

## THE LEGAL FRAMEWORK FOR EXTRADITION IN PERU

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### **The Constitutional Framework**

The Constitution provides a specific framework with provisions directly governing this institution and a framework of basic rights that supplements it.

### **Specific legal framework:**

This is contained in article 37 of the Constitution, which reads:

#### Article 37. Extradition:

*Extradition may be granted only by the executive branch upon the recommendation of the Supreme Court, in compliance with the law and treaties and based on the principle of reciprocity.*

*Extradition will not be granted when it is determined that it is sought for the purpose of persecution or punishment based on religion, nationality, opinions or race.*

*Persons sought for political crimes or related acts will not be extradited. Acts of terrorism, mass murder, and genocide are not classified as such.*

This article gives us the following guidelines:

Extradition is an act of government. It is granted by the executive branch. No other branch of government may grant it.

The act of extradition is subject to verification of legality. It is not an omnibus power, as it is subject to the requirement of legality, i.e. the provisions of law and treaties. It is granted only with the prior opinion of the Supreme Court. The "mixed system" applies to the power to grant extradition: it is granted only by the executive branch, with the prior opinion of the Supreme Court. The characteristic of this system is that the opinion of the judiciary [1], while binding, is binding only if it is contrary to extradition.

It establishes the sources:

- Treaties.
- The principle of reciprocity.

It declares that extradition may be granted only pursuant to law, for which reason:

- It prohibits persecution for non-legal reasons.
- It excludes persecution for political crimes or related acts.

- It declares that Peru does not consider genocide, mass murder or terrorism as political crimes.

### **Legal framework of basic rights**

Among the fundamental rights of individuals, the following are of special significance:

The principle of penal legality. No one may be tried or convicted for an act or omission that at the time it was committed was not previously qualified in law, expressly and unequivocally, as a punishable offense, nor may any person be punished with a penalty not stipulated in the law. It finds its basic application in the principle of double criminality, which applies to active and passive extradition.

The principle of innocence: all persons are considered innocent until they have been found guilty by a court. This relates to the need to demonstrate that there is reasonable and probable cause for extradition, especially if guilt is not discussed in the extradition proceeding.

Protection of the right to liberty. No one may be detained except by a written and substantiated warrant issued by a judge, or by the police authorities in the case of *flagrante delicto*. This is linked to extradition, because extradition is generated by the judiciary. As well, in the case of passive extradition only the judge can issue an arrest warrant. This provision must be treated with care, as article 523 (1.b) referring to passive extradition will allow the provisional arrest of a person sought by the authorities of a neighboring country, even if the Peruvian judge has not issued a warrant.

In reality, the constitutional provision banning the offer of extradition has no practical application in this case, as Peru's neighboring countries are bound by treaties, either bilateral or multilateral, that require a petition for preventive arrest or extradition by the requesting State, but not the offer of extradition.

Physical and moral protection of the individual. No one may be the victim of moral, mental or physical violence, or subjected to torture or inhumane or degrading treatment. If there is evidence of possible acts that affect a person morally, physically or mentally, extradition may be denied.

The right to communicate. A person may be held incommunicado only when necessary to clarify a crime, and as extradition does not in itself seek to clarify crimes but rather to guarantee the presence of the person, the person wanted for extradition may not be treated in this way.

In addition, we find other guidance in the principles and rights of the jurisdictional function contained in article 139: there is a sole and exclusive right to jurisdictional function, which excludes the possibility of accepting an extradition

request issued by a non-judicial body or by bodies parallel to the judiciary, or exceptional courts.

Independence in exercise of the jurisdictional function, which enshrines the prohibition on government interference in jurisdictional questions. The executive branch is prohibited from interfering in an extradition issue until the time it is required to intervene. Nor may the executive branch of the requested State be asked to intervene in the decision of the jurisdictional body of its State.

Observance of due process and jurisdictional protection. Extradition may be declared null and void if the rules of due process have not been followed.

The principle of no conviction in absentia. Extradition for purposes of execution of a sentence may only be granted if the person has been convicted in his presence.

The prohibition on double jeopardy. This provision requires denial of an extradition request if it involves a second prosecution for the same deeds. It also allows recognition of *res judicata*, if a previous extradition request was denied [2]. A further application arises when extradition is not consummated by the removal of the wanted person: in such cases, a second request will not be accepted.

This constitutional framework has two applications:

1. It serves as a framework for negotiating extradition treaties.
2. It serves as a source of guidance for the pursuit of the extradition procedure.

In the first case, extradition treaties are negotiated on general grounds, leaving procedural aspects to the respective domestic legislation.

In the second, even when following pre-established guidelines, there are substantial aspects that will influence the decision and even the process itself, leading in particular to nullification even if this is not contemplated in the specific rules governing the extradition process.

### **Domestic legal framework**

This is set out in the provisions of Book VII, "International Judicial Cooperation", of the Code of Penal Procedure.

### **Applicable rules**

CPP Article 508 specifies the rules applicable to extradition and governing the relations of the Peruvian authorities with foreign authorities:

1. Treaties.

## 2. Principle of reciprocity, within a framework of respect for human rights

From the foregoing we may draw the following conclusions:

a) The treaty prevails and only in the absence of a treaty does the principle of reciprocity come into play. Consequently, the conditions of acceptability, requirements, prohibitions and other general aspects are governed by the provisions of the treaty, leaving procedural aspects to domestic law. However, domestic law may not impose stricter requirements than those established in the treaty. Article 513 (2) provides that in the absence of a treaty, extradition proceedings will rely on the principle of reciprocity.

b) To say that the principle of reciprocity operates within a framework of respect for human rights is not to say that treaties are exempt from such respect. Treaties are negotiated on the basis of respect for human rights and there are numerous articles providing to this effect (requirement for double criminality to protect liberty when the deed is not considered a crime in the legislation of the requested State, prohibition of the death penalty, exclusion of cases based on extralegal grounds such as prosecution by reason of ideas, religion, race etc.).

Nevertheless, there is a technical deficiency in the drafting of article 508, when it says that "if there is a treaty, its rules shall govern the process of international judicial cooperation. Notwithstanding this, the rules of domestic law, and in particular those in this code, shall be used to interpret them." In fact, the ordinary internal rules do not interpret a treaty: treaties are interpreted in accordance with their own provisions which have been previously negotiated to make them compatible with both country's laws. We may note that article 27 of the Vienna Convention on the Law of Treaties provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

The limitations are those set by the rules that comprise its public order, which must have already been foreseen in the treaty (for example the prohibition on conviction in absentia – which is part of the internal public order – is already contained in treaties) and if they are not, then they are limiting norms, not because they interpret the treaty but because they are part of the internal public order which must not be violated. In general they are rules that guide the protection of human rights, or the requirement, for example, for due process vis-à-vis the wanted person, guaranteeing his physical safety, which may be requested because our laws so permit. This may not be contained in the treaty but can be invoked as a request for assurances and it must be answered with the guarantee that extradition will not be used as a mechanism of political persecution but as a mechanism for enforcement of justice.

Article 513 reads as follows: "When extradition, in the absence of a treaty, is based on the principle of reciprocity, the Prosecutor General and the Ministry of External Relations shall advise the judiciary of cases in which that principle has

been invoked by Peru and accepted by the foreign country involved in the extradition procedure, as well as those cases in which the foreign country has invoked it and Peru as accepted it."

The following consideration is relevant here: article 37 of the Constitution declares that extradition is granted in compliance with laws and treaties and the principle of reciprocity. This brief reference to the principle of reciprocity has allowed it to be invoked without the need to cite a precedent. When it says that extradition is granted only in compliance with treaties and according to the principle of reciprocity, it is recognizing reciprocity as a legal source complementary to treaties, so that the country may surrender the wanted person on the understanding that it will receive similar cooperation when it so requests.

The wording of article 513 has a bearing on a practice of seeking a precedent that may not exist and that in practical terms will prevail only for the precedents generated after February 2006. Even so, the deficiency here is that precedents for denying extradition, for example, may relate to questions which, in the context of a treaty, do not constitute grounds for denial, for which reason if there is a denial on legal grounds this would not generate a negative precedent. Normal practice is for countries to accept and deny extradition requests by examining each case specifically, and not by relying on precedents.

### **Extraditable persons.**

Article 513 refers to a person tried, accused or convicted as perpetrator or accomplice. Curiously, and dangerously, it indicates that if the purpose of the request is to enforce a criminal sentence it must have been imposed in the presence of the accused.

Article 516, referring to passive extradition, states: "or to have him serve the sentence imposed in his presence."

Article 525, on active extradition, refers merely to seeking extradition of "a [person] tried, accused or convicted from the State in which that person is found."

We cannot say that a sentence has been imposed with accused present when it was merely imposed "in presence." This could give rise to a dangerous interpretation that would admit a sentence where the person has been present throughout the entire process but not at the time the sentence is read. In any case, article 516 is correct in its specification, because to convict a person in absentia is expressly prohibited by the Constitution.

### **Extraditable offenses**

According to law these are, in the first place, crimes included in the list of offenses approved by the treaty, if any. If there is no treaty, then the offense must

be punishable both in the requesting State and in Peru by deprivation of liberty for a minimum or a maximum of at least one year.

If the treaty adheres to the minimum penalty system then, in addition to double criminality, the minimum penalty must be verified.

Participation by the authorities in an extradition process. Pursuant to article 37 of the Constitution, article 514 provides that the government must decide extradition, whether passive or active, through a supreme resolution issued with the agreement of the Council of Ministers. This decision requires the previous advice of an official commission, created by Supreme Decree 016-2006-JUS as the Official Commission for Extraditions and Surrender of Convicts.

Although the opinion of this commission is merely advisory and nonbinding, it is nonetheless a prerequisite.

Next, the government's decision requires a ruling of the Criminal Chamber of the Supreme Court, which must issue an advisory resolution.

The Supreme Court verifies the legality of the extradition request and issues an advisory resolution that is binding only if negative to extradition.

If the advisory resolution is favorable to rendition or considers it appropriate to apply for extradition to a foreign country, it is merely illustrative and guarantees the legality of the request, but the government may decide the issue at its discretion.

Article 512 designates the Prosecutor General's Office as the Central Authority. It reads: "1. The central authority for international judicial cooperation is the Office of the Prosecutor General. The foreign authority shall address itself to that office for initiating international judicial cooperation, and for coordinating and conducting consultations in this matter (...)". The Ministry of External Relations is responsible for "intervening in the processing of requests for cooperation formulated by the national authorities. Similarly, if the treaties so provide, it shall receive and provide to the Prosecutor General the requests for international judicial cooperation submitted by the foreign authorities." The Code of Criminal Procedure confirms that diplomatic channels must be used to receive and transmit extradition requests.

What does the government evaluate? It evaluates whether an extradition is not only legally possible but politically advisable [3]. Except in very unusual cases, the government may deny extradition even if the judiciary considers it legally proper.

The political evaluation in turn refers to the overriding national interest, and it lies with the government, which is in charge of international relations.

## **Conditions or guarantees that may be requested**

Beyond the requirements of the treaty, the following may be requested:

- a) Assurances that the wanted person will be credited with the time spent in detention during the extradition process, as well as any previous time served in the process that gave rise to the request.
- b) Assurances that if the offense for which extradition is requested is punishable by death in the requesting State, the wanted person will not be executed.
- c) Assurances of due process or a fair trial for the wanted person.

## **Denial of extradition**

Extradition may be refused or denied on the following grounds:

*With respect to the State:*

1. If the requesting State has no jurisdiction to try the offense.
2. If the wanted person would have to stand trial in the requesting State before an exceptional court.
3. If the process to which the wanted person will be subjected does not meet international standards of due process.
4. If there are special reasons of national sovereignty, security or public order or other considerations whereby acceptance of the request would not be in the best interests of Peru.
5. If the requesting State cannot give assurances that the wanted person will be credited with the time spent in detention during the extradition process, as well as any previous time served in the process that gave rise to the request.
6. If, where the offense for which extradition is requested is punishable by death in the requesting State, that State cannot give assurances that the wanted person will not be executed.

*With respect to the wanted person:*

1. If the wanted person has already been acquitted, convicted, pardoned or otherwise absolved.

*With respect to the offense:*

1. Absence of double criminality: if the offense in question does not constitute a crime in both the requesting State and in Peru.

2. Insufficient severity of the penalty: if the laws of both countries have not stipulated punishment that, at either extreme, is equivalent to one year or more of imprisonment [4].

3. The expiry of the time limit for prosecution or punishment, pursuant to the laws of Peru or the requesting State, provided this does not exceed the limit established in Peruvian legislation.

4. If the offense was exclusively of a military or religious nature, or related to politics, the press or opinion. The fact that the victim of the offense, or the wanted person, exercised public functions does not by itself make the offense political. Nor does the definition of political offenses applied to acts of terrorism, crimes against humanity, and offenses with respect to which Peru has accepted an international obligation to extradite or prosecute.

5. If the offense is actionable *ex parte*, or is a misdemeanor.

6. If the offense was of a taxation nature, unless it involved a deliberately false declaration or an intentional omission for purposes of concealing the proceeds of another offense.

7. If the extradition request is motivated by an offense under ordinary law but has been presented in order to persecute or punish an individual for reasons of race, religion, nationality or political opinions, or if the situation of the wanted person is likely to be aggravated by one or other of these reasons.

### **Treatment of double criminality in the new legislation**

While many texts in this area hold double criminality to mean that the criminal conduct in question is deemed an offense in the laws of both the requesting and the requested State, this definition is not wholly satisfactory, as it merely specifies that the offense must be punishable in both states.

Upon closer examination, there are certain other parameters that must be considered. First, the offense must have been punishable before it was committed (principle of legality) in the requesting State, and before the extradition request was submitted, in the requested State [5].

Second, the deed must constitute an offense both at the time it was committed and at the time extradition is requested, and also at the time of surrender. In other words, there must be continuity in the punishable nature of the act. If this continuity is broken, extradition loses its justification.

Third, the offense must not be affected by grounds of exemption in the requested State: if it were, there would be no grounds to issue an arrest order or to initiate

extradition proceedings, as the acts would have no criminal relevance in the requested State.

Fourth, the offense must exceed a certain degree of severity, as indicated in the treaty or, in its absence, in the domestic law of the requested State. It must also be remembered that the criteria for evaluating double criminality will vary depending on the system adopted in the legislation.

One system is to evaluate double criminality in the abstract: does the type of conduct in question constitute a crime? To determine this, that conduct will be compared against the crimes specified by law. Evidence will be confined to verifying that the wanted person faces criminal charges.

A second system is to evaluate double criminality in the specific case: does the conduct of the wanted person constitute a crime in the requested State? The evidence in this case will be used to determine whether there is "reasonable and probable cause" pointing to guilt, the personal situation of the wanted person will be analyzed and linked to prior demonstration of the existence of the crime. This is the system adopted in the laws of Japan, Chile and the United States, for example.

Until February 1, 2006, Peruvian law reflected the second possibility: consequently, evidence could be presented to demonstrate the innocence of the wanted person, and one of the essential requirements was to present the evidence for the prosecution and for the defense. Currently, there is no requirement to present evidence, but merely to supply documentation proving that charges have been laid, referring to the provisions of the applicable treaties; if evidence must be submitted this will not include evidence for the defense but only that supporting the charges against the wanted person.

### **Treatment of provisional arrest**

This is generally referred to as preventive detention in the treaties. There are three classes of provisional arrest:

- a) Provisional arrest at the petition of the requesting State: this is the classic form of preventive detention requested by the requesting State.
- b) Provisional arrest *ex officio*: this occurs only when a person seeks to enter the country when wanted for prosecution in a neighboring country.
- c) Provisional arrest via Interpol: this occurs when the person is definitively located within the national territory, and an urgent arrest request is channeled through Interpol.

### **Provisional arrest at the petition of the requesting State**

The requesting State may submit a formal petition for provisional arrest, through diplomatic channels and through its central authority. This petition is transmitted to the Office of the Prosecutor General.

A formal petition for provisional arrest may also be presented through Interpol channels. Interpol will remit the petition to the Prosecutor General's Office, which will immediately refer it to the competent investigating judge, with notice to the appropriate provincial prosecutor.

Upon receipt of the documentation, the judge will issue the provisional arrest warrant if the petition, after evaluation, is found to fulfill the requirement of double criminality, understood in the following sense:

- a) The offense is punishable in both nations.
- b) The minimum penalty requirement is met.

Nevertheless, there is a serious error in the wording of CPP article 523 in this respect, which would make preventive detention outside a treaty legally impossible.

That article deals with provisional arrest and stipulates the following conditions:

"Article 523. Provisional or pre-extradition arrest.

1. A person sought by the foreign authorities may be subjected to provisional arrest when:

(...)

4. The judge shall issue a provisional arrest warrant, provided the alleged offense constitutes a criminal act in Peru and the minimum or maximum applicable penalty is not equal to deprivation of liberty for one year or more. If several offenses are alleged, it is sufficient that one of them meet this condition in order for [provisional arrest to proceed] with respect to the other offenses. The decision shall be notified to the public prosecutor and reported to the Office of the Prosecutor General and the Local Office of Interpol."

Let us look closely at the minimum penalty parameter: "the minimum or maximum applicable penalty is not equal to deprivation of liberty for one year or more" - in other words, if the penalty is for one year or more, provisional arrest is not allowed.

This stands in contradiction to article 517, which prohibits extradition if the penalty is *not* equal to one year or more:

"Article 517. Denial of extradition:

1. Extradition shall be denied if the material fact of the case does not constitute a crime in the requesting State and in Peru and if the minimum or maximum applicable penalty is not equal to deprivation of liberty for one year or more. If several offenses are alleged, it is sufficient that one of them meet this condition in order for [provisional arrest to proceed] with respect to the other offenses.

The judicial decision shall be notified to the public prosecutor and reported to the Office of the Prosecutor General and the Local Office of Interpol.”

In cases of urgency, provisional arrest may be sought through a simple requisition made by any means, including telegraph, telephone, radio or e-mail. The formal request for provisional arrest must contain:

- a) The name of the wanted person, with personal identity data and information that may assist in locating him in the country.
- b) The place and date of the alleged offense and its criminal classification.
- c) If the wanted person is a suspect, indication of the penalty for the offense; and if the person has been convicted, details on the penalty imposed.
- d) Reference to a judicial warrant of arrest or imprisonment, and to the wanted person's status as missing or a fugitive.
- e) The commitment of the requesting State to submit a formal extradition request within 30 days after receipt of the requisition. At the end of that time, if a formal extradition request has not been submitted, the arrested person will be immediately released.

### **Provisional arrest *ex officio***

This case applies when a police detachment stationed in a frontier zone locates a person wanted by a neighboring country. The law requires that the border police must immediately turn the person over to the competent investigating judge, and so advise the provincial prosecutor. Using the fastest means available, by telephone, fax or e-mail, the judge must bring this fact to the knowledge of the Prosecutor General and the diplomatic or consular officer of the requesting country.

The diplomatic or consular officer will have two days to request that the arrest be maintained, accompanying that request with all the requirements for arrest. If this is not done within the stipulated time limit, the arrested person will be released immediately.

This provision, however, contravenes the text of the Constitution, which stipulates the cases in which a person may be arrested and, as noted earlier, prohibits the offer of extradition. Moreover, let us repeat, the extradition treaties with neighboring countries do not accept the offer of extradition, but require that extradition or preventive detention must be requested.

## **Provisional arrest via Interpol**

In the case of provisional arrest via Interpol, the law merely declares that the national police shall apprehend the wanted person and deliver him immediately to the competent local judge, and so advise the provincial prosecutor, the Prosecutor General, and the diplomatic or consular officer of the requesting country. This provision requires urgent regulation, for even if it takes only minutes to apprehend and deliver the person, this nevertheless amounts to a deprivation of liberty that can be ordered only by a judge.

## **Provisional arrest procedure**

Having ordered provisional arrest, the investigating judge has 24 hours to hear the person, and must appoint a defense attorney, *ex officio*, unless the detainee designates a lawyer of his own choice. If the judge finds that the conditions of double criminality and minimum penalty are not met, he will quash the arrest order and convert it into a summons to appear, with a prohibition on leaving the country. The wording of the Code is questionable. If there is no double criminality or minimum penalty, then a summons to appear is no more appropriate than provisional arrest.

## **Termination of provisional arrest**

Provisional arrest will terminate if it is proven that the person arrested is not the person wanted, or upon expiry of the 30 days for formal submission of the extradition request, with the proviso that in the latter case the wanted person may be rearrested for the same offense, provided a formal extradition request is received.

## **NOTES**

[1] The executive branch may not grant or deny extradition without a prior ruling from the judiciary, through its advisory opinion. It is the judiciary's verification of legality that allows the government to take a decision.

[2] This initial denial may in fact have involved a third State rather than the requesting State, as happened in the case of an extradition request by Peru to the government of Chile. The denial ruling declared the following: "14: the fact that this request for the extradition of Torres Iturra comes from a government other than the government that formulated the request that was denied (...) does not prevent application of the principle cited. In the end, it is not a question of giving effect to the exception of *res judicata*, with the triple identity of elements necessary thereto, since the provisions mentioned (...) of the Code of International Private Law prevent a repeat request for extradition based on the same facts, without requiring that the new request be made by the same government" (cited by Huapaya Olivares Alberto and other authors in:

*Extradición. Teoría y Jurisprudencia.* Instituto de Defensa y Desarrollo Social. Lima 2006).

[3] This power does not mean taking a stance on the jurisdictional process or becoming a party to the case, but rather that the denial is given for reasons beyond the jurisdictional context, and that belong instead to the realm of State interests. As noted by Quintero Olivares, quoted by San Martín Castro, Caesar "(...) is bound by the public interest; the requested State must therefore assess whether extradition is not only legally possible but politically advisable." (*La extradición y la cooperación judicial internacional.* Academia de la Magistratura. December 2001. Peru).

[4] The minimum penalty criterion must be used with care: in most treaties the minimum penalty is set at one year, but in the case of extradition treaties signed with Paraguay and Panama the intermediate duration is set at no less than two years, and in the case of the extradition treaty with Bolivia, about to come into force, the penalty must be greater than two years; in the treaty of extradition with El Salvador, the minimum penalty is three years. The Treaty of Montevideo on International Penal Law requires a penalty of no less than two years.

[5] States do not legislate at the same speed, but in light of the juridical goods they deem most important to protect. For this reason, in the case of the requested State, what is important is that the conduct be punishable as a crime before the extradition request is received, and not at the time the acts were committed, which is irrelevant for this State.