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RETURN OF FUGITIVE CRIMINALS UNDER **INTERNATIONAL LAW -VIS-À-VIS-** **EXTRADITION ACT,1962**

AUTHORED BY - MEDHAVI KISHOR PETHKAR

ABSTRACT-

The return of fugitive criminals across borders is a crucial aspect of international law, aiming to ensure that those accused or convicted of crimes face justice irrespective of their location. This study focuses on the intersection of International Law and the Extradition Act of 1962, a legislative instrument designed to govern the extradition process in various jurisdictions. Treaties and conventions have been established to streamline and facilitate the extradition process, reflecting a shared understanding of the importance of cross-border collaboration in addressing criminal activities. Through this research paper the author aims to provide a nuanced understanding of the complexities inherent in the extradition of individuals accused of criminal offenses across borders.

KEYWORDS- Extradition Act, International Law, Extraditable Offense, Fugitives

INTRODUCTION-

As India celebrates its journey of 75 years of Independence, we cheer on its 75 and upcoming years of massive development. Along with it, there has been an immense development in Indian Air technology, thus India is also coping with other countries development as well. However, due to continuously increasing Air technology all over the world, it is now convenient for lawbreakers to escape another country after committing a crime in their State. But as per the old axiom, “no one can outrun the long arm of the law”, the aim of the legal system is that after committing any offense, the offender should be ultimately brought to justice- no matter where they are. Thus, the concept of Extradition under International Law finds its roots in this old axiom. Extradition simply means, “surrender of fugitives” or “delivery of criminals”. Therefore, in extradition accused is delivered from the state in whose territory the alleged criminal happens to be for the time being to the State on whose territory, he has been alleged for committing a

crime. Thereby, the accused is surrendered by one nation to another, so that the accused undergoes trial and punishment within the jurisdiction of the State where he has been alleged of committing a crime.

Suppose, 'A' commits murder in India for which he is punishable as per section 302 of the Indian Penal Code. Later, to avoid criminal proceedings he escapes the territory of India and runs to Australia. In such a situation Extradition is a process through which 'A' would be brought back to India to undergo the criminal proceedings/sentence here. It won't be wrong to state that the Extradition process discourages the offenders who reckon escape as an easy way to sabotage the power and authority of India's justice system. Moreover, it is obvious that delayed arrest and prosecution are a continuous threat to India's peace, safety and security.

Treaties and/or bilateral arrangements act as the basis for the delivery of fugitives to the requesting sovereign. Sometimes, fugitives are also extradited by one sovereign state to another sovereign state merely on the basis of the principle of reciprocity and comity as a matter of goodwill and courtesy between the concerned sovereigns.

The territorial state and the requesting state are two states that are involved in the extradition process. The Sovereign State in which the convict or accused flees and takes shelter with the view to escape punishment or trial is the "territorial state". Contrarily, the "requesting state" is the state from where the accused or convict tries to evade justice and escape the trial or punishment by flying to other sovereign states. Thus, the "requesting state" is the state where the alleged offense is said to have been committed. Treaties act as channels through which the requesting state formally demands the surrender of the convict or accused. The bilateral treaty is the subject matter of extradition under international law in most of the cases.

However, there are no obligations imposed on the sovereign states to extradite nor any special provisions/procedures are laid down while handing over the concerned fugitive to the requesting state by international law. International Extradition is just a formal process through which when a fugitive is found in one country, he is surrendered to the requesting country for trial or punishment.

The request for extradition of a person differs from extradition and other terms like banishment,

deportation, and expulsion as in the latter the undesirable person is forcibly removed. In the extradition request, the requesting state stoutly demands the delivery of the accused from the territorial state.

The law of extradition is a municipal law; yet is a piece of International Law also, as it determines the relations between two sovereign states over an issue that whether or not an accused must be surrendered by one sovereign state to another sovereign state. This issue is resolved by national courts but it is based on rules of International Law relating to the subject as well as based on international commitments.

THE PHILOSOPHY BEHIND EXTRADITION

It is a general rule that a lawbreaker must be punished in accordance with the laws of the State which he/she has violated. But it becomes problematic to carry out a prosecution against the lawbreaker when he commits a crime in one country and takes shelter in another country. Here, comes the question of extradition. Extradition also known as Rendition, process through which a criminal or wanted person, is surrendered by one country to another country.

It is stoutly believed that the accused can be prosecuted or punished with utmost efficacy only if he is prosecuted as per the laws of the place where the cause of action arose or the crime took place. One of the reasons for this is that procuring the relevant evidence is more accessible and convenient in the country where the offense was committed rather than in any other country. However, the interest of such a country is also more significant in punishing the offender.

While dealing with the philosophy behind extradition, the principle of State Sovereignty also kicks in. The exclusive authority of the concerned state over its citizens and territorial jurisdiction is known as State sovereignty. Thus, technically the jurisdiction of the state fades the moment the accused enters the foreign country due to the absence of territorial jurisdiction, but the jurisdiction over the alleged person does not disappear easily.

As per the maxim 'Aut Punire Aut Dedere', either punish or surrender. The refugee state must either punish the offender or surrender the offender to the requesting state so that the requesting state can and will punish the offender. But, as the state (territorial state) where the offender has

sought shelter has no jurisdiction over the offender, they should prefer to surrender the accused to the requesting state.

However, even though no state is required or obligated to hand over to another state any person (citizen or a non-citizen) who happens to be within its territorial jurisdiction, for the sake of mutual interest and in order to maintain law and order between two sovereign states, it is essential that sovereign states must cooperate with each other in surrendering or returning the alleged person to the requesting state. Thus, this will avoid the possibility of any future clashes between two sovereign states, plus most states enter into extradition treaties with each other to safeguard the situation.

PURPOSE OF EXTRADITION-

We all are aware of the baffling issue that crime is turning International nowadays. To run from prosecution, criminals tend to cross the border and seek shelter in a foreign country. These criminals are no more afraid that they might get arrested, and they continue to walk freely without any guilt in their minds across the country. Moreover, today's increasingly borderless world encourages them to do so and also gives them the ability to evade arrest.

Trade and travel are now at ease due to the relaxing of borders, consequently increased freedom/liberty is subject to the risk of abuse by criminals.

To ensure that no state would become a haven for criminals who evade their judicial system, all sovereign states across the globe needs to start an international battle against crime. It is now obvious that the states are mutually obligated to ensure that fugitives in the country are sent back to their respective country, where they are alleged of committing the crime. They are obligated to do so concerning their mutual interest with each other and also as it is favourable to the international community as a whole. However, the practice of extradition is reciprocal.

To suppress the crime rate, Extradition is a must. Extradition is based on the thought that criminals should be punished for their acts, they should not go unpunished. But, when a fugitive has fled to another country hoping to escape from impending punishment for the offense he has been accused of, he cannot be prosecuted and punished due to lack of jurisdiction. Therefore,

with the help of an Extradition treaty, criminals with such unjustifiable motives are brought back to the country where they have been alleged of committing the crime and it is ensured that they are not left unpunished for the said crime.

Extradition acts as a green flag, by clarifying that fugitives cannot escape punishment by fleeing from the territory of the juridically competent state. Criminals are delivered to the requesting State to safeguard the interest of the territorial State. If any state adopts the policy of non-extradition of criminals or even if they are reluctant to extradite the criminals, then they would act as a safe house for criminals as the criminals would consider fleeing to that State only. The State therefore would become a safe house of international criminals, which actually would be risky for it, as they may again commit a crime there if they are left to be free.

Extradition is based on the principle of reciprocity. If today, 'A' State is requested to surrender the criminal to the requesting State that is 'B' State, then the 'B' state is obligated to surrender the criminal to 'A' State in some future date if such demand is made.

While prosecuting the criminal, the evidence required so is more freely and conveniently accessible in the State where the crime has been committed. Thus, State on whose territory the accused has committed an offence is in a better position to carry out the prosecution proceedings against the accused than any other State. However, Extradition is one step towards the success of international co-operation in international dispute resolution via bilateral or multilateral treaties. In order to eliminate the crime rate, extradition is of utmost importance if it is done with international co-operation.

EXTRADITION- A LEGAL DUTY OF A STATE?

As per an intellectual prodigy, Hugo Grotius,¹ the refugee State is legally bound to follow the principle of 'prosecution or extradition. The refuge State must either punish the offender or surrender the offender to the requesting State, so that they will carry further trial proceedings against him and ensure that the offender is not left unpunished.

However, many States have failed to follow this principle. In the present era, fugitives are

¹ Dutch Humanist, Diplomat and Lawyer

extradited only when there is an Extradition treaty and not otherwise. In only exceptional cases, Extradition takes place based on reciprocity and courtesy. It is the moral duty of the refuge State to deliver/surrender the fugitive to the State seeking his return. The legal duty of the refuge State to deliver/surrender arises only when Extradition treaties are concluded within the States. There exists no obligation on the part of the refuge State to surrender /deliver the alleged person to the requesting State, because States are sovereign in nature as they have legal authority over the people within its border.

FUNDAMENTALS OF LAW OF EXTRADITION-

1) EXTRADITABLE OFFENSE-

Extraditable offenses are usually serious in nature and it does include petty offenses or trial misdemeanours. The offenses for which a fugitive is extradited, are mentioned within the Extradition treaty of the States.

For example, as per the Extradition treaty between State 'A' and State 'B', extradition takes place only when the punishment for the said offense is for more than one year. Thus, if the accused is charged with an offense for which the punishment is less than a year, then he won't be extradited.

2) DUAL CRIMINALITY-

It simply means that the extradition process can only happen when the offense for which the person is alleged to have been committed is an offense in the jurisdiction of both the sovereign States.

For example, apostasy is a serious offense in Islamic Countries like Saudi Arabia. But it is not the same in India, as the renunciation of religion is legally allowed in India. In such circumstances, India might reject the plea of the extradition request made by Saudi Arabia for delivering a Saudi Arabian national on the basis that he had refused to follow his religion.

3) RULE OF RECIPROCITY-

The Territorial State accepts the request of extradition from the requesting State merely based on the assurance that in the future date the favour would be returned by the requesting State.

4) PRIMA FACIE CASE-

Individuals cannot be extradited merely on basis of guess and speculation, there must exist a prima facie case against the individual.

5) PRINCIPLE OF PROPORTIONALITY-

Punishment inflicted upon the accused must be proportional to the offense of which he has been convicted. Extradition may be refused because the punishment of a crime is inhumane in the requesting State or it is out of proportion and severe in form when compared to the degree of the offense.

For example, suppose in country 'A', offenses like theft, leaking of censored images or disclosing of classified information are punished with the death penalty, then the request made by country 'A' to surrender the offender might be rejected by the territorial State 'B' on the ground that the punishment inflicted is severe and inhumane, with respect to the offense committed.

6) FAIR TRIAL-

Before accepting the extradition request from requesting state, it needs to be ensured that the fugitive is given a fair opportunity to represent himself under a fair trial in the requesting state. It is part of a formality which needs to be done before delivering the fugitive to the requesting state. One of the major problems, the Indian government is facing while getting its Extradition request accepted, is the rampant human rights violation in prison. The offenders usually take this defence in order to escape from justice.

7) RULE OF SPECIALTY-

A fugitive must be tried only for the offense for which he has been extradited and none other in the requesting State. The territorial State has no authority to regulate the actions of the requesting State regarding the punishment which has to be imposed on the extradited person. However, the state cannot punish him for any other offense for which he has not been extradited unless he is provided with an opportunity to return to the territorial state.

PROCEDURE FOR EXTRADITION

When the territorial state delivers the fugitive to the requesting state, the arrest warrant issued must be put forth by the territorial state on the basis of the following evidence:

- Establishment of the identity of fugitive criminal.
- The fugitive criminal must be extraditable.
- Crime committed by the fugitive criminal or alleged to have been committed by him must be extraditable.

When India is the territorial State, the extradition process begins as soon as the request has been sent by the requesting state to India. The request must be sent along with necessary evidence through diplomatic channels to the Government of India (GOI), Division of the Ministry of External Affairs (MEA), Consular, Passport and Visa division. After receiving it, the Government of India authorizes the Magistrate of Extradition to issue an arrest warrant. However, an arrest is issued only when the above-stated requisites are satisfied. The fugitive criminal undergoes judicial inquiry after the arrest and it is then submitted to the Government of India. The Government of India may issue a warrant for the removal and custody of the fugitive criminal only when it is satisfied by the report thereby submitted. He is then surrendered at the place specified in the warrant by the requesting state.

However, when India is the requesting State, the process of extradition of a fugitive criminal is quite similar. It starts when a juridically competent Magistrate in India sends a request to the Government of India (GOI), Division of the Ministry of External Affairs (MEA), Consular, Passport and Visa division upon the prima facie establishment of a case against the fugitive criminal. The request sent by the Magistrate is attached with the relevant evidence and an arrest warrant. The request is officially sent to the territorial state on the establishment of the above-stated requisites. Later on, a warrant to arrest the fugitive criminal is issued by the Inquiry Magistrate of the territorial state. His arrest is communicated to the Indian Embassy. Eventually, in order to escort the fugitive criminal back to India Indian authorized personnel travel to the territorial state.

In India, the central authority for all incoming and outgoing requests is the Ministry of external affairs and the government of India. The extradition request of a fugitive criminal sent to the

Ministry of External Affairs is sent by-

- The State Government under whose territorial jurisdiction the alleged often is said to have been committed.
- The court of Law from whose territory the fugitive has escaped or the court of law by whom the fugitive criminal located abroad is wanted.
- Ministry of Home Affairs in respect of cases put together by investigating agencies (e.g. CBI)

EXTRADITION OF POLITICAL OFFENDER

An act done against the state but has been sanctioned by the people. If any person commits an act against the state, but for the benefit of the people, then it would be inappropriate to extradite such a person. These acts do not include terrorist activity. For instance, our freedom fighters were extradited for the acts done against the British government during the freedom movement. This statement sounds erroneous. However, earlier political offenders were also extradited in order to avoid disturbance in other states. But now, this practice does not prevail as in the present era political offenders are granted asylum by the territorial state. Extradition laws also state that political offenders cannot be extradited.

EXTRADITION LAWS IN INDIA

Extradition is a complicated arena as it is nowhere exclusively mentioned in the domain in which extradition prevails- municipal law or international law. The Law of extradition is a dual law. It is governed by both municipal as well as International Law. The municipal law of the Sovereign State determines whether the fugitive shall be extradited or not, but at the same, it is determined on the basis of international relations, commitments and treaties. Treaties bind the state while returning a fugitive to the jurisdiction of the court where it has been alleged for committing an offense.

Extradition Act, of 1962² which was amended in the year 1993 governs the extradition treaties between India and other countries. The procedure which has to be followed while surrendering or delivering the fugitive to the requesting state has been explained in the act. Also, many other

² An Act to consolidate and amend the law relating to the extradition of fugitive criminals

provisions related to extradition are very well mentioned in the act.

The procedure which ought to be followed in the process of Extradition is laid down in several sections of the Criminal Procedure Code, 1973. These sections provide act as a guidebook while dealing with the Extradition process.

1. Section 41- When police may arrest without a warrant
2. Section 166A- Letter of request to a competent authority for investigation in a country or place outside India
3. Section 166B- Letter of request from a country or place outside India to a Court or an authority for investigation in India
4. Section 188- offenses committed outside India

Only on the confirmation of the extradition order by requesting states court, the territorial state government finalizes the extradition order and co-operates with the requested state to hand over the person. Necessary documents and information must be attached to extradition requests. Regardless of all these legal arrangements, India faces hurdles when it comes to the question of Extradition. The success rate of extradition in India is extremely low, out of every 3 offenders only 1 offender is successfully extradited.

LANDMARK CASES -

1. Savarkar's case³

Vinayak Damodar Savarkar escaped to France when he was being brought back to India from Britain as he was charged with murder and treason. However, he was surrendered to the British authorities by a French policeman, who had overlooked the formal extradition proceedings. So, France demanded Britain to deliver Savarkar back to them so that they would discharge him again with the proper extradition proceedings. But, Britain refused to do so, and thus the case was put forth before the Permanent Court of Arbitration in the Hague. The court agreed that the French policeman had failed to execute his duty. However, the French plea was rejected as no obligation is mentioned in international law, for the state to return a criminal. The sovereign receiving the accused is not bound to the return accused even though the extradition has been carried out

³ The Savarkar Case, 1911, France v the UK

irregularly.

The permanent court of Arbitration decided that international law does not impose any obligation on the State to return a criminal. Once a person is extradited even in an irregular way, the country receiving the fugitive is not bound to return the accused.

2. Vijay Mallya case

The famous business tycoon as well as the owner of Kingfisher Airline, Mr Vijay Mallya is undergoing one of the famous extradition case that is Vijay Mallya v. State Bank of India. He owes a debt of 17 Indian banks including the State Bank of India and the Indian Overseas Bank of almost Rs 6,000 crores. To escape justice, Mallya fled in 2016 from India to the United Kingdom. Later on, his extradition was sought and his case was put forth of Westminster Magistrate's Court in London. However, the court ordered his extradition to India in 2018. Even though, his appeal in High Court was also rejected, he has yet not been brought back to India due to ongoing legal procedures.

It is also important to emphasize that he was declared as a 'Fugitive Economic Offender' under the Fugitive Economic Offenders Act, 2018. Any person who commits a fraud of more than Rs 100 crore and then escapes from the impending punishment by flying from India to a foreign country, is known as a fugitive economic offender.

Vijay Mallya has been pleading in UK courts that the prison situation in India is not so good, prisons are not hygienic, safe and especially during the covid times is not safe and that is why his extradition was delayed because of covid. His bail application has been rejected by the Trial Court, by the HC and now finally it is at a stage where it is said that he is being held up in UK and not being extradited because there is some confidential legal matter.⁴

3. Nirav Modi's case

A complaint has been filed by Punjab National Bank against diamond merchant Nirav Modi and his wife Mrs Ami Modi for unscrupulously obtaining fake Letters of

⁴ <https://economictimes.indiatimes.com/topic/vijay-mallya-extradition>

Understanding (LoU) valued at Rs 11,400 crores.

As per the orders of higher authorities all assets of Nirav Modi in India were confiscated. However, even before the scam was detected, Nirav Modi left India. Red corner notice was issued by Interpol against him in 2018. Thereafter, an arrest warrant was issued by Westminster Court after receiving an extradition request from India. In 2019, Nirav Modi was arrested and his extradition was also approved by the court in the year 2021. But, still he has not extradited to India. His stay was continued at Wandsworth Prison in southwest London after the arrest.

Further in the appeal filed by Nirav Modi in the High Courts, his advocates are arguing that he is not in a good medical condition and the conditions in Indian prisons or the facilities that are available there are not so good. That is why his trial is still on. Thus, basically on humanitarian grounds and invoking the principles of human rights, with the help of human rights convention these offenders they try to escape the extradition when it is requested.

However, even after hearing the submissions made by his advocate in High Court, it was held that UK government must not pick any holes in the assurance provided by the Indian government that adequate medical care would be provided at Arthur Road Jail in Mumbai to Nirav Modi. The court also emphasizes that UK must honour its extradition obligations with India.⁵

4. RE CASTIONI'S CASE

The principle laid down in this case was that if the nature of the offense committed by an individual is political, then the offender may not be extradited. There was some political turbulence on going in Switzerland when Castioni killed one of the member of the government named Rossi. Later on, he escaped to London. Mr. Castioni pleaded before the court that he may not be extradited as the offense committed by him was of political character and in which the provision of extraditing an offender was absent. The act is said to be of political character only when it has been a part of political struggle

⁵ <https://timesofindia.indiatimes.com/world/uk/nirav-modi-extradition-barred-by-legal-issue/articleshow/96975165.cms>

ongoing in that country.

5. RE MEUNIER'S CASE

The principle laid down in Re Castioni was repeated again in this case. The French anarchist, was responsible for blasting a bomb at a café and in some barracks in France, due to which two individuals died. Thereafter, committing such a felonious act he escaped to England. His extradition request was upheld by the court as the fugitive was not a political offender.

Court said that for an offense of political nature, two parties in the requesting state who are seeking or battling to impose the government of their choice is essential. However, in the present case, the required essential to determine the French anarchist as a political offender was absent.

6. ABU SALIM

Abu Salim is presently undergoing a life-imprisonment sentence for various cases. He was convicted for the 1993 Mumbai serial bomb blasts that killed almost 257 innocent lives and injured more than 713 people. He is also found guilty of the murder of builder Pradeep Jain in 1995. Thus, Saleem was prosecuted under the provisions of the Explosives Act 1884, TADA Act, and Arms Act, 1959 but still, he is not been served the death penalty.

This is because of the assurance provided by India to Portugal that while extraditing gangster Abu Saleem, he will not be sentenced to imprisonment of more than 25 years or the death penalty. The question of respecting this assurance will arise in the year 2030.

At the very same time, it would be inappropriate not to emphasize the fact that in India's judiciary, the executive and legislative are three independent branches and the assurance which was made by the Indian government to Portugal was in its executive capacity. As the case comes in front of the judiciary, the judiciary being an independent branch is not bound to abide by the assurance given by the government in its executive capacity. Thus, the judiciary has the authority to punish Abu Salim in accordance with the provisions mentioned in the law.

At the same time if India fails to abide by the solemn sovereign assurance given to Portugal, then it leads to certain international ramifications. Also, the assurance that Abu Salim's imprisonment won't extend to 25 years is legally unsustainable. If a person like Abu Salim roams free, then it would result to the death of more than 1000 innocent lives.⁶

CONCLUSION

India needs to assure that its extradition treaties with foreign nations are watertight, as the success rate of India in extraditing fugitives is awfully low; out of every three fugitives, only one is being extradited although we have extradition treaties with various countries. Hence, offenders are finding loopholes in the said treaty with the view to saving themselves from being prosecuted in India. Flying to other countries has become a saviour for the offender in order to hide from justice. Thus, extradition policy must be reformed in order to achieve success in future times with view to eliminate such cases.

Maintaining harmonious relations with other countries is also an indispensable factor for a speedy, smooth, and transparent extradition process. International law does not mandate any sovereign state to extradite the fugitive criminal to the requesting sovereign state. Extradition is completely based on the bilateral or multilateral treaties between the state and in absence of the treaties it is based on the principle of reciprocity and comity.

However, in the nutshell, it can be determined that in order to maintain peace and order in society and to punish the fugitives who are trying to escape from their punishment, the law of extradition and its process is important.

⁶ <https://www.livelaw.in/top-stories/abu-salem-has-to-be-released-after-25-years-of-sentence-as-per-extradition-treaty-with-portugal-supreme-court-203415>