

ABSTRACT

In the context of this study, the interrogation “*dedere aut judicare?*” holds three significances.

Firstly, it enquires whether the Portuguese penal system embraces the principle – usually attributed to Hugo Grotius under the formula “*aut dedere aut punire*” – according to which a request for extradition should mandatorily lead either to the actual extradition of the individual sought or to the undertaking of penal proceedings against him/her for the acts that caused the request. The author concludes that this principle is in force in the Portuguese legal system, since it stems – among other sources – from the basis of jurisdiction commonly known as “vicarious administration of penal justice”, provided for in the Portuguese Penal Code.

In the abstract, this rule ascribes the power (and in fact the duty, because Portuguese penal procedure abides by the legality principle) to exert the *ius puniendi* over any facts regarding which the request for extradition has been denied; however, this is not always possible. Indeed, some circumstances embedded in certain grounds for refusal of extradition presuppose the impossibility of exerting that power. That is the case, for instance, of the dual criminality rule: if the facts do not constitute an offence under Portuguese law, not only extradition must be denied, but also the State is prevented, by virtue of the principle of legality (*nullum crimen sine lege*), from assessing the criminal liability of the person sought. Since they preclude both elements of the Grotian disjunctive obligation, those circumstances are given the designation “*nec dedere nec judicare*”. All the existing grounds for refusal of extradition are assessed and all *nec dedere nec judicare* situations are identified, thereby providing a clean-cut picture of the actual scope of jurisdiction based on the vicarious administration of penal justice.

Secondly, the question “*dedere aut judicare?*” intends to open the discussion on whether the “*judicare*” is a mere consequence of, and subsidiary to, the refusal to extradite, or, at least in some instances, an actual alternative, placed in the same footing of the “*dedere*”, thus affording

the judiciary a real option between them (*sc.*, a decision the outcome of which is not predetermined and hence imposed by the law). The author concludes that the vicarious administration of penal justice does not entail such an option. Given that this basis of jurisdiction presupposes the absence of a relevant connection between the facts and Portuguese penal law, and that its rationale lies, exclusively, in the “compensation” of the unsatisfied requesting State – whose interests have been actually jeopardised by the offence – for not obtaining the extradition of the individual, it would be a paradox that the request could be refused with the sole purpose of trying the person sought.

Nevertheless, a true option between “*dedere*” and “*judicare*” stems from the norms establishing that extradition may be refused for facts that are, or that shall or can be the object of criminal proceedings in Portugal. This regime is applicable in the cases where Portuguese penal law has been breached (given the presence of a relevant connection linking it with the facts) and refusal of extradition is not compulsory (since no grounds for mandatory refusal are met in the case). The decision required by the said norms is labelled as “*dedere aut judicare stricto sensu*”, so as to distinguish it from other expressions of the principle *aut dedere aut judicare*.

Finally, the question “*dedere aut judicare?*” points to the need for identifying criteria that might be mobilised while deciding for either course of action in situations of “*dedere aut judicare stricto sensu*”. Those criteria do not result explicitly from the law, and the author concludes that there is a principle of indeterminacy of the relevant factors. Such principle is considered to be desirable, as it keeps the decision permeable to any important element that might arise on a case-by-case basis. In any event, two main sets of criteria are put forward: the first relates primarily to the notion of “good (interstate) administration of penal justice”, encompassing factors such as the predominant location of the evidence and the deterrent effectiveness of undertaking the proceedings in a given *forum*; the second is oriented to the interest in the rehabilitation of the individual in case of conviction, and takes into account aspects like the predominant location of his/her family and social circles, as well as the possibility of conducting certain activities while imprisoned.

The core normative basis of the study is the Portuguese act governing extradition: Law no. 144/99, of 31 August, on international judicial cooperation in criminal matters. The primacy attributed to this

legal instrument contrasts bluntly with the fact that it is subsidiary to the provisions of international treaties, conventions and agreements binding on the Portuguese state, as well as to the provisions emanated from the institutions of the European Union and the organs of international organisations to which Portugal is a part. However, the said Law constitutes the embodiment of Portuguese legal culture on extradition. In fact, while, *e.g.*, an international convention involves, by definition, the conciliation of different viewpoints on the same subject matter, a national statute is unilateral in a sense, bestowing it with a *paradigmatic character*. Besides, at a pragmatic level, it regulates issues on which the international legal instruments (typically, much less detailed) are silent, and it governs in an exclusive manner the cooperation of Portugal with numerous states.

In any event, in order to provide a broader picture of the decision *dedere aut judicare* in the Portuguese legal system, the study assesses, if only briefly, international law (including the general and conventional rules on extradition, as well as those on the surrender of individuals to the International Criminal Court) and, more thoroughly, the law of the European Union (*sc.*, the rules applicable to the execution of European arrest warrants).

Keywords: *aut dedere aut judicare*; extradition; surrender; jurisdiction in criminal matters; international criminal law; European arrest warrant; International Criminal Court