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## Extradition Law and Procedure in Pakistan: An Appraisal of the Extradition Act 1972

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### Abstract

This article analyses the law and procedure of extradition in Pakistan with special reference to Extradition Act 1972. Extradition is a surrender of an accused or convicted person from one state to other state on its request. It is also considered as a system by which one state delivers an accused person to another state on her demand. Moreover, extradition is also used as a tool and considered to be one of the stages to secure international criminal justice system. Furthermore, the focus of the study is to discuss the interpretation of Extradition Act 1972 by the superior courts in their decisions. This study reveals that there are some lacunas in Extradition Act 1972 i.e., there is no provision which safeguards the fugitive offenders from cruel, torture and other inhumane treatment in the requesting state, it does not guarantee the fair trial of the offender in demanding state, additionally, this Act does not provide any right of appeal against the order of surrender. Resultantly, this paper finds that Extradition Act 1972 provide less safeguard to the fugitive offender and did not guarantee the fair trial in the requesting state.

**Key Words:** Extradition, Fugitive offender, Pakistan, Extradition Act 1972

### 1. Introduction

Extradition is a doctrine of International law, but it is accomplished by the cooperation of two or more states. Word extradition is derived from two Latin words 'ex' and 'tradition'. 'Ex' means 'out' and 'tradition' means 'delivery or handing over'. (Iqbal & Shah, 2017) The dictionary meaning of extradition is "the giving up or delivery of the person" (Daudpota, 2010). In its technical sense, surrendering the accused person to the foreign state. However, there is no universally accepted definition of extradition in international law because extradition procedure varies from state to state. Different jurists defined it differently. One of the distinguished jurist Mr. Cherif Bassiouni defined extradition as, "Extradition is considered as a system by which one state delivers an accused person to another state on her demand" (Bassiouni, 2014).

Basically, Extradition is a procedure by which one state makes a request to other state for surrendering the accused or convicted person for the purpose of trial or punishment. It is considered as a stage of criminal trial especially for transnational offenders. Extradition comes into action when a person commits an offence on the territory of one state and flees to other state in order to immune him from the criminal jurisdiction of that state. Requesting state can only try or punish that offender once the offender reaches back on its territory. Therefore, this doctrine is also taken as a tool for trying transnational offenders.

As stated earlier, extradition is cooperation between the states. Extradition cannot be achieved without cooperation of the states therefore coordination is an essential ingredient for achieving it. International law provides the coordination through bilateral and regional treaties. National legislations provide the mechanism to surrender the accused from its

territory and asking the other states to surrender the accused on its territory. Majorly this cooperation lasts between two states as one state surrenders the accused to other state. In this collaboration one state is called as 'requesting state' on whose territory offence is committed and other state is called as 'requested state' on whose territory offender reaches after committing the offence.

Moreover, extradition procedure varies from one state to other state. This variation is due to different legal systems of the world. Procedure of extradition is different in common legal system states and civil law states. For Instance, legal requirement for extradition is more technical in common legal jurisdiction as compare to civil law states. The legal system of Pakistan is amalgamation of common legal system and Islamic legal system, but common legal system leads it. In this research articles, researcher shall discuss the extradition from Pakistan and Extradition in Pakistan by elaborating and interpreting the Extradition Act 1972.

The researcher preferred the qualitative research methodology due to the very nature of research topic. Primary and secondary sources will be used to collect data. Under the doctrinal research method, Primary sources may include the bilateral treaties between Pakistan and other states, Extradition Act 1972 and Judgements of the Superior courts of Pakistan. Secondary sources include books, reports, scholarly research articles, newspapers and credible information. Since, the methodology is not quantitative therefore; conclusions may not be so accurate.

## 2. Literature Review

Extradition is one of the most significant and complex topics of international and municipal law because if an offender flees from one state after committing the offence on its territory, than, extradition is the only instrument by which that offender can be returned to the state where trial can be concluded. Moreover, there is no ample research on this said topic; although, there are some articles on this topic with different perspective.

- a. Anees Iqbal and Muhammad Qaiser Shah worked and publish an article on the topic "The Legal Conundrum of Extradition Vis-A-Vis Constitution of Pakistan". This piece of research discussed the extradition in general and constitutional position of Extradition Act 1972. They concluded that this Act undermined the spirit of fundamental rights enshrined in the Constitution of Pakistan 1973. My piece of Article is different from this research as I shall try to elaborate the provisions of Extradition Act 1972 and their interpretation by the superior courts in their decisions.
- b. "Extradition Law of Pakistan - Rights of Fugitive Offenders v. Pakistan's Goal to Attain Honoured Place Amongst the Nations of the World" is authored by Faisal K. Daudpota. This article is a major contribution in my area of research as it discussed in detail the procedure of Extradition inquiry by Magistrate in Pakistan. The emphasis of this article is to evaluate the constitutionality of Extradition Act 1972. However, I am intending to work in different perspective by commenting and elaborating the Extradition Act 1972.

## 3. Extradition Law and Procedure in Pakistan

Pakistan has a proper legislation on law of extradition. In this part of paper, researcher will discuss the interpretation of Extradition Act 1972 (hereinafter referred as EA 1972) by the superior courts. This act has been challenged by the citizens of Pakistan and their assertions are neglected by the Superior courts of Pakistan in their decisions.

Before enacting the EA 1972, Extradition Act 1903 was enforced in Pakistan. The Extradition Act 1972 consists of four chapters, twenty-four sections, and one schedule. This is not an exhaustive enactment. This law regulates the procedure to surrender the accused person to the requested state and requisition of an accused person from foreign state.

## 4. Validity of the Extradition Act 1972

Constitutionality of EA 1972 has been challenged many times by different lawyers and jurists but it is finally decided by the Supreme Court in Nasrullah Khan Henjra case (Nassarulah Khan Hanjra Vs. Government of Pakistan, 1994) that Extradition Act 1972 does not contravenes the provisions of COP 1973. The assertion of the petitioner was that every citizen of Pakistan has the absolute right to remain in Pakistan as provided in Article 15 of the COP but then he could be forcefully removed from Pakistan by the procedure prescribed in EA 1972. A reference was made about the practice of Civil law jurisdiction states as they don't extradite their own nationals. It seems clear that the framers of COP have followed the practice of civil law countries by incorporating the Article 15 in COP.

Article 8 (Constitution of Pakistan, 1973) of the COP states that if any law which contravenes or takes away the fundamental rights of citizen as provided in COP will be void. The prayer of the petitioner was that the EA 1972 should be declared null and void. The Supreme Court rejected the petition and held that there is no inconsistency between the COP and EA 1972. Supreme Court argued that Objective resolution is the Grund Norm (Harris, 1974) of COP, it provides that the goal of Pakistan is to achieve the respect and honour among the nations of world by international cooperation, peace and progress. It was also noted that principle of policy in Article 40 of the COP provides that Pakistan will promote international peace and security. If Pakistan became the haven for the offenders, then how it will achieve her goal at international level.

Legality of EA 1972 was assailed in *Nargis Shaheen vs. Federation of Pakistan*, (*Nargis Shaheen Vs. Federation of Pakistan*, 1993) it was argued that this law is repugnant to the injunction of Islam as to surrender the Muslims to non-Muslims. It was contended that Article 227 of COP 1973 (Constitution of Pakistan, 1973) states that any law which is inconsistent with the injunction of Islam would be declared void. The High Court rejected the plea and based its argument by referring the Hudebia Treaty (Khan, 2015). This treaty was between the non-Muslims of Mecca and Muslims of Medina. One of the provisions in the treaty was that if a person fled from Mecca without the permission of his/her Guardians then he/she will be returned to the people of Mecca. It was implemented in the case of Abu Jandal, who was surrendered to the Mecca in compliance with the treaty of Hudebia. It is now well-settled law that EA 1972 is *intra vires* of the COP.

## 5. Extradition Act 1972

The Extradition Act 1972 is a combination of substantive as well as procedural law. Researcher will examine the act by commenting the significant sections of EA 1972. Moreover, interpretation of sections by superior courts shall also come under the discussion.

### Section 1 – Title, Extent and Commencement

Section 1 of the mostly enactments deal with title of that law, its territorial jurisdiction and commencement date. But, section 1(4) of the said act classified two types of application. Firstly, requisition and surrender the fugitive offender to the foreign state with which Pakistan has the extradition relations. Secondly, requisition and surrendering the fugitive offender to those foreign states with which Pakistan have no extradition relations. Second type of application falls under the international principle rendition. (Garcia, 2006) This concept is enshrined under section 4 of EA 1972. Researcher shall highlight the difference between extradition and rendition while explaining the section 4 of EA 1972.

### Section 2 – Definition or Interpretation clause

Every statute has the definition/interpretation clause which defines some of the important words of the act which shall be used in the act consecutively. Section 2 of the EA 1972 provides 6 definitions. Some of them are important to discuss here.

- a) 'Extradition offence' is an act or omission, as specified in First schedule of the said act, committed within the jurisdiction of Pakistan. In case of treaty state, an act or omission which constitutes the offence mentioned First schedule of the act and in the treaty with that state. In case of non-treaty state, an act or omission which constitutes the offence mentioned in First schedule of the act and specified in the declaration made by the federal government under section 4 of the EA 1972.
- b) 'Extradition treaty' means a treaty between Pakistan and foreign state to surrender an accused or convicted of extradition offence. Treaties are concluded between the states for this cooperation. Treaty between states is an essential condition for the extradition proceedings.
- c) 'Fugitive offender', is defined in the act, it includes both accused of an offence and convicted person. A person who is accused or convicted of extradition offence founds in the territory of Pakistan or suspected to be found in Pakistan shall be called as fugitive offender.

### Section 3 – Publication of Treaty States

Section 3 of the EA 1972 states that Federal Government shall publish the names of states by which Pakistan has ratified the extradition treaty.

Supreme Court of Pakistan decided in (Muhmmad Azim Malik Vs Government of Pakistan, 1989) the above cited case that mere non-publication of treaty in official gazette has no bar to extradition if Pakistan has the valid extradition treaty with that state.

Therefore, it can be rightly said that publication in gazette is a procedural requirement, but ratification is a substantial requirement. Thus, if a treaty is not published in the gazette but ratified properly would be considered legally binding on the state.

#### **Section 4 – Rendition to foreign state**

Rendition is not defined in this law, but the doctrine of rendition is incorporated in section 4 of EA 1972. Rendition is surrendering the accused or convicted person without extradition treaty and formal procedures to other state. Section 4 clearly states that fugitive offender can be surrendered to other state if there is no treaty with a state by a notification of the Federal Government. Here, it is necessary to differentiate the extradition and rendition. Although, many reports and authors consider the rendition illegal as it violates the human rights protected by the national constitutions.

##### **5.1. Extradition and Rendition**

Major distinction between the extradition and rendition is procedural in nature rather than substantive. In extradition, there must be some formal legal basis for the surrender of the accused but in rendition, there is no need for any formal agreement between the two states. (Bassioune, 2014) In extradition, a person is surrender by a judicial procedure (Rogers & Peers, 2006) but in rendition, he/she may be returned by the administrative authorities (Garcia, 2006).

#### **Section 5 – Liability of fugitive to be surrender and Exceptions**

Section 5 has two parts, first clause deals with the surrender of accused person. Every fugitive offender is liable to be surrendered and apprehended by the requested state in a prescribed procedure. This section imposed a restriction on the government that if a fugitive offender founds on its territory, he/she shall be liable to be surrendered to the treaty state by following the prescribed rules.

Second clause of section 5 provides seven exceptions to the extradition. Exceptions mean those grounds on which extradition will not be granted. Here the researcher will discuss these grounds of rejections/exceptions briefly.

##### **5.2. Grounds of Rejection for Extradition Request**

**First** ground for rejection of extradition request is political offence. Extradition would be rejected if the accused person has been charged with political offence. Political liberalism has recognized that those who are fighting against the oppression, tyranny, and self-determination are the freedom fighters so they should not be extradited. This ground was recognized after the American and French revolutions (Mafei, 2019). The first treaty for refusing based on political offence was made between the Belgium and France in 1834 (Cassese, 1989).

**Second** ground is provided in 5(2)(b) which states that extradition will not be allowed in the cases of trivial nature. Offences which are not punishable with death penalty, life imprisonment and imprisonment less than one month will not be considered for extradition proceedings.

**Third** ground is prescribed in section 5(2)(c) i.e., lapse of time. However, lapse of time is not applicable in criminal justice system of Pakistan but there are some states which bars the prosecution based on time-barred. In a case, Zulqarnain khan vs. Government of Pakistan (Zulqarnain Khan Vs Government of Pakistan, 1994) the accused person challenged his extradition based on lapse of time. The accused person took the plea that he cannot be tried in USA because the crime committed there was in 1984 and under the USA law, a person cannot be tried after five years lapse of time. The court held that the plea taken by the accused person is not correct because the accused person had been already indicted on 28-06-1984. However, court noted that lapse of time is a valid ground but, in this case, it is not applicable.

**Fourth** ground talks about the precept of speciality, the requesting state is to prosecute the offender for those offences for which his extradition was sought from the requested state.

**Fifth** ground is about the doctrine of Double Jeopardy in extradition law. This ground is based on the principle “no one should be vexed twice for the same cause”. If the person has been tried earlier for the same offence, he will not be tried again for the same offence.

**Sixth** ground is not a ground of rejection in stricto sensu. It is in actual the stay by the superior court to stop the extradition proceedings. In Zulqarnain Khan case, (Zulqarnain Khan Vs Government of Pakistan, 1994) Supreme court stay the extradition inquiry on the ground that the accused person has to defend himself in the appeal before the high court. So, accused person cannot be extradited till the decision of appeal.

**Seventh** ground of rejection is about the discrimination. There are four grounds of discrimination such as nationality, religion, race and political opinions. If the requesting state intends to prosecute the accused person based on the above mentioned discriminations, then the requested state is under no obligation to surrender the accused person.

#### **Section - 6 – Request for the Surrender of Fugitive Offender**

The request for the surrender of fugitive offender by the other state can be established by two ways. First, diplomatic agent of foreign state in Pakistan can make a request of surrender; secondly, diplomat of Pakistan in that state can be requested for surrendering the fugitive offender. However, any other method can be opted by the federal governments of both states.

#### **Section - 7 - Order for Magisterial Enquiry**

According to section 7 of EA 1972, Federal Government is authorized to order the Magistrate of First class to enquire for the extradition requests. According to this section, Federal government has the power to order the enquiry or to restrain it. The words of section are "... the Federal Government may, if it thinks fit, issue an order..." Supreme Court of Azad Jammu & Kashmir interpreted the words 'may' and 'shall' in the case (Muhammad Shafiq Vs. Chief Secretary and Others, 1973) The Court mentioned in its judgment that if the word 'may' is used in the statute to effectuate the right, to authorize the body for doing justice and to work for the public good. It is submitted that the word 'may' used in the section is to enforce a right, so it is mandatory for the Federal Government to order for enquiry.

#### **Section - 8 –Enquiry Conducted by Magistrate**

The wording of this section is quite clear. It provides that when the order of the Federal government to hold enquiry reaches to Magistrate, he must follow the due process of enquiry as provided Pakistani law. Practically, federal government sends the notification of enquiry to the District and Session Judge (DSJ) of the district in whose jurisdiction fugitive offender resides or suspected to reside. DSJ marks the notification to the Magistrate in order to compliance with the notification.

#### **5.3. Procedure of Enquiry**

For the purpose of this enquiry, Magistrate of first-class exercises powers and jurisdictions of the Court of Session. He issues summons and warrants as the case requires to the fugitive offender to attend his court on certain date and time. When accused appears or brought before the court, the Magistrate shall enquire that prima facie case has been made out or not as this enquiry is not to conclude the merits of the case. Initially, prosecution is ordered to produce the documents in support of requisition. Evidence includes documentary evidence or testimony and statements of witnesses. Fugitive offender is also given the opportunity to defend his case by proving that his case falls in the exception to extradition offences as given in section 5 of the EA 1972.

#### **5.4. Distinction between Trial and Enquiry**

Lahore High Court in (Mst. Akhar Malik Vs. Federation of Pakistan and Five Others, 1994) made distinction between the trial and enquiry as petitioner in this case argued that framing of charge, recording of evidence, statements of accused u/s 340 and 342 of CrPC 1898 are necessary to hold enquiry in order to comply with the constitutional principle of fair trial but court rejected the arguments of the petitioner by stating that Enquiry is not equal to trial and Magistrate is not bound to follow the mode of trial it is sufficient that enquiry is to be conducted in judicious mode.

#### **Section 9 – Exhibit of Evidence and Depositions**

This section provides the certain admissible documents for the purpose of enquiry. This is a special law so, it will curtail the jurisdiction of general law i.e., Qanoon e Shahadat Order 1984. In Muhammad Azim Malik case, (Muhammad Azim Malik Vs Government of Pakistan, 1989) the Supreme Court stated that statements recorded by the authorized person on oath are admissible in evidence even the officials are not there for cross-examination. In Nasrullah Khan case, (Nassarullah Khan Hanjra Vs. Government of Pakistan, 1994) the Court held that the report prepared by the Magistrate on the basis of hearsay evidence is of no legal effect.

**Section 10 – Report of Magistrate**

After conducting the enquiry by the Magistrate, if Magistrate is of the opinion that prima facie case has not been made out against the fugitive offender, he will be released forthwith, and Magistrate shall submit the report to the federal government by stating the reasons of his opinion. If Magistrate considers that prima facie case has been proved against the fugitive offender, he shall submit the fugitive offender and report in this regard to the federal government for surrendering the accused.

**Section 11 – Surrender of Fugitive offender to the Foreign State**

This section deals with the surrender of fugitive offender to the foreign state. When Magistrate submits the report prepared u/s 10 of the EA 1972. Federal government may notify the warrant to surrender the fugitive offender to the relevant person of the state by whom the requisition is made. Supreme Court in *Azim Malik vs. Government of Pakistan* held that Federal Government is to be reasoned in surrendering the fugitive offender.

**Section 12 – Release of Fugitive offender**

This section provides another right to the fugitive offender that if he remains in the detention after the two months of the submission of the report by the Magistrate. However, court interpreted this section conversely that if Federal Government shows enough cause for this delay than fugitive offender shall not take benefit of section 12 of EA 1972.

**Section 13 – Powers of Federal Government**

Sovereignty of the state is articulated in this section. It provides vast powers to the Federal Government in order to cancel or stay the extradition proceedings at any stage. There are three reasons provided in article to stop or stay the proceedings, namely, nature of the offence is trivial, extradition request is not made in good faith and in the interest of justice. Once, Federal Government makes decision as to stay or cancel the proceedings it may notify to withdraw the proceedings before the magistrate or if report is submitted to the federal government than to stop the warrant of surrender to the foreign state under section 11 of EA 1972.

**Section 14 – Simultaneous Requisitions**

If Federal Government receives two extradition requests by different states for the same offender, the Federal Government has the discretion to determine with situation on objective basis. This is a vague section as no specific procedure is provided to cater with the simultaneous applications.

**Chapter III – Accused Person Surrender to Pakistan**

This is the brief chapter as consist on three sections. It deals with the second type of application of extradition law i.e., request by the Government of Pakistan for seeking the extradition of accused in Pakistan.

**Section 15 – Requisition to surrender the accused in Pakistan**

This section is like section 6 of the EA 1972, as former discussed the procedure to make request to Pakistan for extradition and section 15 discusses the procedure to make requisition to other state. The requisition for the surrender of fugitive offender by the Federal Government can be made by two means. First, diplomatic agent of Pakistan in that state can make a request of surrender in that state; secondly, diplomat of that state in Pakistan can be requested for surrendering the fugitive offender. However, any other method can also be opted by the federal governments of both states.

**Section 16 – Principle of specialty**

Rule of specialty states that if an offender is surrendered for an offence, he/she shall be tried for the same offence. This is a general principle of extradition. This rule is enshrined in section 16 of the EA 1972.

**Section 17- Return of Surrendered person to foreign state**

Federal government must bear the cost of return to the accused person in the state from where he was sought for trial if proceedings against the surrendered person have not been commenced after the six months of his/her arrival in Pakistan.

**Chapter IV - Miscellaneous**

This chapter has seven sections, but the researcher will discuss only section 19 because it is one of the important sections of the EA 1972.

### Section 19 – Bail of Arrested Person

Bail in bailable offences is a matter of right. This section states that the provisions of CrPC will be applicable in the bail matters for the accused person. In the case (Sami Nasir Vs State, 1984) the Sind High court held that bail application is rejected for the accused person because the bail application is considered on the ground that the accused person will be present before the court when and where will be called.

### Recommendations

After appraising the Extradition Act 1972 in detail, researcher reaches to some recommendations to amend the EA 1972.

1. First recommendation is made for section 5 of the Act; this section provided the ground of rejection of the extradition request. There are seven refusal grounds provided in it. They are not enough grounds of rejection as compared to the legislation of other states which provides more protection against the extradition request. Therefore, four more grounds are suggested to add in it.

Torture: If the surrendered person be subjected to torture, cruel, inhumane or with degrading punishment in requesting state, then extradition shall be refused. Provided that requested state can take assurance from the requesting state that if the person be surrendered, he/she shall not be subjected to torture, cruel, inhumane or with degrading punishment in requesting state.

Trial in Absentia: Extradition must be refused by the Pakistan if the requested person was convicted trial in absentia and he/she will have no opportunity to have a retrial again or does not have the right of appeal against that conviction.

Military Offence: Military offences are considered as exception to extradition in international law because it is presumed that military personnel acted in self-defence of her state. Therefore, it is dire need to add the provision of exception to military offences in Extradition Act 1972.

Rule of double criminality: Rule of double criminality states that if an offence is committed in the requesting state, it must be punishable in requested state. Meaning there by, offence in extradition case must be mutual in requesting and requested state. If offence is not mutual than extradition must not be granted by the requesting state. This principle is not the part of Extradition Act 1972, hence, if a person committed act outside the Pakistan that is not punishable under Pakistani law, then, it must be refused by the Government of Pakistan on the ground of principle of double criminality.

2. Second recommendation is made about section 12 of the Extradition Act 1972. This section deals with the discharge of the person. if the person is behind the bar for two months after submission of the report of magistrate to surrender that person to foreign state than he/she may apply to the high court for his/her removal from the bar. Pakistan deals with right to liberty of the person, two months behind the bar is a larger time to detain a person without conviction therefore, it is recommended to commute the time for one-month detention. Moreover, application to discharge in the high court is a typic complex procedure. There must be a provision which bounds the federal government to release the person after one month in detention.

3. Third and most significant recommendation is made about right of appeal against the report of the magistrate. Appeal is a judicial check by the superior courts against the decisions of the lower courts. Appeals are also considered part of fair trial. There is no single provision the Extradition Act 1972 which deals with appeal against the report of the magistrate. Hence, it is recommended that right of appeal must be given as a matter of right to the person who is being surrendered to the foreign state.

### Conclusion

When an offence is committed on a territory of the state, it is the duty of that state to punish that offender to meet with the ends of justice. However, when offender crosses the borders and enters into the territory of other state, now the jurisdiction of former state cannot be exercised on the territory of that latter state. Here, the principle of international law “*aut punire aut dedere*” comes into action which states that “*either to punish or either to deliver*”. In this situation, it is difficult for the state to punish the offender who has committed the offence on the territory of other state but it is very easy to deliver the offender to that state on whose territory offence was committed. Accused can be surrendered by following some constitutional and legal requirements of that state. Resultantly, criminal justice system is incomplete in this type of situation without extradition as it provides certain legal requirements to surrender the offender.

On one side, extradition proceeding is a tool to deal with this type of situations and on the other hand, it safeguards certain rights of the accused person against the fake extradition requests. For achieving international peace, every state has enacted its own law to deal with the extradition procedures.

Government of Pakistan adopted Extradition Act 1903 in 1947. After 25 years of its independence, Pakistan enacted an independent law to deal with the extradition procedures in Pakistan namely Extradition Act 1972. However, extradition EA 1972 in Pakistan cannot be considered as an exhaustive piece of legislation. There are some lacunas in Extradition Act 1972 which are needed to be discussed here. It does not protect the human rights in letter and spirit. For example, exceptions provided in section 5 do not protect the fugitive offender from torture, cruelty, inhumane or degrading treatment in the requested state. Moreover, it does not provide the fair trial to the fugitive offender in the requesting state as requested state is not bound to prove the case in requesting state nor the legal requirements to prove the case. Above all, right to appeal is one of the significant stages in justice system as irregularities and illegalities are rectified in superior courts by way of appeal, this Act does not contain any provision relating to right of appeal.

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