commonwealth States to make arrangements for its replacement by the transmittal of the record of the case in accordance with the provisions of Annex 3. Can you imagine the outcry there would be if Jamaica agreed to extradite persons on the basis of the transmittal of the record of the case?

While the 1989 UK Extradition Act provides for the prima facie test in Section 9 (8), it also allows in Section 3 (5) for the return of a fugitive without the requesting State having to make out

11. See Clause 19 (2) and Annex 3 of the Commonwealth Scheme.

a prima facie case - a requirement of the European Convention on Extradition. The provision met with great opposition in the UK Parliament. An order in Council allowing return of a fugitive on this basis is subject to the negative annulment procedure in either House.

L.
Sections 11 (2) and 12 (3)

These provisions empower the court of committal to discharge the fugitive where in a certain set of circumstances it would be unjust or oppressive to extradite him. In the same set of circumstances, the Minister is obliged not to make an order for his extradition.

These provisions are substantially based on Section 10 of the 1881 Fugitive Offenders Act. Significantly, there were no corresponding provisions in the 1870 Extradition Act, and thus fugitives from Commonwealth States enjoyed a safeguard that was not applicable to fugitives from foreign States - another artificial distinction with which the Act has dispensed.

M.
Section 12 (1)

This Section empowers the Minister to order the extradition of a fugitive who has been committed by a Resident Magistrate to await his extradition. It is, of course, not a new provision. Significantly, Section 12 (6) of the 1989 UK Extradition expressly grants the fugitive the right to apply for leave to seek review of the equivalent order made by the Secretary of State under Section 12 (1) of that Act. The fact that there is no such express provision in the Act does not mean that the Minister's order under Section 12 (1) of the Act is not subject to judicial review by the Jamaican courts.

Provisions equivalent to Section 12 (1) of the Act existed in Section 11 of the 1870 Extradition Act and Section 6 of the 1881 Fugitive Offenders Act.....

I am not aware of any case in which the Minister's order of extradition has been challenged, although representations have in the past been made to the Minister not to make the order on certain grounds. But it is clear that, on the basis of the application of the common law principles of administrative law, the Minister's decision to order extradition, being the exercise of an administrative discretion, is amenable to review on the ground of irrationality, illegality or procedural impropriety; and that the Wednesbury principles[13] will apply to determine irrationality. It has also been held that the courts will apply the principles of reasonableness more strictly where a Minister's discretionary power touches on the right to life. Lord Templeman in Rv Home Secretary exparte Bugdaycay said, in relation to the exercise of the power under the Immigration Act to refuse leave to enter or remain in the U.K. "In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."[14] Thus, the exercise of the discretion to order extradition under Section 12 (1) would certainly be reviewable by the Jamaican courts in relation to the death penalty in Section 12 (4).

N.
Section 12 (4)

This Section provides:
"The Minister may decide to make no order under this Section in the case of a person accused or convicted of an extradition offence not punishable with death in Jamaica if that person could be or has been sentenced to death for that offence in the approved State by which the request for his extradition is made; and for the purposes of this subsection the Minister may take into account any assurance

12. Counsel of Civil Service Unions and Others v Minister for the Civil Service [1984] 3 AER 935.

13. Associated Proomcial Picture House Ltd. v Wednesbury Corporation (1948) 1 K.B. Rep. 223.

14. (1957) 1 AER 940 at 956 j; for a discussion of the issue see Sharon Williams, supra Note 3 at pages 135 - 137.

given by the negotiating State that the death penalty, if imposed, will not be carried out."

A corresponding provision is to be found in Annex 2 of the Commonwealth Scheme; Commonwealth States have an option of applying this Annex. A similar provision is also to be found in Article V of the Extradition Treaty with the USA.

It may be possible, particularly following the amendment to the Offences Against the Person Act which distinguishes between capital murder, which attracts the death penalty and non-capital murder which attracts life imprisonment, for the USA to request extradition for an offence that attracts the death penalty in that country, but does not have the same penalty in Jamaica.

In Earl Pratt and Ivan Morgan v The Attorney General [15], the Privy Council held that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute inhuman or degrading treatment or punishment."
This judgment followed the decision of the European Court of Human Rights in Soering v the United Kingdom[16] that the return of Soering by the UK to the USA where he would face the death row phenomenon constituted inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights.

The question that arises in this: Could it be successfully argued that Jamaica's return of a fugitive to the USA to face the death row phenomenon constitutes inhuman or degrading treatment in breach of Section 17 of the Constitution.[17] Is the scope of Section 17 of the Constitution wholly intra-territorial, or is it also extra-territorial? If the Soering decision were followed by

15. (1993) 4 AER p. 769.
16. (1989) 161 Eur. Ct. H.R. (Ser.A)
17. For an analysis of this question in relation to the Canadian Constitution, see Sharon Williams' article Supra Note 3.

the Jamaican Courts, it is very possible that they would give an affirmative answer to the question. If the surrender to the USA in the hypothetical situation would breach Section 17 of the Constitution, then obviously the extradition could not take place.

Another question that arises is: is the Minister's decision to order the extradition of a person for an offence that does not attract the death penalty in Jamaica, but which attracts such a penalty in the Requesting State, reviewable by the Courts on the basis of its reasonableness in a particular set of circumstances? It must be, particularly in the light of Section 12 (4) of the Act.

O.
Section 13

This SEction allows for an application to be made to the Supreme Court for the discharge of the fugitive on the ground of delay in extraditing him. In general terms there is a corresponding provision in Section 17 of the 1881 Fugitive Offenders Act, but no corresponding provision in the 1870 Extradition Act. This is another example of the former dichotomous regime which the Act has for the most part dispensed with.

P.
Section 17

The simplified extradition procedure is a feature of modern extradition law; it allows for the extradition of the fugitive in the absence of formal extradition proceedings if he consents in writing to this procedure. This procedure is to be found in Clause 6 of the Commonwealth Scheme, Article 6 of the UN Model Treaty in Extradition, Article XV of the Extradition Treaty with the USA and Section 14 of the 1989 UK Extradition Act; in relation to the latter Act, however, it would appear that the right to waive relates not to the committal proceedings, but only to the right to apply for habeas corpus.

This simplified procedure is certainly unobjectionable, if there are adequate procedures to ensure that the fugitive's consent to dispense with formal extradition proceedings is genuine and

based on an informed understanding of its significance. In this regard Section 17 (2) of the Act could benefit from the language in Article 6 of the Commonwealth SCheme by requiring the magistrate to be satisfied that the fugitive understands the significance of the consent to be extradited without formal extradition proceedings.

Q.
Section 21

This Section makes the Act applicable to offences committed before the 8th July, 1991. In this respect it mirrors the retroactive application of the Extradition Treaty with the USA. Article XVIII of that Treaty renders it applicable to offences committed before its entry into force "if at the time of the act or omission comprising the offence such act or omission constituted an offence under the laws of both States." This provision makes the extradition system retroactive.But the / acts must have constituted an offence at the time of commission. Thus there is no breach of Section 20 (7) of the Constitution which prohibits retroactivity in relation to crimes and penalties.

Article XVIII of the Extradition Treaty with the USA therefore makes that Treaty applicable to acts which prior to its entry into force in 1991 were not extraditable but which became extraditable on its entry into force. In Rv Director of Public Prosecutions, the Commissioner of Police, exparte Daphne Schwartz,[18], the Supreme Court held that conspiracy to traffic in drugs was not an extraditable offence, since conspiracy was not on the list of extradition crimes in the 1970 Extradition Act. This decision was found to have been wrongly decided by the Privy Council in U.S. Government v Bowe.[19] However, the institution of the length of sentence approach in the Act and the Extradition Treaty with the U.S.A. renders any offence committed prior to the Treaty's entry into force extraditable if it attracts a sentence of twelve months or more.

Concern was expressed by the Bar about Article XVIII, and consequently the Jamaican Government arrived at an understanding with the USA that it would only be applied to serious offences.

18. 1976 24 WIR p.491
19. (1989) 37 WIR p. 9

R.

PRE-INDEPENDENCE TREATIES

The case of Daphne Schwartz[20] and R v Commissioner of Correctional Services exparte Fitz Henry [21] settled the basis on whioch pre-independence U.K. Extradition Treaties apply to independent Jamaica.[22]

Naturally, following the enactment of the 1991 Extradition Act, it would be foolish for Jamaica to seek to continue to apply pre-Independence treaties concluded by the U.K. with other countries, since those treaties, formulated on the basis of the 1870-1935 Extradition Acts would be inconsistent with the modern developments in the 1991 Extradition Act.

Jamaica continues to receive enquiries from European countries with whom the UK had concluded Extradition Treaties in the second half of the 19th century as to the application of those treaties to Jamaica. Some of these countries insist that the old treaties apply to Jamaica today. The bases for the continued application of a pre-Independence Extradition are -

(a) the Treaty must have been applied by the U.K. to colonial Jamaica;

(b) Both Jamaica and the State seeking the application of the treaty must either expressly or by their conduct have agreed to its continued application.[23]

It would seem that if extradition is to take place as between those European countries and Jamaica, it will have to be on the basis of a new Extradition Treaty which is consistent with the 1991 Extradition Act. There would hardly be any point in Jamaica, either expressly or by conduct agreeing to the continued application of a pre-Independence Treaty that could not be implemented by the 1991 Extradition Act.

20. 1976 24 WIR p. 491. 15 J.L.R. p. 32

21. 14 JLR p. 288

22. For a discussion of this issue, see Patrick Robinson's article supra Note 6 p. 15-21.

In this regard, Section 4 (2) of the Act is troubling and confusing; it preserves instruments made under any enactment to give effect to treaties made prior to the 8th July, 1991. Why preserve an instrument such as the Order in Council which in 1935 applied the 1931 UK/USA Treaty to Jamaica? Those instruments would relate to treaties that are no longer consistent with the 1991 Extradition Act. Since those instruments would be preserved by Section 4 (1) of the Jamaica (Constitution) Order in Council, 1962, and since they are inconsistent with the new policy of the 1991 Extradition Act, they should in fact be repealed by Section 23 of the Act.

CONCLUSIONS

1. In general the Act has succeeded in establishing a single, uniform and integrated regime for extradition in relation to all fugitive offenders, whether from Commonwealth or non-Commonwealth States. The only substantive distinction made by the Act between the two kinds of States is in relation to the definition of an extradition crime. If this distinction is eliminated and treaties are required for an extradition relationship with all States, the Act could then apply to all States without the need to deal separately with Commonwealth and non-Commonwealth States. Extradition is an important aspect of a country's foreign relations, and as such, should not depend on an informal, non-binding Scheme, but rather should operate on the basis of bankable assurances given in a treaty. If Jamaica extradites a person to a Commonwealth State that it has designated pursuant to the Act, it ought to do so on the clear assurance that that State would also act on on an extradition request from Jamaica. The Commonwealth Scheme does not give that assurance,[24] and some Commonwealth States practise selective designation, that is, they do not designate all Commonwealth States for the purpose of their extradition relations. No doubt it is for that reason that some

23. See Article 24 of the Vienna Convention on Succession of States in Relation to Treaties.

24. For criticisms of the Commonwealth Scheme, see Article at Note 3.