

BURNISHED LAW JOURNAL

Extradition Laws in India- Critical Analysis¹.

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The imposition of criminal liability upon an offending individual is a function of the existing framework of laws in a certain territory. Normally, barring exceptions, an individual who has committed a crime in a certain territory is liable to be punished as per the penal provisions that govern such criminal action in that specific territory. Thus, in an attempt to escape prosecution, numerous offenders have often fled the territory where commission of the crime took place. Extradition involves the return of such offending individuals to domestic soil via cooperation between sovereign nations.

Model Law on Extradition, 2004, defines extradition as:

“Extradition refers to the surrender of any person who is sought by the requesting State for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence.”

Generally, the concept of “*dual criminality*” applies to an extraditable offence, i.e. an individual can only be extradited for an action that is considered a criminal offence in both states. The framework for extradition between sovereign nations is laid out in bilateral treaties and certain multilateral conventions such as the United Nations Convention against Corruption, 2005 (UNCAC) and the United Nations Convention against Transnational Organised Crime, 2003 (UNTOC) and its three protocols.² Under the norm of *pacta sunt servanda*, treaties place binding obligations on states with respect to extradition. The Extradition Act, 1962 lays down the domestic legislative framework of India for extradition of criminals from India to foreign nations and vice-versa.

India has had negligible success in extraditing domestic offenders who flock to foreign nations to shield themselves against criminal action, from Nadeem Akhtar Saifee (wanted in the Gulshan Kumar murder case) to Lalit Modi and Vijay Mallya, Indian extradition requests have met with numerous hurdles especially from the United Kingdom which has often cited the “possibility of human rights violations”³ as a bar to extradition.

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²Ministry of External Affairs, Guidelines For Indian Law Enforcement Agencies For Extradition Of Fugitives From Abroad - <https://mea.gov.in/extraditionguidelinesabroad.htm>

³Another extradition setback for India as UK refuses to deport Indian-origin murder accused couple Press Trust of India, July 7, 2019, Business Standard, available at: https://www.business-standard.com/article/pti-stories/another-extradition-setback-for-india-as-uk-refuses-to-deport-indian-origin-murder-accused-couple-119070700453_1.html

Instances of Failed Extradition

In *Saifi v Brixton Prison & Anr*⁴, where the Union of India sought the extradition of music composer, Nadeem Saifi for the murder of Gulshan Kumar in 1997, a bench of Lord Justice Rose and Justice Newman of the England and Wales High Court denied the request on the ground that the investigating agencies' mishandling of evidence was so severe as to show a pattern of events that is "*consistent with a pre-conceived desire to blame the applicant (Saifi) and the use of improper pressure to obtain a statement from Ali Shekhar (a primary witness) to make good the allegations*".

Similarly, India was unsuccessful in the extradition of a prime accused in the Bofors scam. It was alleged that Swedish arms manufacturer, AB Bofors had bribed top Indian politicians, including erstwhile PM Rajiv Gandhi and defence personnel to secure a contract for the supply of 400 155 mm Howitzer guns to the Indian Army from with Sweden. Quattrocchi was an Italian businessman who was allegedly said to have facilitated the exchange of bribes in the Bofors scandal. India had failed to extradite Quattrocchi twice, once from Malaysia and once from Argentina in 2003 and 2007 respectively. India had no bilateral treaties with either of the nations. When the request for extradition was made by the Union of India to Malaysia, Quattrocchi applied for judicial review of the extradition to the Malaysian High Court which rejected India's plea for the businessman's extradition to stand trial in the Bofors payoff case, observing that while there was sufficient amount of evidence to show exchange of payments a *conspiracy to commit corruption* was not an offence in Malaysia and the other charges against Quattrocchi were not disclosed in a comprehensive manner. In Argentina, extradition failed in spite of exorbitant expenses amounting to 40 lakh. The First Court in Argentina had held that the CBI had presented an insufficient, poorly documented case and in numerous instances was not even equipped with "proper legal documentation."

Further, much remains to be achieved, in terms of extradition of fugitives from the UK (in particular), even as India seeks the extradition of fugitive, Nirav Modi, wanted in the Rs 13,500 crore Punjab National Bank (PNB) fraud case. The processes⁵ underlined in the India-UK treaty⁶ are not simple. Out of the 28 extradition requests made to the United Kingdom since 2002 only that of Samir Vinu Bhai Patel has been successful.

Position – UK Extradition Act, 2003.

The U.K. Extradition Act, 2003 categorises India as a category- II nation. Therefore, once India sends request for extradition to the UK Secretary of State, he or she decides whether to certify the request. After that, a Court decides whether to issue a warrant for arrest.

⁴[2000] EWHC Admin 437

⁵Extradition Act, 2003, See **Extradition: processes and review**: Extradition processes and agreements between the UK and other countries, role of the Secretary of State, High Court and Supreme Court and the extradition review. Available at: <https://www.gov.uk/guidance/extradition-processes-and-review>,

⁶ Extradition Treaty between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland, signed September 22, 1992, ratified November 15th, 1993.

Thereafter, the person wanted is arrested and brought before the Court. This is followed by a preliminary hearing and then an extradition hearing. If the Court rules in favour of extradition, Secretary of State decides whether to order for it. During the extradition hearing in a UK Court, the judge must be satisfied that '*the conduct described in the warrant amounts to an extradition offence, and meets the requirement that the conduct would amount to a criminal offence were it to have occurred in the UK*'. The decision of Secretary of State can be appealed at a High Court and the order of High Court can be appealed at Supreme Court. Extradition is prohibited if it exposes the person to possible death penalty⁷.

In extradition hearings, human rights violation of the fugitive has emerged to be a frequent point of contention. UK has a comprehensive human rights regime and as per Section 87 of the Extradition Act, 2003 (UK) a judge must decide whether the person's extradition would be compatible with the convention rights within the meaning of the UK Human Rights Act 1998. Numerous fugitives, including Vijay Mallya have raised the squalid condition of India prison cells where they would be required to reside in the event of extradition, as a violation of their human rights.

This defence was successful in the discharge of the extradition request of Sanjeev Chawla before District Judge Rebecca Crane who in spite of her satisfaction that there was a *prima facie* case against Chawla ruled against extradition on human rights grounds over severe conditions in Tihar Jail where he would be lodged after being extradited. Union of India appealed against the decision and Chawla was finally extradited in February 2020, after the UK High Court quashed the order of the District judge only after taking note of India's "solemn diplomatic assurance" around the safety and security of the Cell where he would be kept and the four specific cells surrounding the cells that Chawla would be kept⁸. This process caused a delay of up to 20 years in bringing Chawla to justice. The difficulty of the UK extradition process makes it a safe haven for numerous offenders in India, especially those with the means to sustain a lifestyle in the UK.

Position – Fugitive Offenders Act, 2018

Having recognised the difficulty and costs of bringing fugitive economic offenders to justice, India, by an act of Parliament brought into existence the Fugitive Economic Offenders Act, 2018 which under Section 4 of the Act empowers a Special Court designated under the Prevention of Money Laundering Act, 2002 to declare that an individual is a fugitive economic offender (FEO) if: (i) an arrest warrant has been issued against him for any specified offence where the value involved is over Rs 100 crore, and (ii) he has left the country and refuses to return to face prosecution. Such declaration is to be by the Special Court upon an application of the Director appointed under sub-section (1) of section 49 of the Prevention of Money-laundering Act, 2002. Upon declaration as an "Fugitive Economic

⁷Section 94, Extradition Act, 2003.

⁸Vidya Ram, *Victory for India in Sanjeev Chawla case*, November 16, 2018, The Hindu, available at: <https://www.thehindu.com/news/national/victory-for-india-in-sanjeev-chawla-case/article25520612.ece>

Offender” under Section 4 of the Act, Section 12 of the Act empowers the Court to order that all properties of the offender that are proceeds of crime in India or abroad, any other property or benami property in India or abroad, owned by the fugitive economic offender stand confiscated to the Central government, to the extent that all rights, title and interests in such property vest in the Government free of all encumbrances, Section 14 empowers all and any Court or tribunal in India from disallowing any civil proceedings/claim before it by an individual who has been declared a fugitive economic offender under Section 4, this provision also extends to those LLPs, companies where the promoter/Key Managerial Personnel/majority shareholder/individual having a controlling interest has been declared an FEO. Notably, Section 5 also empowers authorities appointed under the PMLA (Director or deputy Director) to provisionally attach the offender’s properties up to 30 days prior to the filing of the application under section 4. While the act has been criticized for not having adequate safeguards and vesting extraordinary power in authorities under the PMLA⁹, it aims to deter high-value offenders by requiring them to submit to Indian Courts for the protection of their assets, in effect it is to prevent the flight of offenders to foreign jurisdictions in the first place unlike extradition treaties/ arrangements which seek to bring fugitives back to India for further proceedings. The Act, of course deals with only economic offences and does not seek to mitigate all of India’s systemic issues with extradition but certainly attempts to address burgeoning NPAs and credit liquidity in cash-strapped Indian banks whose debtors have left the country to escape repayment of dues.

Extradition Treaties with respect to India qua other Nations.

India has a total of 43 bilateral extradition treaties and 11 extradition arrangements¹⁰, unlike the treaties which impose binding obligations upon the states as per the principle of *pacta sunt servanda*¹¹, the extradition arrangements are not binding on the signatory states. As of November 29th, 2019, India has extradited a total of 54 fugitive offenders, 5 to the UK, 27 to the USA, 4 to Australia, 6 to Canada and the rest to Germany, Croatia, Netherlands, Thailand and Uzbekistan. Further, as of As on January 31 , 2019, a total of 73 offenders have been extradited to India, of this a whopping 23 have been extradited from the UAE, in contrast to only 10 from the USA and as previously discussed, only 1 from the UK. The legal ease of extraditing any offenders from a foreign nation will always be a combination of two factors-

- (a) The terms of the treaty executed with the nation in consideration.
- (b) The provisions related to extradition of the domestic law of the nation.

Extradition in the UAE is governed by Federal Law No. 39 of 2006¹², concerning international judicial cooperation in criminal matters. Article 2 of the Extradition Law provides that the judicial authorities in the UAE shall extend judicial cooperation in criminal matters to Foreign Judicial Authorities, in accordance with the Extradition Law

⁹In order to conduct search under Sections 8 and 9 of the Act, there is no requirement to obtain a search warrant as would ordinarily be required under Section 95 of the Criminal Procedure Code, 1973

¹⁰Ministry of external Affairs, Government of India, Countries with which India has Extradition Treaties/Arrangements, available at:<https://www.mea.gov.in/leta.htm>

¹¹Vienna Convention on the law of treaties, Article 26.

¹²United Arab Emirates: Extradition Requests In The UAE, 02 July 2019 by Horizons & Co, available at: <https://www.mondaq.com/crime/820654/extradition-requests-in-the-uae>

and any applicable treaties that UAE acceded and subject to reciprocal treatment. To further facilitate the resolution of international crime, an extradition treaty¹³ was inked with India in 1999. There could be numerous reasons as to why the UAE is a far more receptive to extradition requests, while diplomatic ties are certainly an important consideration in this regard, the language of the treaty and UAE's domestic extradition law must also be taken into account, at first glance they seem far more conducive to Indian extradition requests. While the UAE does not extradite its own nationals, unlike the UK, it does not place any bar on extraditing offenders who may face the death penalty, this is in consonance to the UAE's own domestic framework whereby, a capital sentence is a legal and accepted form of punishment. Considering Article 3 of the Treaty, it is also easier to fulfil the general requirements of "dual criminality" since attempts or conspiracies to commit an extraditable offence are also to be treated as extraditable offence. Article 3 to a large extent lowers the burden of having to prove that a crime has been committed, proving an attempt of commission is a far lower burden than proof of the crime itself, the fulfillment of a lower threshold for an offence to be extraditable necessarily implies that a larger number of criminal actions are such that they amount to an extraditable offence. The most recent instance of successful extradition to India from the UAE is with regard to British national, Christian James Michael, who was wanted in the ₹3,700-crore Augusta Westland chopper deal bribery case for his role in the purchase of 12 helicopters as a middleman, swinging the deal in favour of AgustaWestland and making illegal payments to Indian Bureaucrats and politicians.

Extradition treaties with countries such as USA, UK, Mauritius etc., permit surrender and transfer of fugitive nationals to the requesting State. However, extradition treaties between India and certain countries such as France, Germany, Spain, Bulgaria, Bahrain, do not permit extradition by India and the foreign States of its respective nationals.¹⁴

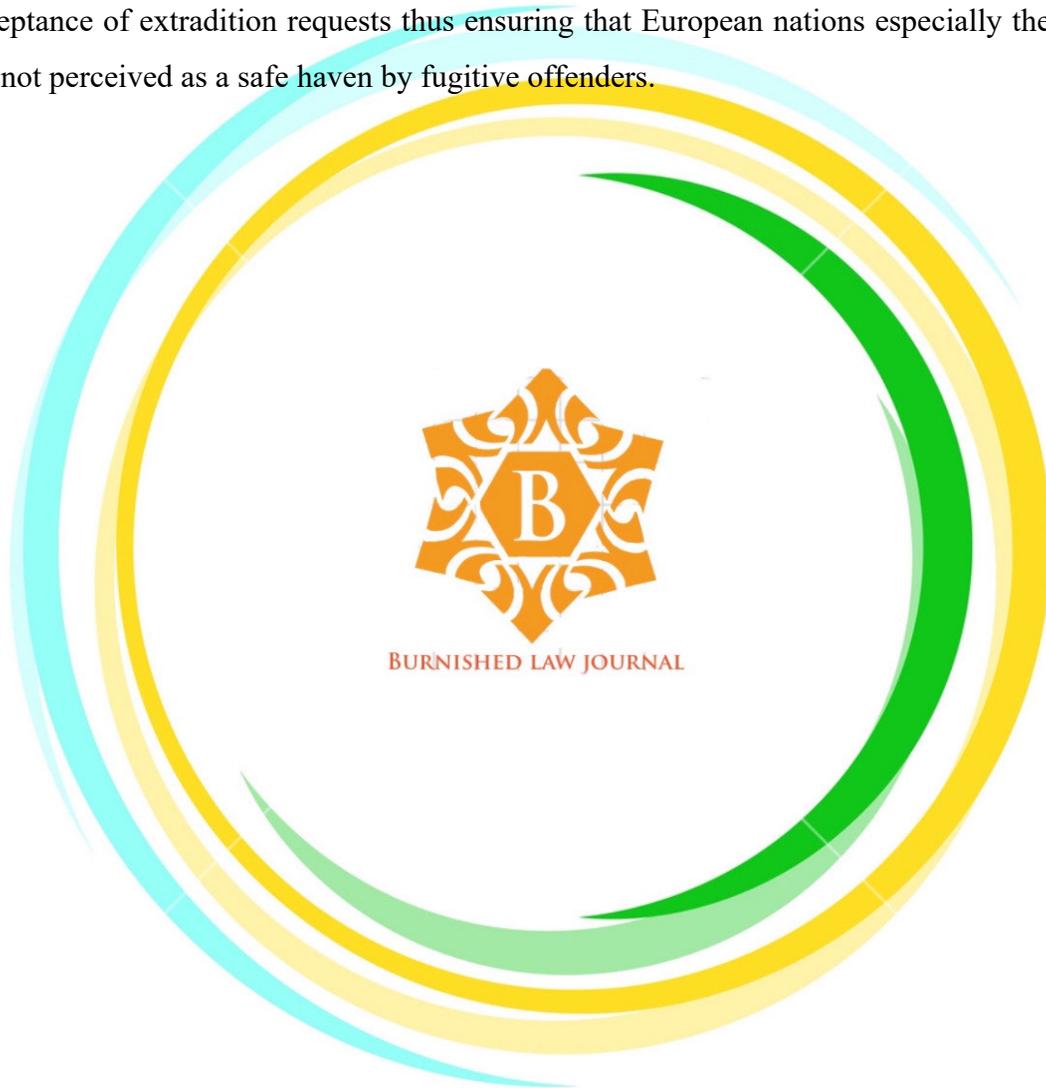
Conclusion

Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1994) provides, "*no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*". Further, Article 3 of the European Convention on Human Rights (ECHR) stipulates that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*." Foreign courts consider that squalid conditions in Indian prisons amount to degrading treatment or punishment and are a violation of the accepted norms of the ECHR. It is amply clear that in order to ensure that Indian extradition requests are approved with ease, the nation must strive to undertake make systemic measures to substantially improve its correctional homes, such that they are in

¹³Extradition treaty between the Government of Republic of India and the United Arab Emirates signed on 25th October, 1999. Available at: <https://mea.gov.in/Images/CPV/leta/UAE.pdf>

¹⁴India: Indian Extradition Law – Process For Seeking Extradition Of Persons From Foreign States 14 June, 2018, Seema Jhingan and Monica Benjamin, LexCounsel Law Offices, available at: "<https://www.mondaq.com/india/crime/710482/indian-extradition-law-process-for-seeking-extradition-of-persons-from-foreign-states>

conformity with the spirit and terms of the ECHR and the International Covenant on Civil and Political Rights to which India is a signatory. Indian Courts have emphasized time and again¹⁵ on the importance of ensuring the sanctity of human rights of prisoners by providing for basic amenities such as food, sanitary accommodation, medical facilities at reasonable standards. India is certainly entitled to prosecute fugitive offenders but the provision of such basic supplements to prisoners is a globally accepted norm and therefore, in order to set in motion the wheels of domestic law enforcement against fugitive offenders and uphold the rule of law, the Government must venture forthwith to fulfil its own human rights obligations towards prisoners. Additionally, investigative delays are required to be curbed to remove Foreign Courts' anxieties as to the evidentiary value of Indian witnesses and affidavits. These combined measures will significantly reduce the barriers towards acceptance of extradition requests thus ensuring that European nations especially the UK are not perceived as a safe haven by fugitive offenders.



¹⁵Hussainara Khatoon vs. State of Bihar AIR 1979 (SC 1377), Ravinder Dev v. State of Rajasthan,(1981) 1 SCC 503 and 1382 Prisons vs. State of Assam and Ors. (2016) 3 SCC 700