



## LAW OF EXTRADITION

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### Introduction:

It is quite possible for a person to escape from punishment to another state after committing a crime in his state.

After the development of air traffic such cases started occurring more frequently.

Fugitive shall be tried in the country where he has fled away or the state where the crime has been committed is the question which arises.

The fugitive where he had fled there is lack of jurisdiction. Hence the criminal is surrender to the requesting state and this surrender of the fugitive is called as extradition.

Surrender of a person is opposite to the traditional practice of granting asylum of the state. Extradition has started since the last quarter of the eighteenth century.

Word extradition has derived from latin words ex and traditum.

Generally it may mean 'delivery of criminals', 'surrender of fugitives', 'handover of fugitives'.

According to Oppenheim extradition is the delivery of an accused of or has been

convicted of a crime, by the state on whose territory he happens for the time to be.<sup>1</sup>

Requesting state generally requests for the fugitive through the diplomatic channel.

Thus in extradition request of a person distinguishes extraction from banishment, expulsion and deportation.

### Purpose of extradition:

It is necessary to extradited the criminal which will recreate a sense that by moving to another state will not amount he can't escape from the crime which he has committed.

A criminal is extradited to the requesting state by the territorial state because of the following purposes:

1) Lack of jurisdiction and because of some technical rules of criminal law makes the process really difficult to punish the person or prosecuted in a state where he has fled away.

2) Extradition is like a warning to the fugitives that they can't escape punishment by fleeing to another state. Thus it has a deterrent effect.

3) To safeguard the interest of the territorial state criminals are surrendered.

For example: if a state adopts a rule of non-extradition of criminals they would likely to flee to that state. Then the state would become a place for international criminals which will be indeed dangerous to people.

4) Extradition is based on reciprocity.

<sup>1</sup> 'International law' Vol. I, Ninth Edition(1992),p.949.



5) Extradition is the step towards the achievement of international cooperation in solving international problems of a social character.

It fulfills one of the purposes of the United Nations as provided under Para 3 of Article 1 of the Charter.

6) The requesting state would be having in a better position to try the offender because the evidence is more freely available in that state only.

### Extradition law in India:

For the first time in India an Extradition Act was formed in 1902. Prior to the enactment of the act of 1962<sup>2</sup> extradition in India was regulated on the basis of the United Kingdom Extradition Act of 1870.

Act of 1870 was applicable to whole British Empire.

The fugitive are surrendered amongst the countries of British Empire by another act i.e., the Fugitive Offenders Act of 1881.

Different footing of extradition was treated to and from countries of British Empire to that of other counties.

The Indian Extradition Act of 1903<sup>3</sup> was enacted to give convenient administration in British Indian and in addition to provide supplement the Extradition Act of 1870 as it is modified time to time and to the Fugitive Offenders Act of 1881. Thus the act of 1903 provides supplementary to the above two acts.

The act of 1903 continued after the India became independent.

Section 2(d) of the Extradition Act of 1962<sup>4</sup> defines the term extradition treaty as a treaty (agreement or arrangement) made by india with a foreign state relating to the Extradition of fugitives made before the 15th day of August 1947, which extends to, and is binding on India.

Thus treaty prior to independence are still concluded by the India . Thus it is bound by all the Extradition treaties of india.

India formed a list of 45 pre-independence Extradition treaties which were in force in 1956.

But then question arises whether other contracting states other than which were in list should be considered themselves to remain bound by such treaties.

After inquiry it was found that only some countries considered themselves to be bound by pre-independent extradition treaties.

Many other states were not clear since they did not give replies to the query. In while time Germany and Portugal expressed the view that extradition treaties are not operative with India, but it was regarded by India that the pre-independence extradition treaties with these states are still operative.

When Abu Salem ,an accused in Bombay blasts,fled to Portugal in 2002, it was found that at that time there is no extradition treaty between India and Portugal. Existence of pre-independence extradition treaty was not pressed by India. The same was held in the case of France. When it was suspected that Dharam Teja had fled to France, the PM of India declared in the parliament on August 24,1966 that India has no extradition treaty with France and therefore extradition is not

<sup>2</sup> Act XXIV of 1962.

<sup>3</sup> Act IV of 1903.

<sup>4</sup> Lok sabha Debates,12<sup>th</sup> Session,1956



possible. But list of countries with whom India has extradition treaties includes France as a party to the treaty.

Similarly, When Quattrocchi, an Italian businessman and an accused in Bofors Scam fled to Argentina and in parliamentary session it was found that India didn't have Extradition treaty with Argentina but the opposition leader L.K. Advani that the treaty signed in 1899 by the British India is still in force as it has mentioned in the list of pre-independence treaties.<sup>5</sup>

India itself is not sure as to which pre-independence treaties are operative. But in present time, India has extradition treaty with 47 countries and extradition arrangements with 9 countries<sup>6</sup>. Between 2002 to December 7, 2016 a total of 62 fugitives have been extradited to India by foreign countries on the basis of Extradition treaties.<sup>7</sup> Crimes for which they have been extradited, includes murder, kidnapping, fraud, cheating and terrorism.

India has extradited 49 criminals to other states till 2016.<sup>8</sup>

**Extradition and human rights violations:**

The classical international law did not provide human rights safeguards at the time of extradition of fugitives.

But in the recent past years human rights safeguards are taken into consideration.

Many European countries such as Switzerland, Austria and Germany in their extradition treaty laws they have adopted the principle that extradition shall be refused if the procedure in the requesting state is contrary to the European Convention on Human Rights.

Although presently, the refusal of extradition on the ground of alleged violations of all the human rights is not accepted by the states extradition is refused, in case of certain violation of human rights such as

Firstly, where there is a substantial ground's for believing that if fugitive is extradited he will be given torture or will be given cruel, inhuman or degrading treatment or punishment.<sup>9</sup>

Secondly, if the purpose of prosecuting or punishing of the person extradited is his race, religion, nationality or political opinion, or that person's position may be prejudiced for any of these reasons.<sup>10</sup>

Thirdly, the prosecution of the person will not be fairly conducted by the requesting state.<sup>11</sup>

<sup>5</sup> For instance Belgium, Chile, Netherlands and Switzerland.

<sup>6</sup> Times of India, February 20, 2018

<sup>7</sup> Times of India, February 20, 2018

<sup>8</sup> Ibid.

<sup>9</sup> The convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment under Article 3 lays down that member States would

not repeal, return or extradite persons to states if there are substantial grounds for believing that they would at risk of being subjected to torture.

<sup>10</sup> The U.N. Model treaty on Extradition also contains a similar provision which adds ethnic origin, sex and status to the list of prohibited categories of discrimination.

<sup>11</sup> Article 3 of the U.N. Model Treaty on Extradition.



**Extradition of Foreign Nationals for crimes committed in Foreign countries:**

Foreigners are not extradited for the offence committed in foreign countries.

Extradition is done when it has been thoroughly examined by the state (where the crime has been committed) regarding the impact and consequences of the offence in the requesting state. It is a point to be noted that extradition of foreigners committing crimes in foreign countries can only take place when extradition treaties include a provision regarding it.

For example: extradition treaty between Canada and India has included this provision for the possibility of extradition for the extra territorial offences by stating under Article 2 that extradition shall also be granted in respect of an extradition offence.... committed outside the territory but within the jurisdiction as assessed by the requesting state, if the requested state would, in corresponding circumstances have, jurisdiction over such offences. This is, of course an innovative provision which the two countries have inserted in the treaty in recognition of the fact that terrorist activities have trans-national connection and impact.

Extradition law, at present is wholly based on the basis of bilateral treaties and national laws.

Since many years they are practised in many countries, they can be stated as to have become general principle of international law. However, in any way, they are binding on all the states. It is possible that any extradition treaty or extradition law of state remains wholly silent on any of these points, or they might contain provisions otherwise.

While in many former case, difficulties are bound to arise, and latter would be regarded as violative to the general principles of international law. And they shall be binding on the parties.

In my opinion it is desirable that International Law Commission take up the topic of extradition for its consideration and codification. If the topic of Extradition once codified is likely to be of great help in the suppression of the crime and in achieving international cooperation in social fields which is one of the reason of the United Nations as provided under Para 3 of Article I of the Charter.

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**Extradition of political offenders:**

Customary rule of international law is political offenders are not extradited. Or we can say they are granted asylum by the territorial state.

During monarchy, political offenders are extradited very often.

To avoid the intervention in the affairs of another state. Then in the beginning of the French Revolution this practice underwent numerous changes.<sup>12</sup> Perhaps for the first time, the French constitution of 1793 under Article 120 made a provision for granting asylum to those foreigners who exciled from their home country for the cause of liberty.

Afterwards many states followed the principle of non-extradition of the political offenders. Indian Extradition Act of 1962 also lays down similar provision under section 31(a).

At present times political offenders are not extradited has become a general rule of international law and therefore it is an exception of extradition.

**Basis for the non-extradition of the political offenders:**

Consideration for the rule of non-extradition of the political offenders are as follows-

- 2) First rule is based on the elementary consideration of humanity. State would not like to extradite a person who is not a criminal in the eyes of law. If it does so it will not be in compliance with the law of natural justice.

- 2) In case if the political offenders is extradited, it is feared that they would not be treated fairly.

It is the duty of territorial state to ensure safeguards to the surrendered fugitives for a fair trial in the requesting state. Since it is difficult task, they are not extradited.

- 3) the rule protect extra-legal character which the requesting state might attempt to take against the political offenders.

- 4) the political offenders to take shelter in another country is same as those of the ordinary criminals.

- 5) political offenders are not that dangerous for the territorial state as may be in the case of ordinary criminals.

**Exceptions to the political offence exception:**

There are chances that, fugitives will take undue advantage of the principle of non-extradition of political offenders by posing themselves as political offenders.

In 1856, Belgium introduced the attentat clause in its extradition law to keep a check to restrict the principle misuse.

Article VI of the act provides that an attempt on the life of head of a foreign government or the members of his family shall not be considered to be a political offence, or an act committed with such an offence, when it is fact constitute murder, assassination or poisoning. Still Attentat clause<sup>13</sup> is not a general rule of international law. For instance, the queen of England or the

<sup>12</sup> European Convection on the suppression of Terrorism.

<sup>13</sup> The clause has found its way into many treaties. For instance, see Article 4(2) of the Extradition



President of India may not be as powerful as the Prime minister.

A no. Of serious crimes at present for which the political offence exception is no longer accepted are :

- 2) Multilateral treaties like Genocide convention of 1948 and the convention on Apartheid of 1973 expressly excluded it. The Genocide convention provides under Article VII that genocide, conspiracy to commit genocide, direct and indirect public incitement to commit genocide, attempt to commit genocide and complicity in genocide shall not be considered political crimes.

2) In case of customary international law crimes such as war crimes and crimes against humanity, political offence is not recognised as an exception to extradition.<sup>14</sup>

3) Multilateral treaties relating to hijacking, torture or hostage taking, injury to diplomats and grave breaches of the Geneva conventions on the laws of war and armed conflict have seriously undermined the exception by requiring states either to prosecute or extradite despite the fact that they will normally be politically motivated.

4) States have excluded the political offence exception in the case of some purely

localized criminal offence by means of bilateral or multilateral treaties.<sup>15</sup>

5) It has been held not to protect former government officials guilty of human rights abuses.<sup>16</sup>

Extradition treaty between India and Canada concluded on February 6, 1987 provided under Article 5(1)(a) that extradition may be refused if the offence in respect of which it is requested is considered by the requested state to be political offence or an offence of a political character.

The extradition treaty concluded between India and Britain in 1992 also prevent the suspected terrorists from arguing that their offence are political to avoid extradition.

Indian Extradition Act of 1962 as amended by the Extradition (amendment) Act 1993 had also laid down a comprehensive list of offences which shall not be regarded as political offence. The Schedule of list of offences under the suppression of unlawful acts against the Safety of Civil aviation Act, 1982.

**Re Castioni Case:**

In th last decade of the nineteenth century, a leading case decided by British court was that of Re Castioni.<sup>17</sup>

In this particular case, Castioni who had returned to Switzerland from abroad, joined the revolutionary movement in the Canton of Ticinio a place in Switzerland and in the

Treaty between Germany and Turkey of 1930; Article 4(2) of the Extradition Treaty between France and Czechoslovakia of 1928; Article 6 of the Extradition between Belgium and Poland of 1931.

<sup>14</sup> See General Assembly Resolution 3074(XXVIII) on Principles of International Cooperation in the Detention, Arrest, Extradition and Punishment of

Persons Guilty of War Crimes and Crimes against Humanity.

<sup>15</sup> See European Convention on the Suppression of Terrorism.

<sup>16</sup> See in the matter of Extradition of Soares Mason 694,F Supp. 676(N.D.Cal. 1988) at 705.

<sup>17</sup> (1891)IQB 149.



course of it, he committed the murder of Rossi, a member of the government. It was pleaded on behalf of Castioni in writ of habeas corpus that his offence was a political offence for which extradition was not available. He claimed protection under section 3 of the Extradition Act 1870. Lord Denman, J; laid down that in order to bring the case within the scope of the act, and for an offence to be political, it must atleast be shown that the act is done in furtherance of, done with the intension of assistance, as a sort of overt act, in the course of acting in a political matter, a political rising, or a dispute between two parties in the state as to which is to have the government in its hands.....

The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as a part of the political movement and rising in which he was taking part.....<sup>18</sup> His extradition was refused on the finding that his motive for the act was political. The deciding factor for an offence, to be considered as political, according to the court was that the act should have been committed in the course of a political struggle or disturbance during which two or more parties in the state are contending and each party seeks to impose the government of its choice on the other. In other words, the act should be done against the established regime, by the other party, seeking to establish its own regime.

### Re Meunier Case:

In the case of *Re Meunier*<sup>19</sup> which came before the court 3 years after the case of *Re Castioni*, the principle laid down in previous case of *Re Castioni* was repeated once again. In *Re Meunier*, the petitioner was a French anarchist who was charged with causing explosions at a particular I and also in certain barracks in France, one of which resulted in death of two individuals.

The principle laid down in *Re Castioni* and *Re Meunier* was followed for a fairly long time by other states as well. The federal court of the United States, in 1894 in *Rec Ezta* held that in order 'to bring an offence within the meaning of the words' political character' it must be incidental to and form part of political disturbance.<sup>20</sup> The Federal Tribunal of Switzerland in *Re Pawan*,<sup>21</sup> the supreme court of Brazil in *Re Benegas*<sup>22</sup> case also applied the strict principle laid down in the *Castioni* case. According to these decisions, an offence is considered to be political if it directed against the state or the constitutional order, or be otherwise 'inextricably involved in conditions disturbing the constitutional life' of the state . It should be committed by an organised movement to secure power in the state against the established regime.

### Criticisms of the Re Castioni and Re Meunier cases:

Previously noted approach in defining the term political offence appears to be narrow and rigid. Many acts of individuals such as terrorist acts of personal vengeance or gain and acts having an entirely local impact are totally excluded from the category of political offence.

<sup>18</sup> (1891) 1 QB at p. 156 and 159.

<sup>19</sup> (1894) 2 QB 415.

<sup>20</sup> (1894) 62 Federal Court p. 972 at p. 999.

<sup>21</sup> Annual Digest (1927-28) Case no. 29 p. 347.

<sup>22</sup> Annual Digest (1948) p. 800.



It is defined if a group of people persuades the government to do any particular act, and in the course of their persuasion, they commit certain crimes, their object is not to overthrow the government, yet the crime may be considered as political. Further, the above view does not take account of the motive of the crime. An individual may fear of not getting fair trial from the government of his own state on social, economic, religious or cultural grounds which are inextricably woven with the policies of the government. Such persons are not treated as political offender according to the above approach taken in Castioni and Meunier cases .

Extradition and deportation:

Extradition and deportation both are the method by which an alien is required to leave the territory. However both differ from one to another.

Firstly while extradition is primarily performed in the interest of the requesting state, deportation is performed in the exclusive interest of the expelling state.

Secondly, extradition needs the consensual co-operation of at least two states, whereas deportation is a unilateral action apart from the duty of the receiving state to accept its own national.

Thirdly, extradition applies to criminal prosecutions and thus suppresses criminality, expulsion order may be issued to any foreign national on a number of grounds.

Fourthly, while extradition of a person takes place only on the request of another state, expulsion is an order of a state which prohibits a person to remain inside the territory of the ordering state.

**Law of extradition:**

Extradition is a topic which does not come exclusively under the domain of international law thus rules regarding extradition are not well established.

Law of extradition is a dual law.

It has 2 operations

- 1) National
- 2) international.

Whether the extradition or non-extradition of a person will be done or not it is determined by the municipal courts of a state, but at the same time it is also a part of international law because it governs the relations between two states over the question of whether or not a given person should be handed over by one state to another state

This question is decided by the national courts but on the basis of international commitments as well as the rules of international relating to the subject.

In 1935 the Harvard Law School prepared a draft Convention on the subject. The

International law association has also considered legal problems relating to extradition in the Conference held at Warsaw. In 1928 the Draft Convention extradition was approved but nothing has materlised in concluding a universal convention on extradition. International law Commission has also not yet taken this topic for its consideration for codification despite the inclusion of the topic of extradition in 1949, in its provisional list of fourteen topics for codification. It is desirable if a multilateral convention is concluded so that general rules of international law may be settled regarding extradition.

Attempts have also been made by the states to conclude regional conventions on the





subject. The Pan American Conference of 1902 produced a treaty signed by twelve states but it was not ratified. The Asian-african Legal Consultative Body also prepared a draft Convention on extradition at its meeting in Colombo in 1960. In September, 1965, the Commonwealth Conference of Law Ministers and chief Justices expressed the desire for a Commonwealth Convention on Extradition. Some states, no doubt, are parties to schemes of extradition between a group of states having geographical affinity. For instance, the European Convention on Extradition was signed on December 13, 1957 by the members states of the Council of Europe, and the Arab League extradition agreement was approved by the council of the League of Arab states on September 14, 1952. Such regional conventions contribute to the trend of creating general rules of extradition.

In India, rules regarding extradition have been made in the Extradition Act of 1962 and the Extradition (Amendment) Act, 1993. Extradition is done by India only when the condition laid down in the Act are satisfied. Similarly, other states have extradition laws.

### Extradition treaties:

Foremost condition of extradition is the existence of an extradition treaty between the two states. Some states such as the United States, Belgium and the Netherlands, requires a treaty as an absolute pre condition.<sup>23</sup> The strict requirement of an extradition treaty may be regarded as the most obvious obstacle

to international cooperation in the suppression of crimes.

Since extradition treaties are politically sensitive and require careful and lengthy negotiations, States have few extradition treaties and the criminal can usually find a safe haven—that is a state which requires a treaty for extradition and has no such treaty with the state within whose jurisdiction the crime was committed, It is therefore, desirable that states conclude extradition treaties with as many states as possible to suppress the crime.

In order to provide assistance to states interested in negotiating and concluding bilateral extradition agreements, the General Assembly on December 14, 1990 adopted a Model Treaty on Extradition by adopting a resolution. India does not have any extradition treaty with Portugal. However, when Abu Salem, an accused in 1993 Mumbai blast and an underworld don fled to Portugal along with his wife Monica Bedi, Portugal, in the absence of a treaty, extradited Abu Salem to India after the latter gave assurance that he would not be given death sentence. Later, high court of Portugal passed an order on July 14, 2004 along with reasons for his extradition to India. Abu Salem was extradited in 2006 on the condition that he will not be given death sentence. His wife has also ordered to be extradited to India.

### Conclusion:

In cases where a crime is recognised in both the states, i.e. in the territorial as well as in

<sup>23</sup> Quattrocchi an Italian businessman and an accused in Bofos Scam could not be extradited to India from Italy in the absence of a treaty between

the two countries. Negotiations for an extradition treaty with Italy were initiated in 2001 but two countries have not concluded any treaty as yet.



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the requesting state, but the crime for which the extradition is demanded is punishable by death in the requesting state and not in the territorial state, a further difficulty may arise in extraditing a person. Territorial state may hesitate to extradite such a person as it would offend its conscious if it has to extradite a person to whom death sentence would for that offence. In such case treaty provides a provision in that requesting state gives a assurance that they will not give death sentence to the fugitive.

A fugitive may be tried by the requesting state only for that offence for which he has been extradited.(rule of speciality).

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