

# NATIONALITY AND EXTRADITION AT CROSSROADS

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## **Abstract:**

**Non extradition of nationals, also known as a Nationality exception rule to extradite an offender is a well-known customary principle of public international law. The observance of this rule is basically driven by emotions and national sentiments. It is also a distinctive feature of civil law jurisdictions as opposed to common law jurisdictions. But it is understood that this principle at present, is becoming a complex problem with multiple nationalities in practice and also facilitates increase in crimes with criminals escaping punishment resulting in complete frustration of criminal justice. This paper attempts to elaborately study the concept of this rule and the possible outcomes attempted by nations to render flexibility to the same.**

**Keywords: Nationality, extradition, territorial supremacy, State practice, justice, fugitives.**

If one examines the escape of Carlos Ghosn from Japan to Lebanon in 2020, one can agree the adverse impact of the rule against extradition of nationals, a principle that un-equally applies across States, as far as extradition laws and practices is concerned. As a matter of fact, Japan did not seek the extradition of Carlos Ghosn from Lebanon, because he is a Lebanese national and Lebanon's strong commitment banning extradition of its nationals, made it pointless for Japan to issue a request. Despite the fact that both countries have not signed a bilateral extradition treaty yet based on an adhoc arrangement, Japan could have lodged a request with Lebanese authorities to extradite Carlos Ghosh. On the other hand, it is inferred that Lebanon had granted the extradition of a dual American -Lebanese citizen, Ali Salameh, to the USA in 2019, and this act was justified against refusal to extradite Carlos Ghosn, by Albert Suhan, Minister of justice Lebanon based on the fact that Salameh held dual nationality – being a Lebanese and an American, whereas Carlos Ghosn was not a Japanese, indicating that the rule against the extradition of nationals could be excluded when the requested person is also a national of the requesting State. Thus this exception clause in extradition is subject to lot of changes and needs more clarity in international community.

## **Origin of the concept of Nationality Exception Rule:**

Historically speaking, the first application of this rule against the extradition of nationals can be traced back to an extradition request, made by King James II of England to Holland in respect of a naturalized Dutch citizen, on the basis of a bilateral treaty concluded between, England and the Dutch Republic in 1662.

But the principle was legally characterized only in the 19<sup>th</sup> century when France in 1834 entered into a bilateral treaty, with Belgium. The principle, was then included into the domestic law, for the first time in 1944 by a ministerial decree. The concept hence forth spread across continental Europe.

## **5.2.2 Principle of territorial jurisdiction against the Nationality exception rule:**

Though the exception rule gained prominence based on the need to protect a state's national, treated as a fundamental right that a national should be tried by the judge of once own country, slowly this theory which made jurisdiction conditional on nationality, did not find much support in the Positive law, as the principle of territorial jurisdiction was rapidly asserted by every State. The development of bilateral and multilateral extradition treaties in the 19<sup>th</sup> century made it clear that there was no such thing as a right to be tried by once national courts, but jurisdiction should be territorially based. For instance, in 1935, the Harvard Draft convention, held that in criminal jurisdiction, the relation to prosecute multiple national offenders is covered

by the nationality principle, meaning a state which is attempting to prosecute and punish shall be competent to do so and it shall not be impaired or limited by the fact that he is also a national of another state. This relates to Dominant Nationality and the dominant link principle, whereby dominant link with a suspect has a greater right and the principle of equality which holds that all States have the same right to prosecute offenders. Thus the prevalence of territorial jurisdiction justified the development of extradition treaties, in the name of inter-state co-operation, as each State was willing to recognize the legitimacy of a sovereign State to assert its criminal jurisdiction over any person who was alleged to have committed a crime in their territory, irrespective of their nationality.

#### **Conflict between territorial supremacy and State's duty to protect its citizens from foreign justice:**

In this regard, though nations accepted that the State in which the alleged offender commits the crime should have primary rights to prosecute and punish the offender, yet in practice, State's felt it possesses legitimate interest to protect its citizens from foreign justice and hence till date there is exists no uniform extradition law either banning or permitting, extradition of nationals. These questions are left to be best determined by the extradition treaties entered between countries. As a matter of fact, treaties entered between civil law countries ban extradition of its nationals, on the other hand, between civil and common law country, optional clause is provided. Article 3 of the extradition treaty between France and US, whereby it is left to the discretion of the executive authority to decide on extradition. In relation to multilateral agreements - Article 6 of the European convention on extradition, 1957 provides a right to refuse extradition of its nationals. But before the signing of the Maastricht Treaty in 1992, members of the EU adopted varied approach in applying the restriction clause. For instance, Poland refused to extradite and offered asylum in accordance with 1(b) Article 6 of the European convention on extradition (henceforth will be referred as ECE) and treated them as nationals whereas Netherlands permitted extradition for prosecution purposes but held that the alleged offenders should be returned to Netherlands to serve the sentence, if any imposed upon him. Contrast to this some States like Republic of Ireland or UK, did not clearly indicate her stand and the rule was devoid of a common practice.

#### **Progressive decline of Nationality exception rule:**

With the signing of the Maastricht treaty in 1992, the procedures relating to judicial co-operation in criminal matters were streamlined resulting in simplified extradition procedures. Article 7 of the 1996 of the ECE convention abolished the nationality exception and henceforth held that extradition may not be refused on the ground that the person claimed is a national of the requested member state within the meaning of Article 6 of the ECE. This was a major breakthrough, facilitating a fast track extradition procedure by removing the ban on extradition of nationals either for prosecution or execution of a custodial sentence. This 1996 convention was replaced by the European Arrest Warrant Framework decision (henceforth will be called as EAW) on 13th June 2002, came into force in 2004 and binds all EU member States. Member States henceforth were under an obligation to surrender alleged offenders to the requesting States. For instance, some noteworthy surrenders made included the surrender of Mehdi Nemmouche perpetrator of the Brussels Jewish Museum attack, by French to Belgian authorities and in 2010 surrender of Aurore Morten, accused of terrorist offences in Basque conflict, by French to the Spanish authorities. She became the first French citizen to the surrendered to foreign authorities for the purpose of prosecution.

So to conclude, The refusal to surrender the nationals by nation states, still continues to hinder extradition proceedings. As it is evident, from State practice, for instance, within the EU, firstly several members viz., Cyprus, Germany and Poland had to amend their national constitutions, to remove the ban on extradition of its nationals. Secondly, many EU countries still impose the ban for the purpose of execution as opposed to prosecution.

Thirdly, international agreements does not contain a clear ban in the extradition of nationals as there is no uniform rule or practice regarding the extradition of nationals under international law.