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American justice? Isn't that a contradiction?

The extradition law is more than unfair, it's probably illegal

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Americans are well aware of the horrid faults of their legal system, but they still like to think that it is the best in the world. Its abuses include plea bargaining, class actions, Hollywood actions, Guantanamo Bay, racism, elected district attorneys looking for votes, hick justice in states such as Arkansas, federal patronage of prosecutors and judges, the politicisation of the Supreme Court, the squalor and brutality of big federal and state prisons and the aggressive ruthlessness of tax and regulatory authorities. In the United States, you can be ruined by the cost of doctors if you get sick and by the cost of lawyers if you get into court.

There are, of course, honourable lawyers and distinguished judges, some of whom are among the best in the world. It is the downside of US law that terrifies Americans and should terrify foreign businessmen.

A British businessman should never become a nonexecutive director of an American company, since the legal fees, in the event of trouble, can be a multiple of the board fees. If threatened with a legal action in the US, one should hire a lawyer who frightens the other side and settle as quickly as possible. If necessary, go to live in a country, such as Russia, which has not signed an extradition treaty with the United States; President Putin will protect you, but you can be sure that the British Government will not.

Before 9/11 Britain had a reasonably fair system of extradition with the United States, which, among other provisions, required any country seeking extradition from Britain to produce prima facie evidence that an offence had indeed been committed. This extradition system exasperated US prosecutors because it was subject to long legal delays. Even British judges shared this impatience; good lawyers could defer extradition for years.

After 9/11 both countries wanted rapid extradition of terrorists. The British had been totally unsuccessful in securing extradition of IRA terrorists from the US with the American argument that Irish terrorism was a political act. A treaty was then negotiated that made some modifications of the US rules but eliminated the UK requirement that a prima facie case for extradition must be shown. Britain now has similar fast-track arrangements with a number of Commonwealth countries; there is also a fast-track extradition in the European Union, but that is subject to European law.

The treaty with the United States was signed in 2003 and came into effect in 2004. It is an unequal treaty in that the required proof of an offence is quite high in extradition from the United States but virtually nonexistent in the British case. It is often difficult for defendants to organise their defence effectively after they have been extradited. That puts them under pressure to enter the US plea-bargaining negotiations on unequal terms.

The United States Justice Department has been anxious to extend American regulation of business to the rest of the world, particularly in the areas of price fixing and of fraud. The NatWest case was a fraud case that arose out of Enron. If any offence was committed in that case, it was presumably a fraud against the NatWest bank, which the British authorities decided not to prosecute. The US authorities decided to prosecute and were able to secure the extradition of the "NatWest Three".

There are a number of other outstanding cases. The case of Ian Norris, the former chief executive of Morgan Crucible, involves a price-fixing charge, as would the possible prosecution of four senior executives of British Airways. There is another price-fixing case against Sir Anthony Tennant, the former chairman of Christie's. There is a tax case and a computer hacking case also outstanding.

In all these cases, the British authorities have decided not to prosecute and the potential penalties in the US are higher than they would be here. About ten British citizens are currently in jeopardy, but there are more to come.

In several of these cases plea bargaining is an important factor. In the Christie's case, Christopher Davidge, the retired chief executive of Christie's auction house, was given immunity by the US Department of Justice and gave evidence against his alleged co-conspirators in Sotheby's. In the British Airways price-fixing case, Virgin seems to have sought immunity. It has given information to the Office of Fair Trading, which has never prosecuted an individual for price fixing; presumably that evidence has been sent to the US Department of Justice, which is investigating airline price fixing.

The risk of a miscarriage of justice is inherent in the US plea-bargaining system. Two competitors, such as Sotheby's and Christie's, or British Airways and Virgin, may confer together to fix prices; their action might, at the time, have been legal in Britain, but might have been an offence in the US. Say one of the competitors senses that this is a risky business and gets to the authorities first. That competitor may be awarded with immunity or be allowed to plead guilty to a lesser charge. The other competitor will be seriously damaged and individuals may go to prison. The informant has two strong motives to go beyond the truth – one is to get immunity and the other is to damage his competitor. The evidence of a co-conspirator in a business case may be perfectly truthful, but it may be self-interested. The co-conspirator does not come to court with clean hands.

Yet, in these extradition cases, the co-conspirator's evidence will never even be seen by a British court; under the 2003 treaty, it is irrelevant. The US authorities do not have to produce a prima facie case; they merely have to show that they are bringing charges. Even if the US authorities were as wise as Solomon, it would be against natural justice to extradite British citizens with no opportunity to learn the case against them and no opportunity to reply to it.

The 2003 treaty was negotiated in the post9/11 anxiety about terrorists; it is not being applied to terrorists, but to ordinary businessmen for regulatory offences, which would not be criminal in Britain. It is all very embarrassing. We do not want to tell the Americans that the defects of their justice system have become notorious. Yet the 2003 treaty invades human rights and, in European terms, may well be illegal as well as unjust.