

Cyber Crimes and Extradition Issues in India

Shiv Raman*

Research Scholar, Maharishi Dayanand University, Rohtak, Haryana-124001

Abstract – The incredible evolution of information society and its dependence on Internet usage in world and particularly in India is laterally accompanied by vulnerability of societies to cybercrime. Cybercriminals are not constrained by geographical limitations as cyberspace is a free-flowing, borderless and a global problem. These crimes can't be deterred by local laws, India in such scenario is like sitting ducks. India to counter Cybercrime has engaged itself in various bilateral agreements like cyber agreement with Russia and a framework agreement with the US, recent visit of prime minister of India Mr. Modi to Israel to sign Indo-Israel cyber framework is yet another effort of India to streamline its cyberspace. These bilateral agreements have limited scope and are inadequate and ineffective to deal with cybercrime. India need a multilateral treaty which will harmonize its laws by a common criminal policy, and deal with international cooperation for combating cybercrimes at global level. The treaty should help in formulating effective legislation and robust investigative techniques, which can foster international cooperation to combat cybercrime. The Council of Europe's Budapest Convention on Cybercrime is such international multilateral treaty dealing with international cooperation for combating cybercrimes at global level. India should sign the convention to combat cybercrime, even the US and Israel with whom India is having bilateral agreements to combat cybercrime have joined Budapest cybercrime convention.

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INTRODUCTION

It is matter of deep concern whether the cyber-criminal ever get extradited? Surprisingly we treat the 'perpetrator of cyber-criminal' as criminal, but not the 'cyber-crime victim' as victim in any 'Cyber laws' of India. It's generally contended that "everything is fair in love and war." But if apply this concept then the 'hacking national or international website, ID theft, espionage, cyber terrorism is legal". We realize the falsehood of this belief after being victim of cyber offence especially, when we are unable or helpless to try 'International Cyber Criminal' for trans-border or cross border cyber offences.

Due to the technological advancement the whole world turned in to "global village". All digital citizen has single 'digital citizenship', irrespective of our nationality or jurisdictional borders. We already discussed the 'extraterritorial operation of the code for any offence committed by any person targeting the computer or computer resource located anywhere in India or any person or citizen abide by India law commit any offence in violation of criminal laws including IT Act, 2000. Further Sec. 75 remove are jurisdictional barriers of 'nationality' or 'citizenship'.

But practically, it is a very difficult task to try a 'foreign national' with in territory of India. The extradition treaties, convention, asylum, public or

private International law are laws to be given due regard and recognition.

Internet is a world which 'disrespect' jurisdictional boundaries. Cyber criminal can initiate their criminality from any 'physical location' of the world, the effects would be the same as 'physical presence' of accused at crime scene. 'Cyber jurisdiction' or extradition is an exception to defence of 'plea of alibi'. Merely the virtual presence can make a person liable for the commission of any 'virtual offence'. The cyber criminal jurisdiction in the context of 'extra-territorial' claim over cyber crimes is affected by two types of controversies:

1. Positive Jurisdiction Conflicts:

Its occasions, where several countries are vying for jurisdiction.

2. Negative Jurisdiction Conflicts:

Where there is an expectation or waiting for the other Country to claim jurisdiction but fails to do so accordingly. For. e.g. 'love bug' virus, is example of positive jurisdiction conflicts, but infect its example of both of above-mentioned conflicts.

All the countries of the world are not signatory or rectified the treaties or conventions related to

international cyber crimes or jurisdictional issues. Infact sometime the cyber offence including 'cyber terrorism' is sponsored, supported, politically promoted or organized by sovereign itself from the private persons. In these situations, it is very difficult to try a 'foreign national' in India.

It is the 'Criminal justice system' which maintain law and order situation in a society and to punish the law, rules or regulating violating conduct, which could inflict harm to persons, society and institutions. The rule of International and customary law is to be given due respect, regard and recognition to the border and boundaries of other nation too.

The violation of above rule can pose a serious problem in providing justice and adjudication of cross border or trans-border offences especially when the offender escapes or fled away to another country. In order to deal with these issues and handing over of accused to requested country, after the commission of criminal offences, has been developed with international cooperation. The whole process of handing over of the fugitive for trial to other country is termed as "extradition."

1. Meaning and Definition of Extradition:

The term extradition awes its origin from Latin word "extradere", meant thereby "delivery of fugitive", "surrender of criminals" or "handing over of criminals". There is no consensus on definition of 'extradition'. Various authors and academicians give diverse definition of 'extradition'.

According to definition given by **Cherif Bassiouni, scholar of international extradition and international law**, extradition is: "*the delivery of an individual, usually a fugitive from justice, by one nation-state to another. This process may be based on an explicit agreement between the states in the form of a treaty, or on reciprocity or comity.*"[1]

According to definition given in the book of **John Murphy, titled as "Punishing International Terrorists"**, defines extradition as- "*in most instances where a terrorist has committed his actions in one state and flees to another, he will be prosecuted for his crimes only if the country where he is apprehended (requested country) agrees to return him to the country where he committed his crimes (requesting country).*"[2]

The United States Statute defines international extradition as- "*the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other which, being competent to try and punish him, demands the surrender.*"[3]

We can conclude that "Extradition is a bilateral process, whereby one country upon the requisition of

other country handover the the accused to the later country for adjudication of offence committed by him in the jurisdiction of later country."

2. Objectives of Extradition:

Extradition is method of 'international legal cooperation' for the objective of combating criminal offences by handing over the accused to the requesting victim country. The principle of international law is to give due regard to sovereignty and nationality of other country, by non-interfering in territorial matter of other country. In case if national of one country fled away to other country or escape to other country, or foreign national commits the offence with in own territory of country, to immune himself from apprehension of punishment. This may cause the situation of jurisdictional hardships to both of the countries. In that situation extradition can be used as an effective legal process to take the accused in requesting country to face the trial. The procedure of extradition is based on 'principle of reciprocity'.

The extradition policies deeply affect the mutual relations of the countries, cooperation in future and their foreign policies. The flexibility in extradition procedure lead to mutual trust and confidence and help in strengthening their relations. Usually, country where the offence has been committed is in comfortable position to adjudicate due to easy access and presence of evidence. Further the extradition ensures that "*no crime goes unadjudicated and to bring the offender to justice.*"

3. Cyber-crimes, Are they Extraditable?

The European convention and other international treaties on cyber crime has made 'cyber crimes extraditable'. The extradition can be allowed only in the case 'when offence is a punishable at least with severe imprisonment of One year or more offence under laws of the both of the countries and both are the signatory of 'pre-commission of alleged offence', bilateral treaty for the extradition of offenders. Further extradition is allowed if the 'commission of criminal offence' established according to the conditions and provisions of Budapest Convention. 11

4. Extraditable Offences under Cyber Crime Convention, 2001:

The following are the offences those are extraditable under the European Convention ob Cyber Offences, 2001:

Extraditable Offences Under Convention	Offences
Title 1: Offences against the	Art. 2: Illegal access of Computer or computer

confidentiality, integrity and availability of computer data and systems.	resources or server or network etc Art. 3: Illegal interception Art. 4: Interference with information or Data or data resources. Art. 5: Interference with computer System or data resource. Interference. Art. 6: Misuse or illegally using of cyber or telecommunication devices.
Title 2: Computer-related offences	Art. 7: Forgery with or using Computer. Art. 8: Offence of fraud by or with the use of computer.
Title 3: Content-related offences	Offences related to child pornography (Article 9)
Title 4: The offences related to infringements of copyright and related rights	Offences related to infringements of copyright and related rights (Article 10) Attempt and aiding or abetting (Article 11).

Unfortunately, India is not signatory till now to the Cyber Crime Convention, bilateral extradition treaties, which is signed by about 50 countries. In the matter of **Rambabu Saxena v. State** [4], it was held that India's status of being non-signatory of the convention could not deter Government of India. Further "if the treaty does not enlist a particular offence for which extradition was sought but authorizes the Indian government to grant extradition for some additional offences by inserting a general clause to this effect, extradition may still be granted."

The following are the 'Pre-conditions for the compliance of requests for seeking "mutual assistance". It includes:

The commission of "criminal offence" which is punishable in Indian criminal Law about which legal assistance is requested;
<i>The adjudication proceedings have not been finished by the court which require the pre- criminal sanction to be granted;</i>
<i>The criminal must not be privileged from criminal prosecution mean for criminal prosecution the sanction is not excluded by the law of nation or the prosecution is not duly condoned or an ordinary pardon;</i>
<i>The requisition for legal assistance must not related with the request for legal</i>

<i>assistance to a political offence or an offence inclusive of court marshal laws;</i>
<i>The compliance with requests for mutual assistance would not in any way violate or infringe sovereignty Integrity, safety, security, peace, public order or other sovereign welfare of India.</i>

Further the 'mutual assistance' can be even given for the under 'international humanitarian law for the commission of any "criminal offence" which is not controlled by state restrictions. It is duty of 'judicial authority' to determine and decide- "whether or not the preconditions have been satisfied?

The Judiciary could grant mutual assistance which is subject to "rule of reciprocity". The Ministry of Law can issue a notification on the existence of reciprocity upon demand of the Court. But where there is no confirmation on reciprocity, we can presume the existence of rule of reciprocity. The additional preconditions shall be inclusive of following "additional pre-conditions:

The person, in respect of whom extradition is requested, is not a national of India;
<i>The offence, in respect of which extradition is requested, was not committed in the territory of India, and not committed against it or against its citizen;</i>
<i>The same person is not prosecuted in India for the offence in respect of which extradition is requested;</i>
<i>In accordance with the national legislation conditions exist for reopening the criminal case for the criminal offence in respect of which extradition is requested;</i>
<i>Proper identity of the person in respect of whom extradition is requested is established;</i>
<i>There is enough evidence to support the reasonable doubt, that is, an enforceable court decision is in place demonstrating that the person in respect of whom extradition is requested has committed the offence in respect of which extradition is requested;</i>
<i>The requesting party guarantees that in case of conviction in absentia the proceeding will be repeated in presence of the extradited person;</i>
<i>The requesting party guarantees that the capital offence provided for the criminal offence in respect of which extradition is requested will not be imposed, that is, executed.</i>

5. Difference between Extradition and Rule of Deportation:

Prima-facie Extradition and deportation seems to be similar but practically there is a lot of difference between these. Extradition means when a person accused of extraterritorial offence or foreign national commits offence in other country, who is required to handover to the requesting country for adjudication of dispute. This process is governed by bilateral treaty or convention. Further it is also required that the alleged offence is punishable in both countries.

The rule of deportation means that “if duration or time period of person’s visa expired and that person could be deprived from exercising his ‘right to stay’ in other country. In that situation that person is required to be returned to his native place or country. Deportation is a rule of legislative law, which doesn’t require pre-enforcement of any treaty in this regard. Deportation is an ordinary rule, applicable to every law violating person.

6. Extradition Procedure and Law:

The ‘extradition process’ and ‘extradition granting’ is primarily governed by municipal law rather than international law. In various cases the extradition law narrates the conditions & mode of extradition of fugitive delinquent. The non-uniformity of extradition laws raises various conflicts for e.g. extradition of nationals, *prima facie* case, quantum of punishment, mode of taking evidence and the extent of executive and judicial power in process of surrender of fugitive. Instead of these obstacles’ bilateral treaties, municipal laws and judicial precedents led to application of extradition laws, developed under international law.

A sovereign State is in a position to conduct the trial of fugitive offender on basis of application of principle of *lex-loci* and *lex-fori* for appraisal of available evidences. The very basis of international rule of Extradition is to “*ensure that no crime goes unpunished and that the offender is brought to justice.*” The Extradition policies ensure that the criminal may flee away from territorial jurisdictions, but he could be brought back and tried for the commission of other offence.

Often the perpetrator fled away to the countries who don’t have extradition treaties with requesting countries. Later, that would be safe heaven for those criminals. The non-cooperation for extradition threatens the law, sovereignty and security of that country. The extradition ensures the offender to be penalized for the commission of offence and uphold the trust and faith of the society.”

7. Notice or requisition for extradition:

The extradition can be allowed based on “full information regarding accusation” of the “person

extradited”, which is directly received from requesting country or that can be done through ‘*red notice*’ from General Secretariat, ‘INTERPOL’ (International Criminal Police Organisation). On receiving the ‘requisition or notice’ the ‘Interpol Wing’ of CBI (Central Bureau of Investigation) handover the ‘requisition or notice’ to the designated police organizations. Further the copy of ‘red notice’ is transferred through ‘General Secretariat’ to all State Police Department, embassies and immigration department.

8. Arrest and Extradition of Criminals:

The arrest and detention of fugitive can be done according to the procedure provided in **Article No. 34(b)** of The Extradition Act, 1962. It can be done on receipt of the request from embassies through ‘diplomatic channels’, under arrest warrant issued by competent court of jurisdiction.

9. Arrest without warrant:

The provision of **Sec. 41(1)(g)** of Code of Criminal Procedure Code 1973, which empowers the police authorities to arrest a person under certain circumstances even without warrant. The person after arrest refer the case to Interpol Wing for forwarding to Indian Government for consideration of matter. Further action can also be taken after taking previous approval or sanction of Central Govt. under ambit of Sec. 188 of Code of Criminal Procedure Code, 1973.

10. The extradition process in India:

The extradition process in India is governed by “The Extradition Act, 1962.” The extradition can be based on convention, treaty or mutual arrangement. Presently India has extradition treaties with about 39 countries till 2016.

Extraditable offences:

It means when both the requesting and requested Country contained extradition laws in the process. The offences could be treated as ‘extraditable’ by any of the two methods:

1. Enumerative method:

This method involves the granting of extradition for the offences duly pre-enlisted in list explaining ‘extraditable offences’. That may be in any clause of agreement or made essential part of the treaty.

2. Eliminative method:

This method of extraditable offences made an offence extraditable based on ‘maximum or minimum penalty’ of offence. The French extradition law inserted this provision in their law.

Now serious crimes providing strict punishment are automatically treated as covered in extraditable offences.

The procedures for extradition are premeditated to ensure the return of criminal from one country to another and the safeguarding the rights of accused of cyber- crimes by the requesting nation. The sufficiency of evidence is the precondition to promote the 'prima facie case' and the protection of accused from being tried of the offence not committed by the accused for which accused was extradited.

In the leading case of '**Daya Singh Lahoria v. Union of India**', apex court observed that: "A fugitive brought into this country under an Extradition Decree can be tried only for the offences mentioned in the Extradition decree and for no other offences and the criminal courts of India will have no jurisdiction to try such fugitive for any other offence." [5]

Further "It is prohibited by International law that -A fugitive can not be extradited to the requesting country in absence of 'extradition treaty'. The nature of law of extradition is dual., which demand the existence of bilateral treaty rules the relations between two sovereign countries on the issue of extradition of offenders." [6]

In another illustrative case of **R v. Governor of Braxton Prison and another, ex parte Levin** [7], a Russian national was charged for the offence of 'hacking' with in American territories with the use of "Russian computer". His activity also composition of various cyber crimes under laws of England which also effect American laws. England police arrested him and extradited to America

11. Internationally Accepted Extradition Rules:

The whole Extradition process and procedure is of administrative, judicial, executive in nature, based on 'principle of reciprocity' of public International law. Though extradition process is governed by the 'extradition treaty' yet guided by internationally accepted traditions and rules of extradition. Every country is abiding by the rules of International law in their dealing with International community those as follows:

1. Rule of Dual Criminality:

This 'Rule of Dual Criminality' is deeply embedded in the roots of universally accepted 'principle of international extradition laws.' It made a reciprocal classification of those 'extraditable offences. The very basis of this principle is- "the offence for which extradition is sought must be punishable in both the requesting and requested countries." The exact similarity of offence or its ingredients is not a mandatory requirement, but the main thing required is "the offence charged punishable in both country".

Further "the primary focus of dual criminality has always been on the conduct charged and that the elements of the analogous offences need not be identical." The basic requirement of this principle is deemed to be fulfilled where there is "bilateral and multilateral extradition treaties" entered by both countries. It is a universally accepted principle, now turned in to "root attribute of 'international customary law'. The following are two different approaches to interpret the requirement of this principle in this regard.

1.1 in concerto: In this method court duly relied on municipal law of a country and strictly analyse the ingredients to the similar law of requesting country. In case of similarity of laws of both the country the court apply domestic laws of the country.

1.2 in abstracto: In this method there is reviewing into "criminality of the accused" instead of attributes of the offence. The conduct of accused must be treated as "criminal in both the country in spite of need of "parallel requirement of offence".

The requirement of 'dual criminality' is a hurdle for 'international co-operation' for extradition.

2. Principle of Specialty:

This basis of this is "person extradited to a requesting state is not to be detained, prosecuted or punished by the requesting state for any offence committed prior to the extradition, apart from that for which extradition was granted." In the famous American case, **United States v. Rauscher** [8], the American Apex court evolved this doctrine. The objective of this doctrine is to provide protection and safeguard to the accused and protection of interest of other nation. Further it ensures that "requesting state may not try an extradited individual for any crime other than that for which he was extradited." The protection of this doctrine can claim either by the offender extradited or by the requested country. It does not have an absolute application.

This doctrine could not be invoked where the extradited individual has been providing time and opportunity to fled away from requesting country. Likewise, in case of voluntary returning of the accused to requesting country after completion of trial, he might have been face additional charges for crimes, which he committed before extradited trial.

The case of extradition of **Abu Salem**, the controversy raised about the "principle of specialty", according to the conditions and assurance given by India under the extradition treaty of Abu Salem that "he could no charged with death penalty or imprisonment for not more than 25 years. But such charges were brought in against him later on. The Portuguese Apex Court upheld it

as “violation of the Rule of Specialty.” But Indian Supreme Court of India held that “the extradition of Salem to be valid in the eyes of law and the decision of Portugal courts “not binding” on court in India.”

3. Exceptions to the rules of Extradition:

Rule is rule but every rule has exception to the rule of extradition. Following are the exception to the rules of International extradition laws.

3.1 Political Offence Exception:

This exception provides that “instead of fulfillment of all requirement of extradition, the requesting country can exercise of right of denial if the bilateral treaty provides any applicable exception therein. This exception is giving the right of reserving decision of extradition. It is also providing in many international extradition treaties, prohibiting extradition for commission of political crimes. For e.g. Model Treaty on Extradition, Article 3(a).

3.2 Nationality Exception Rule:

Most probably ‘not allowing extradition of the nationals’ is one of the ‘controversial’ and well recognized principle of international-extradition cases. This ‘nationality exception prohibits the extradition of his own citizens. Oftenly it is included in the provisions of ‘bilateral or multilateral agreements which providing exemption to the asylum state from “extradition of own nationals even on demand or request of the other member county of the bilateral or multilateral agreement. The following are the justifications in favour of this exception:

1	<i>The accused not be refrain from obtaining justice from his natural judges;</i>
2	<i>The state is duty bound to protect its subjects and provides protection of its laws;</i>
3	<i>No full reliance can be done or confidence to be posed on other country in providing justice, particularly about anon-national. and</i>
4	<i>It posed obstacles to the accused in his defence due to language barriers and he is away from his family, friends and Lawyer of his own country.[9]</i>

The nationality exception is still not-settled in customary international law. Its use, significance is always remaining debate. Generally, all the states provide the opportunity of prosecution of its own nationals for the commission of ordinary or cyber crimes in abroad and providing them supremacy of national laws over extraterritorial, extradition or international laws.

The ‘Nationality exception Rule’ is also called as ‘active personality principle’. The justification of this rule is embedded in fact that “jurisdiction over crimes committed by nationals abroad is necessary to prevent such crimes and criminals from escaping prosecution.”

3.3 Military offenses or war crimes:

Extradition is frequently not permitted allowed for war crimes or military offenses. Generally, all extradition treaties provide exclusion to ‘extradition of persons charged with military offenses or war crimes.’

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Corresponding Author

Shiv Raman*

Research Scholar, Maharishi Dayanand University,
Rohtak, Haryana-124001

advocateshivraman2007@gmail.com