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India-UK extradition law and practice: the case for reform.

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India–UK Extradition Law and Practice – the Case for Reform

1. Introduction

India-UK extradition law and practice need reform. This is particularly acute as regards the rendition of persons from the UK to India. The number of Indian requests, their success rate and the nature of the crimes and individuals subject to them support this fact.[1] The central and most weighty argument in favour of reform is simply that extant law and practice is not meeting its purpose. The reasons for this are that either general extradition requirements are not met or that the applicable bars to the process are successfully invoked. There are three further arguments favouring reform. The first is that there is historical precedent for a relatively streamlined approach. Reviving aspects of previous law would undoubtedly improve the current situation. The second is that India has been left behind in the modernisation of UK extradition relations. Ending the resultant differentiation in UK practice is called for. Thirdly and finally, reform is desirable in the light India's emergence as a leading power, the UK's departure from the European Union and the new political will in both countries to enhance criminal co-operation. The case for reform is also ripe, and not merely because of Brexit.[2] It is timely on account of the increased importance, growth and profile of extradition requests by India to the UK in recent years. Notable here are the cases of Vijay Mallya, Nirav Modi and Sanjeev Chawla.[3] Overall it appears clear that the scale, nature and fate of Indian extradition requests to the UK, the new geopolitical realities and the heightened desire to co-operate combine to beg the question of whether it is time to reconsider the terms and nature of extradition law and practice between India and the UK.[4] The answer is an unequivocal yes.

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[1] This article will not discuss the converse situation. For a criticism of Indian law in this regard see Subramanian, S.R., The Role of Human Rights in Extradition: The Imperatives of Reforming the Indian Extradition Law, (2014) 40(2) Commonwealth Law Bulletin 233. It has been reported that from 2002 to 2019 India has extradited four persons to the UK, see Ministry of External Affairs, at https://www.mea.gov.in/byindia.htm.

[2] The UK has legislated for a 'no-deal' Brexit, where extradition with former EU partners is intended to take place under the European Convention on Extradition 1957.

[3] These cases are mentioned below.

[4] This is in spite of then Home Secretary Rajiv Mehrishi stating in July 2017 that no change was needed in the treaty, see https://www.ndtv.com/india-news/no-change-needed-in-india-uk-extradition-treaty-says-top-official-in-london-1726185. In contrast Subramanian argues that Indian extradition law needs "… a complete overhaul… so that India truly and effectively cooperates with other countries in criminal matters", supra note 1 at p 235.

The research question addressed in this article is whether the UK-India extradition relationship requires reform. The reasons in favour of revisiting that relationship are examined through analysis of existing extradition law and practice, the jurisprudence arising therefrom, the historical position of the subject in India-UK relations, the UK's practice with certain third states, the changed political dynamics resultant from India's rise in power and stature and the UK's departure from the EU and the increased scale and importance of Indian extradition requests to the UK. The methodology taken in addressing the research question entails a textual analysis of the law, jurisprudence, statistics and literature relating to India-UK extradition law and practice. Overall, the theme of the article is that together a number of disparate factors coalesce and give rise to a strong case in support of the reform of extradition law and practice between the two states.

2. The Context of the Case for Reform

2.1 Purposes of Extradition

In order to construct an argument in favour of the reform of India-UK extradition law and practice the purposes of extradition must be outlined. This is because it is only possible to adjudge the process if its goals are manifest. The purposes of extradition are two-fold, and contradictory. They are the facilitation of international criminal co-operation through the rendition of accused and convicted persons, and the provision of protection to requested persons from unfair and egregious treatment. Both purposes are found in the applicable convention, the India-UK Extradition Treaty 1992. Its preamble *inter alia* provides that the parties desire "… to make more effective the cooperation of the two countries in the suppression of crime…" and that they recognise that "… concrete steps are necessary to combat terrorism".[5] The protective aspect of extradition law is found in article 9. It allows for the refusal of a request in circumstances including where an individual is sought for his political opinions, it would be unjust or oppressive and where the extradition offence is trivial. Clearly these purposes may be at odds with each other. As Warbrick notes "The conflict between the cooperative and protective functions of extradition law creates a certain tension…".[6] The protective purpose of extradition can explain why certain extradition requests are refused. In one sense, then, the law is meeting one of its purposes in such cases. They are not necessarily evidence of failure nor supportive of reform. On the other hand, however, the factors giving rise to the need for protection may themselves be the

[5] Cited at https://mea.gov.in/Images/CPV/leta/UK_Extradition_Treaties.pdf. Hereinafter the 1992 Treaty. It entered into force 15 November 1993.

[6] Warbrick, C., The Criminal Justice Act 1988 – Part 1: The New Law on Extradition, (1989) Criminal Law Review 4 at p 5-6, footnotes omitted.

result of a failing, of the efficiency of a state's criminal justice bureaucracy or the conditions within its prisons, for example. More evidently, where an extradition request is refused for reasons apart from protecting a requested person then law and practice more clearly fail. As will be seen below, the high failure rate of Indian extradition requests to the UK supports the need for reform and the relevant case law indicates what is required to be done.

2.2 The Applicable Law

The purposes of extradition are given effect by law. That law is found in both the realm of public international law and national law. This is because extradition is the lawful procedure whereby an accused or convicted person is sent from one state or territory to another to stand trial or be imprisoned. It is necessarily an inter-state procedure and certain states – including India and the UK – require to legislate to give effect to the international agreements they have ratified. Simply, with India and the UK being dualist in their approach to law both international and domestic law regulate the subject. Internationally, the 1992 Treaty governs relations. The agreement is unusual in UK practice as relations within the Commonwealth are generally governed, or rather conditioned, by the London Scheme.[7] The 1992 Treaty was concluded to formalise relations and to address concerns over the application of the political offence exception. Arguing in support of the 1992 Treaty in the House of Commons Kenneth Clark stated "It is plainly right that we should have up-to-date extradition arrangements between India and the United Kingdom. It is particularly important that the so-called political defence should not be cited in criminal charges that turn on terrorism, from which both our countries suffer".[8] Earlier Douglas Hurd described the prospective treaty as helping "… to reassure the Government of India that, within what is possible under the laws of the United Kingdom, we are anxious to co-operate with them in dealing with terrorism".[9] The 1992 Treaty contains the common and standard terms[10] found in extradition agreements and mirrored in model laws on extradition.[11] These include a

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[7] This is discussed below. The move from the London Scheme to a bilateral treaty was at the behest of India, see House of Commons Debates, 13 January 1992, vol 201 col 466 per Kenneth Baker, cited at https://api.parliament.uk/historic-hansard/written-answers/1992/jan/13/india-ministerial-visit.

[8] House of Commons Debate, 11 March 1993, vol 220, col 1088, cited at https://api.parliament.uk/historic-hansard/commons/1993/mar/11/extradition-india.

[9] House of Commons Debate, 5 February 1992, vol 203, col 272, cited at https://api.parliament.uk/historic-hansard/commons/1992/feb/05/india.

[10] The UN Model Treaty on Extradition contains these provisions, cited at https://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

[11] The articles are often incorporated into national law, in that vein see the UN Model Law on Extradition 2004, found at https://www.unodc.org/pdf/model_law_extradition.pdf.

general duty to extradite (article 1), the definition of an extradition offence, including double criminality (article 2), the political offence exception (article 5) and a provision setting out optional grounds for refusing an extradition request. Also within the 1992 Treaty are the rule of speciality (article 13) and the *prima facie* evidence requirement (article 11(3)). These articles are particularly relevant to note in discussing the possible reform of India-UK extradition law and practice because they have been the basis of arguments that have led to requests being refused in UK jurisprudence. Further, certain of these rules have been dispensed with or altered in the UK's extradition law and practice with a number of states apart from India.

The domestic law governing extradition within the two countries is in India the Extradition Act 1962[12], and in the UK the Extradition Act 2003.[13] In the context of UK to India extradition the 2003 Act is of more importance. This is because it contains the core rules governing UK hearings where the extradition of a person to a third country is considered. Those rules include the general features of extradition law and the specific bars to extradition discussed below. It should be noted firstly, though, that UK extradition law has been amended a number of times over the past several decades. These changes include the considerable revision to the law made by the Extradition Act 1989, which was in turn repealed and replaced by the 2003 Act.[14] Whilst some of these changes are mentioned below it is worth noting here that there is no longer a general political discretion in UK law[15] and the *prima facie* evidence requirement has been excepted in certain cases.[16] Giving rise to and affecting the nature of the most recent major revision of the law by way of the 2003 Act were the EU Framework Decision on

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[12] The 1964 was amended in 1993, it is found here https://www.mea.gov.in/Images/attach/Extradition_Act_1962.pdf. See further Saxena, J.A.N., India - The Extradition Act 1962, (1964) 13(1) ICLQ 116.

[13] http://www.legislation.gov.uk/ukpga/2003/41/contents.

[14] The Extradition Act 1989 repealed the previously applicable statute, the Extradition Act 1870, see as to the history of UK extradition law and more generally Baker, S., Perry, D., Doobay, A., A Review of the United Kingdom's Extradition Arrangements, 2011, the 'Baker Review', found at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf. In contrast to the numerous changes to UK extradition law Indian law has remained relatively static since 1962, with Subramanian noting that the law "… has not been touched upon except for certain piecemeal amendments made in 1986 and in 1993", supra note 1 at p 235.

[15] In its place are factors, under section 93, that must be considered at the end of the judicial process in Category 2 cases (Category 2 territories are those with which the UK has international extradition arrangements outside the EU).

[16] In Indian law section 7(3) of the Extradition Act 1962 provides that if a Magistrate is of opinion that a *prima facie* case is not made out in support of the request of the foreign state he shall discharge the fugitive criminal.

Extradition 2002[17] and the terrorist attacks within the US on 11 September 2001. Both impacted UK law. A heightened desire to address terrorism and international criminality was understandably pronounced at that time. Within the EU, the desire to build an area based upon mutual recognition of judicial and prosecutorial decisions was realised.[18] The UK has been at the forefront of these developments both within the EU and with a number of its other extradition partners. India-UK practice, on the other hand, remains governed by the terms of the 1992 Treaty as concluded over a quarter of a century ago.

3. The Arguments in Favour of Reform

3.1 Law and Practice Clearly not Working Well

Pre-eminent amongst the arguments in favour of the reform of India-UK extradition law and practice is that it is not working well. There is clear evidence of this. Whilst the statistics vary, India has a very low success rate in securing individuals from the UK. It appears that of the 28 requests made to the UK under the 1992 Treaty as of 30 August 2019 only one has resulted in the extradition of the person from the UK to India, that of Samirbhai Patel.[19] Sanjeev Chawla lost his appeal against extradition in February 2019 and his transfer is pending.[20] More generally it has been noted that 9 of the 28 Indian requests have been refused with arrest warrants not being issued in 3.[21] A different expression of the success rate is suggested as only one in three fugitives being successfully extradited to India from the UK.[22] Regardless of these variations it is beyond doubt that India has suffered in

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[17] Cited at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from=EN. This is the basis of the European Arrest Warrant system. It is discussed further below.

[18] Recital 5 of the Preamble of the Framework Decision *inter alia* provides that "The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities", ibid.

[19] Patel lost his appeal against extradition in Patel v India [2013] EWHC 819 Admin). Patel is listed as the only person transferred from the UK by the Ministry of External Affairs as at 31 January 2019, https://www.mea.gov.in/toindia.htm.

[20] Chawla's appeal at the Divisional Court was rejected, in India v Chawla [2018] EWHC 3096 (Admin).

[21] See Chaudhury, D.P., UK's Law a Big Hurdle for India to Extradite Fugitives, The Economic Times, 15 June 2018, cited at https://economictimes.indiatimes.com/news/politics-and-nation/uks-law-a-big-hurdle-for-india-to-extradite-fugitives/articleshow/64595380.cms.

[22] Tirkey, A., India's Challenges in Extraditing Fugitives from Foreign Countries, 28 November 2018, Observer Research Foundation, at https://www.orfonline.org/research/indias-challenges-in-extraditing-fugitives-from-foreign-countries-45809/.

its attempts to extradite persons from the UK. That noted, however, the position may be in the process of improving. The case of Vijay Mallya, for example, is proceeding to appeal in 2020 on only one of a number of argued grounds.[23] His arguments against extradition were rejected at first instance.[24] It is clear, though, that the success rates of Indian extradition requests to the UK stands in stark contrast to the position of the UK with certain other states.[25] As regards the UK's EU partners and the US the refusal of extradition requests is exceptional. Indeed, the perception common in some circles that UK law and practice, including human rights, prevents extradition from the UK is largely misplaced.[26] The question that arises, then, is what is acting to frustrate Indian extradition requests? The answer is not simple nor singular. Indeed, there are a multiplicity of factors at play which can militate against an extradition in a given case. These factors can be categorised, albeit imperfectly, as falling under one of two headings; general extradition requirements and specific bars to extradition.

3.2 General Extradition Requirements as Barriers to Extradition

Extradition law contains criteria that require satisfaction prior to an individual being transferred from one state to another. In the India-UK context they are found in both the 1992 Treaty and the domestic law of both states, with the latter applying in individual cases. The general requirements that have been put forward in opposition to Indian extradition requests are those mandating particular forms and levels of evidence (the *prima facie* evidence requirement), that a requested person is only tried for the crime iterated within the request (the speciality principle) and that the

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[23] His leave to appeal application is reported as Mallya v India [2019] EWHC 1849 (Admin). Persons wanted in India currently based in the UK include Ravi Sankaran, wanted in the navy war room leak case, Lalit Modi, sought for money laundering, Tiger Hanif, in connection with bomb attacks in Gujarat in 1993 and music director Nadeem Saifi in the Gulshan Kumar murder case.

[24] The first hearing at Westminster Magistrates' Court, India v Mallya, 10 December 2018, is found at: https://thewire.in/business/vijay-mallya-uk-extradition. A further indication of an improving relationship is found in judicial dicta on Indian extradition assurances, mentioned below.

[25] It is also clear that the volume of requests under the 1992 Treaty in both directions is limited. To give some context, Poland sought 2174 persons from the UK over the financial year 2017-2018, and 22 persons were arrested in Poland pursuant to UK requests over that same period, see https://nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/fugitives-and-international-crime/european-arrest-warrants.

[26] See Arnell, P., The Human Rights Influence upon UK Extradition – Myth Debunked, (2013) 21 European Journal of Crime, Criminal Law and Criminal Justice 317.

offence underlying the request is found in the law of the UK as well as India (the double criminality rule).

3.2.1 *Prima Facie* Evidence

Indian and UK extradition law requires that the requesting state provide evidence to the requested state that establishes a *prima facie* case that the person concerned committed the offence in question.[27] The requirement in the 1992 Treaty *inter alia* provides that the requesting party must provide "… such evidence as, according to the law of the Requested State, would justify his committal for trial if the offence had been committed in the territory of the Requested State". The formulation in UK law found in section 84(1) of the 2003 Act. It states that the judge must decide whether the request includes evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him. The 2003 Act also contains rules on the admissibility of evidence in extradition hearings.[28] An example of how this requirement has frustrated an Indian extradition request under the Extradition Act 1989 is Saifi v India.[29] Here an application for habeas corpus was granted where it was held that the translation of certain evidence was inadmissible because it was not independently done and the original material was not included in the request. Saifi was discharged.

A case under the 2003 Act where evidential concerns were at issue is India v Rajarathinam.[30] Rajarathinam was sought for offences of fraud. A synopsis of the case against him accompanying the extradition request contained content and the conclusions from a firm of chartered accountants into the alleged fraud. It was held that this fell outwith the evidential requirements of the 2003 Act, and the Government of India was given the opportunity to provide admissible evidence upon which the district judge could rely. A third example where evidential considerations were live is Shankaran v India.[31] There, a crucial factual averment that the appellant had received an email under the name Vic Branson was found in only one of three statements to the police, which was subsequently denied by the witness. It was such that the court held that that statement was "far too

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[27] Note that the *prima facie* evidence requirement will be discussed again below in the context of the differential treatment afforded by the UK to its extradition partners.

[28] Sections 84(2) and (3) contain relevant rules. Note, though, that extradition hearings take a more generous approach to admissibility than criminal hearings in UK law, see R. (on the application of B) v Westminster Magistrates' Court [2014] UKSC 59 at para 21.

[29] [2001] 1 WLR 1134.

[30] [2006] EWHC 2919 (Admin).

[31] [2014] EWHC 957 (Admin).

slender a basis for founding" the case against Shankaran. He was discharged. An instance where evidential concerns were raised but did not frustrate extradition is Kapoor v India.[32] There the District judge refused an appeal against extradition where it was argued that a *prima facie* case had not been made out where there was dispute over handwriting in a passport application in a child abduction case.

3.2.2 The Speciality Principle

In general terms the speciality principle provides that an individual may not be tried for an offence in the requesting territory that was not iterated in the extradition request. It has been of some concern in UK jurisprudence in cases following Indian requests. Notably, this arose not from a UK precedent, but rather one from Portugal. There Abu Salem had been charged in India with crimes not specified in its request to Portugal in breach of the rule of speciality.[33] In Chawla v India[34] the Abu Salem case was put forward in support of the contention that the speciality principle might not be respected. In response the Divisional Court held that India in fact respects the speciality principle and the appeal on that point was refused. As to India's compliance with the principle the Indian Supreme Court in Lahoria v Union of India[35] notably upheld an appeal where an individual extradited from the United States was charged with offences which had not formed part of the extradition decree granted by the Texas court. The speciality principle was held to exist in customary international law, and more relevantly, it was confirmed that it formed part of Indian law by virtue of section 21 of the 1962 Act, as amended.

3.2.3 Double Criminality

The third general extradition requirement that has acted as an impediment to extradition from the UK to India is double criminality. This is the long-standing feature of extradition law providing an individual will only be extradited if the crime at issue is found in the law of both the requested and requesting states. In UK law it is provided for in section 137(3)(b) of the 2003 Act, which *inter alia* provides an extradition offence is one where "… the conduct would constitute an offence under the law of the relevant

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[32] [2015] EWHC 1378 (Admin). A further case is that of Vijay Mallya, discussed below.

[33] See Tirkey, supra note 22. That noted, India complied with its treaty obligations as regards not imposing the death penalty following his conviction in 2017, see https://www.hindustantimes.com/india-news/1993-mumbai-blasts-convict-abu-salem-moves-european-court-of-human-rights-to-cancel-his-extradition-to-india/story-PRi3hzLdn6zQywSqrAU06J.html.

[34] Supra note 20.

[35] [2001] 4 LRC 663.

part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom".[36] Whilst there is a considerable overlap of offences within the substantive criminal law of India and the UK there are exceptions. An example where this acted to frustrate an extradition arose where a person was sought for the crime of dowry harassment.[37] In the case, in 2018, the double criminality requirement frustrated the extradition for the reason of there not being a corresponding crime in English and Welsh law.[38]

3.3 Specific Bars to Extradition Frustrating the Process

The specific bars to extradition under the 2003 Act form the second category of factors that have acted to frustrate Indian extradition requests to the UK. These differ from general extradition requirements in that they do not concern a feature within the law that must be satisfied prior to a request being acceded to. Rather, they centre upon a circumstance or circumstances of a case that justifies the refusal of a request in UK law. There are four bars to extradition that have been particularly relevant. These are 'extraneous circumstances' defined by section 81 of the 2003 Act, oppression based on the passage of time under section 82, oppression on the grounds of physical or mental health under section 91 and human rights under section 87.[39] Each of these has to a greater or lesser extent been at play in India-UK extradition practice.

3.3.1 Extraneous Considerations – a Political Component

'Extraneous considerations' as a bar to extradition include what can be considered the modern version of the political offence exception. Historically, that exception provided that an extradition request will be refused where it is made in order to prosecute someone for a 'political crime'. A version of that exception subsists in article 5 of the 1992 Treaty, albeit with material exceptions.[40] Namely, article 5(2) contains a list of

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[36] There are variants of this formulation to encompass extraterritorial crimes.

[37] As mentioned by Tirkey, supra note 22.

[38] See https://www.doughtystreet.co.uk/news/indian-dowry-law-blackmail-extradition-request-rejected-no-dual-criminality.

[39] For the purposes of this article 'bar' is referred to in a general sense. It should be noted, though, that that word in law refers to the grounds in section 79 of the 2003 Act alone.

[40] This version of the exception gave rise to dissent, including the view that "… the sheer arbitrariness and malice embedded in the treaty should make opposition to it a question of principle for all justice loving Indians and Britishers", in Siddharth, V., New Indo-British Extradition Treaty, (1992) 27(47) Economic and Political Weekly, 2531. This sentiment was based on vague usage of the word 'terrorism' in

crimes not to be regarded as of a political character. In UK law the traditional form of the exception has been removed. It fell in the face of concerted international efforts to address terrorism.[41] This is seen in the difference between the Extradition Act 1989 and the 2003 Act. Section 6(1)(a) of the Extradition Act 1989 *inter alia* provided that an extradition is barred where the requested person was accused or convicted of an offence of a political character. The 2003 Act, in contrast, provides that a request will be barred where it is made for the purpose of prosecuting or punishing an individual on account of, *inter alia*, his political opinions or that his trial or punishment will be prejudiced for those reasons.

An example of traditional conception of the political offence exception being argued following an Indian request is Re Government of India and Mubarak Ali Ahmed.[42] Here, under the Fugitive Offenders Act 1881, an applicant sought a writ of habeas corpus *inter alia* on the ground that the proceedings against him in India were based on political considerations only. He also suggested he had publicly been branded a political spy for Pakistan. The High Court held that "If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him".[43] This is a surprising and notable dictum in light of the 1881 Act not containing a political offence exception.[44] A modern instance where the section 81 bar was put forward is India v Mallya[45] at Westminster Magistrates' Court. Here Montgomery for Mallya argued that India's case against him is "… a flawed criminal case which has been brought to meet a political objective to quell public anger at the accumulation of bad debts by Indian state-owned banks".[46] The question for the Court was whether "… the request for extradition has been made on account of Dr

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India. At the time of the conclusion of the 1992 Treaty the Indian Prevention and Suppression of Terrorism Act had been proposed.

[41] In this regard India has been designated as a Commonwealth country with which sections 24(1)(a) and (2)(a) of the Suppression of Terrorism Act 1978 apply, by the Suppression of Terrorism Act 1978 (Application of Provisions) (India) Order, SI 1993/2533. The effect of which was the exclusion of various offences as offences of a political character in extraditions to India. Designation followed a heated debate in the House of Commons where India's conduct in Kashmir was referred to, see https://publications.parliament.uk/pa/cm199293/cmhansrd/1993-07-21/Debate-11.html. There is a voluminous literature on this subject generally, including Thompson, D.K., The Evolution of the Political Offence Exception in an Age of Modern Political Violence, (1983) 9 Yale Journal of World Public Order 315.

[42] [1952] 1 All ER 1060.

[43] Ibid at p 1063.

[44] As will be discussed below, the Fugitive Offenders Act 1881 applied as between the UK and its colonies, Dominions and possessions and eschewed certain aspects of traditional extradition practice.

[45] Supra note 24.

[46] Ibid at para 358.

Mallya's political opinions or whether he might be prejudiced at his trial on account of his political opinions".[47] Evidence was led in support of this contention. In spite of this it was held by the Magistrate that just because the Congress and BJP parties are blaming him and others for the state banks' losses does not mean that he is being prosecuted for his political opinions, and that suggestions that the head of the CBI was partial were unfounded.[48]

3.3.2 Oppression – Passage of Time

Oppression as a bar under the 2003 Act takes two forms. One is that based on the passage of time. For Category 2 states it is found in section 82.[49] It *inter alia* provides an extradition is oppressive by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence. A case following an Indian request that graphically illustrates the operation of this bar is India v Angurala.[50] Here a former branch manager employed by the Bank of India and his wife were successful in resisting their extradition from the UK. The District Judge held that to extradite the pair would be unjust or oppressive by virtue of the passage of time. The facts of the case were that over 25 years had elapsed since the conduct which allegedly gave rise to the extradition crime, fraud, and in the course of that period authorities in India knew or could have known of the whereabouts of the requested persons in the UK. A case where the passage of time had been accepted as blocking an extradition by the Divisional Court under the Fugitive Offenders Act 1967 but was overturned by the House of Lords is India v Narang.[51] It was held that the Divisional Court erred by considering circumstances not relevant to the ground argued by the requested persons. The appeal by India was allowed.

3.3.3 Oppression - Mental or Physical Health

The second form of oppression bar to extradition in UK law acts to prevent an extradition on the grounds of the physical or mental health of the

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[47] Ibid at para 357.

[48] Ibid at paras 376-377.

[49] Section 10 of the Fugitive Offenders Act 1881 contained a general oppression bar, whereby a superior court could discharge a fugitive where the case was trivial, it was not made in good faith, or having regard to the circumstances of the case it would unjust or oppressive or too severe a punishment. A case where this was unsuccessfully argued in an Indian context is Henderson v Secretary of State [1950] 1 All ER 283.

[50] Cited at https://www.casemine.com/judgement/uk/5b2897d12c94e06b9e19bb2f.

[51] [1978] AC 247.

requested person. This form of the bar has acted to frustrate an Indian extradition request. It did so in India v Ashley.[52] Here India appealed a decision of a District Judge that the requested person's mental health was such that it would be unjust and oppressive to extradite him. Ashley was accused of various sexual offences against children. India's appeal was refused because the Court accepted that Ashley's mental health condition, dementia, was permanent. Here, of course, there was nothing that India could have done to overcome the bar. In other cases, however, diplomatic assurances stipulating that the requested person will be afforded the treatment needed to address his or her health needs have been successfully employed. Such a case in the UK's practice with South Africa is that of Shiren Dewani. There the fact that Dewani's mental health condition was considered temporary led to his conditional extradition to South Africa for a set period during which he would be examined in order to decide whether he continued to be unfit to plead.[53]

3.3.4 Human Rights

The final bar in UK law that has played a role in hindering extradition from the UK to India is that based on human rights. The bar provides that if a judge decides that the requested person's extradition is not compatible with the rights found in schedule 1 to the Human Rights Act 1998 he must order his discharge. The most relevant rights are those protecting a person from torture and inhuman and degrading treatment or punishment under article 3, the rights to liberty (article 5) and a fair trial (article 6) and the right to respect for private and family life (article 8). Of these it appears that the most common human rights argument in hearings considering Indian extradition requests are that the prison conditions in India in which a requested person will be held, prior or subsequent to conviction, are such as to give rise to a breach of article 3.[54] In India v Chawla[55] the Divisional Court agreed with the District Judge's view that there was a real risk that Chawla would be subjected to inhuman or degrading treatment at Tihar prison in New Delhi contrary to article 3, and sought further assurances from India. Notably those assurances were later held to satisfy the Divisional Court's concerns.[56] In Mallya's case an argument based upon

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[52] [2014] EWHC 3505 (Admin).

[53] See Dewani v South Africa [2012] EWHC 842 (Admin) and South Africa v Dewani [2014] EWHC 153 (Admin). Diplomatic assurances in the India-UK context are mentioned below.

[54] An instance where prison conditions are said to have been relevant in barring an extradition to India is noted by the London law firm Peters and Peters, at https://www.petersandpeters.com/leading-cases/successful-discharge-from-extradition-for-a-uk-citizen-wanted-by-the-government-of-india/.

[55] [2018] EWHC 1050 (Admin).

[56] In India v Chawla, supra note 20.

prison conditions within the Arthur Road jail in Mumbai was rejected, in part on account of Westminster Magistrates' Court receiving video evidence regarding the conditions there.[57] A request to appeal this aspect of the District Judge's decision was refused on the basis of Indian assurances providing where Mallya would be detained and what treatment, including medical assistance, he would be afforded.[58] A case where article 3 was successfully invoked was that of Arti Dhir and Kaval Raijada, where Chief Magistrate Emma Arbuthnot held that the mandatory and irreducible life sentence they would face if convicted of the murder of their adopted child was not compatible with article 3.[59]

In Patel v India[60] it was not prison conditions in India or the prospective sentence that formed the basis of a human rights argument, rather it was the suggestion that Patel would not receive a fair trial under article 6. As noted above, this argument was unsuccessful and Patel was returned to India. A further case where the right to a fair trial was put forward, again mentioned above, is Re Government of India and Mubarak Ali Ahmed.[61] In response to the argument Lord Goddard CJ notably stated "I think it would be an impossible position for this court to take up to say that they would not return a person for trial to a country which is a member of the Commonwealth and where it is known that courts of justice have been presided over by Indian judges for very many years because we thought the court would not give him a for trial. That would be an insult to the courts of India".[62] Clearly, whilst human rights arguments have acted to bar extraditions from the UK to India their success is far from certain.[63]

3.4 Reform Could and Should Reprise Certain Historical Features

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[57] As noted in Tirkey, supra note 22. Similarly, in Kapoor v India, supra note 32, an argument based on prison conditions was not successful – where those conditions in the Punjab did not form an argument in the appeal, at para 45.

[58] Mallya v India, supra note 23.

[59] See https://www.bbc.co.uk/news/uk-england-london-49592362. India successfully sought leave to appeal in October 2019. It is scheduled for 2020.

[60] Supra note 16. An argument based on prison conditions was rejected by the District Judge.

[61] Supra note 42.

[62] Ibid. This reasoning mirrors certain of the arguments made below.

[63] The reluctance of Indian authorities to expose their prison conditions to scrutiny appears to have come to an end. It has been noted in this regard that "In recent years the Indian Government has refused to allow inspections of prisons by UK experts for the purpose of providing expert reports in extradition cases. Westminster magistrates court took a robust view and drew adverse inferences if prison inspections were refused. This all changed with the Mallya case", see https://www.bindmans.com/news/recent-developments-in-extradition-and-prison-conditions-are-assurances-suf.

The fact that the extradition arrangements between India and the UK are not working well is the pre-eminent argument in favour of reform. It is not the only one, however. A further reason is that it is desirable and appropriate to reprise aspects of historical precedent in the area. Of course, the relationship between India and the UK is today one founded upon each being an equal and sovereign state. Indeed, as the Indian Supreme Court itself noted in an extradition case "It is time to realize that India is now a significant and important player in the world stage".[64] There is no doubt, however, that the two countries share a common legal heritage and cultural affinity as well as a strong desire to enhance the degree of criminal co-operation between them. These factors support looking to the past. The law that governed extradition between India and the UK prior to Indian independence was the Fugitive Offenders Act 1881.[65] Extradition relations between India and the UK, therefore, were governed by a UK statute and not international law.[66] For India generally the 1881 Act applied as between Commonwealth countries, and the Extradition Act 1903 for all others.[67] Post-independence both were repealed and replaced by the Extradition Act 1962.[68] What is of particular note in the 1881 Act is that it eschewed aspects of extradition practice applying as between sovereign states. In particular the 1881 Act did not contain double criminality or speciality provisions. Further and notably the 1881 Act also did not contain a political offence exception (that was introduced in 1967 as for Commonwealth countries). Indeed, the 1881 Act specifically included treason as an extraditable offence. A suggestion that this be excluded made in a committee report prior to its enactment was refused by the UK Attorney General.[69] The absence of double criminality, speciality and the political offence exception under the 1881 Act illustrates the close and intricate extradition relationship

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[64] Verhoeven v Union of India, (2016) 6 SCC 456 at para 135, 28 April 2016, cited at https://indiankanoon.org/doc/101513838/.

[65] Hereinafter the 1881 Act.

[66] See generally Clute, R.E., Law and Practice in Commonwealth Extradition, (1959) 8(1) American Journal of Comparative Law 15, at p 15.

[67] Within India the Extradition Act 1903 was enacted to provide more convenient administration of extradition in India, see the Delhi High Court case of Verhoeven v Union of India, 21 September 2015, at para 7, cited at https://indiankanoon.org/doc/18537853/. The case was overturned by the Indian Supreme Court, supra note 64. The 1881 Act replaced the 1843 Act for the better apprehension of certain offenders 6 & 7 Vict. C. 34. Prior to 1843 surrender took place pursuant to the proviso to section 15 of the Habeas Corpus Act 1679, which permitted the sending of persons to be tried in Scotland, Ireland or any of the islands or foreign plantations of the King, see Baker Review, supra note 14 at page 42, footnote 61.

[68] The procedures under the 1881 Act applied prior to 26 January 1950. Under the Adaptation of Laws Order 1950 the Indian Extradition Act 1903 was held to apply to the Native States.

[69] As noted in Clute, supra note 66 at p 24.

between India and the UK at that point. It is not presently suggested that all of these are presently removed from India–UK extradition relations.[70] There is a feature of past practice under the 1881 Act, however, that does merit resurrection.

The 1881 Act contained a *prima facie* evidence requirement within section 5. It *inter alia* provided that if the warrant was duly authenticated and "… such evidence is produced as… raises a strong or probable presumption that the fugitive committed the offence… the magistrate shall commit the fugitive to prison to await his return…". Notably, however, Part II of the 1881 Act permitted the *prima facie* requirement to be dispensed with as regards contiguous territories.[71] This is what happened between India and, *inter alia*, Hong Kong, the then Federated Malay States and Brunei by an Order in Council 2 January 1918. The Order *inter alia* stated "… by reasons of their contiguity or the frequent intercommunication between them it seems expedient to His Majesty and conducive to the better administration of justice therein to [apply Part II of the 1881 Act]". As was noted in C.G. Menon v India "As the laws prevailing in those possessions were substantially the same, the requirement that no fugitive will be surrendered unless a prima facie case was made against him was dispensed with".[72] It is submitted that it is this feature of the historical practice that merits reapplication. Whilst admittedly it did not apply as between India and the UK but rather 'contiguous territories' its justification has a modern resonance. The 1881 Act was an "… easy administrative expedient for the return of fugitives from one part of the Empire to another without their ever leaving the jurisdiction of the highest court of appeal".[73] Whilst India does not fall under the jurisdiction of the UK Supreme Court both states are bound by international obligations including the International Covenant on Civil and Political Rights 1966 and so a somewhat similar argument can be made. The joint human rights obligations and the protections under the 1992 Treaty, in light of the legal and historical affinity between India and

[70] In due course this may be possible. As mentioned, under the EAW the double criminality requirement has been supplemented with the inclusion of a Framework List of offences that can operate in lieu of the orthodox position.

[71] The system was termed inter-colonial backing of warrants.

[72] (1954) AIR (SC) 517. Note, however, that the Madras High Court in the case held whilst the Fugitive Offenders Act 1881 was in effect in India Part II of the Act could not be enforced as it denied equal protection of the laws and was repugnant to the Constitution of India. The Supreme Court of India in the same case, in The State of Madras v C.G. Menon and Another, 1955 SCR 280, subsequently found that the Fugitive Offenders Act, 1881, was not in force in respect to India, at https://indiankanoon.org/doc/1309162/.

[73] Describing the 1881 Act, Clute, supra note 66 at p 27. The court being the Judicial Committee of the Privy Council under the 1881 Act.

the UK, lead to the conclusion that it is now time to revert to a degree of similar co-operation.[74]

A bridge between the historical practice between India and the UK and the arguments in favour of reform is the Commonwealth Scheme for the Rendition of Fugitive Offenders 1966 also known as the London Scheme.[75] Whilst having its origins in the system under the Fugitive Offenders Act 1881, it has been updated and amended over time, in 1986, 1990 and 2002. The Scheme comprises an agreed set of recommendations intended to guide governments in their extradition relations *inter se*.[76] It was designed to encourage the adoption of law and practices that will result in an efficient and effective co-operation.[77] The Scheme, along with the 1992 Treaty, have been said to support "… the presumption of good faith" as between the parties.[78] Of particular note within the Scheme is clause 5(4), providing a *prima facie* evidence requirement. As under the 1881 Act this may be dispensed with, as per clause 6. That provides that two or more parts of the Commonwealth may replace the requirement by either Annex 3 of the Scheme or other provision that they agree. Annex 3 provides that a certificate issued by the Attorney General of the requesting territory stating that in his opinion the case discloses evidence sufficient to justify a prosecution can replace the requirement. It appears clear that the Scheme provides a possible template for reform in this regard.

3.5 Reform Could End UK Differentiation of India

The UK treats its extradition partners differently. This is not in itself exceptional. States are of course free to enter into extradition agreements

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[74] Examining extradition practice in the Commonwealth in 1959 Clute concluded that it "… may well be an area in which Commonwealth countries will choose to abandon the Commonwealth law in favor of the law of nations", supra note 66 at para 28. It is now time, it is argued, to reprise the tenor of certain past practice, but not its form.

[75] 1966, Cmnd 3008. It is found here: http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_13_ROL_Schemes_Int_Cooperation.pdf.

[76] The Commonwealth itself describes it as "… non-binding and flexible arrangements which provide a constructive and pragmatic approach to mutual co-operation in Commonwealth countries", cited at http://thecommonwealth.org/sites/default/files/key_reform_pdfs/P15370_13_ROL_Schemes_Int_Cooperation.pdf.

[77] See Prost, K., Breaking Down the Barriers: International Co-operation in Combating Transnational Crime, Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition 2007, Organisation of American States, at https://www.oas.org/juridico/mla/en/can/en_can_prost.en.html#ftnref10.

[78] Patel v India, supra note 19 at para 14.

of whatever nature, or not, with third states. Indeed, as just discussed there has existed especial provision of varying types within the Empire and Commonwealth for over a century. However, the fact that India is presently in the third tier of four within UK law in level of trust and minimisation of formality is of note. For reasons akin to reviving aspects of the historical arrangement between the countries the distinction in law and practice between the UK and the EU and other select states and the UK and India requires consideration. The features of law that vary as between the UK's partners are the *prima facie* evidence requirement, double criminality and political involvement in extradition decisions. A relaxation or abolition of one or more of these features leads to a streamlined extradition process and one where the success rate of extradition requests increases. The four approaches in UK law are that under the EAW system, that under a bilateral treaty where the *prima facie* evidence requirement is dispensed, that under a bilateral treaty and the London Scheme, and that applying in the absence of an extradition agreement. In the first two of these the UK has lessened certain of the formal extradition requirements normally applicable.

The modern divergence in UK extradition practice has its origins in the 2003 Act. It is the basis of the differences between the India-UK relationship and those between the UK and its EU partners and the UK and a number of other states. The UK's closest co-operation is with its EU partners under the Framework Decision on the European Arrest Warrant.[79] Particularly notable here are the removal of the *prima facie* evidence requirement, a novel double criminality approach, and the lack of political involvement in the process. As to the first, *prima facie* evidence is not needed. This ground-breaking development is based on the principles of mutual trust and recognition. Under the EAW what is required is evidence that, on the balance of probabilities, the person before the judge is in fact the person referred to in the arrest warrant and confirmation that a form of double criminality is met. This latter requirement under the EAW is also novel. In addition to a traditional iteration of double criminality the Framework Decision provides that the requirement is met if the offence is listed in a Framework List of Offences, found in article 2(2), and if the offence is punishable in the issuing state by a maximum period of at least three years.[80] Finally as to the EAW, political involvement in the process has been completely removed. The final decision on extradition is that of the judge at the hearing, and not the Secretary of State. Cumulatively, EU Member States have agreed to a system of rendition that is more properly designated one of surrender than extradition. Clearly, with its EU partners

[79] Supra note 17.

[80] The orthodox manifestation of the principle provides that the offence be punishable by imprisonment for a maximum period of at least 12 months in the requested state, in articles 2(1) and 2(4).

the UK operates a system of extradition considerably different from that applying with India.

The second tier of co-operation within UK law is akin to the traditional approach, with a material exception. This allows the *prima facie* evidence requirement to be dispensed with.[81] The requirement applies in the first instance to all the UK's partners apart from those within the EU.[82] Section 84(7), however, empowers the Secretary of State to designate territories with the effect of removing the requirement. In those cases, requesting territories must merely provide information that would justify the issue of an arrest warrant, called the reasonable suspicion test.[83] Once this is met no further evidence of culpability of the requested person is required. This is a lesser burden on the requesting state.[84] This power has been exercised on a number of occasions. India, however, has not been designated.[85] Amongst the states that have been are Albania, Azerbaijan, Russia, the Republic of Korea, Ukraine and South Africa.[86] These territories have been designated because they are party along with the UK to the European Convention on Extradition 1957 (ECE), which mandates extradition without the requirement. Notably, however, the territories of Australia, Canada, New Zealand and the United States have also been designated although not party to the 1957 Convention. India's absence from the list merits redress.

The approach to diplomatic assurances is a further subject where there appears to have been a degree of divergence in UK practice between India and certain other states. Notably, though, this may have come to an end with recent dicta treating assurances from India in a manner akin to those from the UK's close partners. The origins of the scepticism of Indian assurances in UK practice is not a UK judicial decision, but rather a judgment of the European Court of Human Rights. In the deportation case

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[81] As noted above, the role of the Secretary of State has been curtailed in all Category 2 cases.

[82] It is described above. The requirement is also found in section 86(1) where it applies to requests where the individual has been convicted *in absentia*.

[83] Under sections 71(3) and (4) of the 2003.

[84] It has also given rise to controversy on account of terminological differences between the UK and the US. The Baker Review, supra note 14 concluded on the point that the distinction was immaterial, at para 7.86.

[85] In 2013 the UK did amend the length of time allowed for necessary documents to be provided to the judge to 65 days from the point of arrest, under The Extradition Act 2003 (Amendment to Designations) Order 2003, SI 2013/1583. This was in order to comply with the 1992 Treaty, article 12.

[86] The statutory instrument The Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 2003/3334, as amended, contains a list of all Part 2 territories and those regarding whom the evidential requirement has been dispensed with.

of Chahal v UK[87] the ECtHR held that assurances given by the Indian Government did not have the effect of mitigating concerns over the possible violation of article 3 were Chahal transferred to India. In a majority decision it stated "Although the Court does not doubt the good faith of the Indian Government in providing the assurances… the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem".[88] In the Court of Appeal judgment prior to the ECtHR decision those assurances were accepted.[89]

Within UK jurisprudence there are no reported extradition cases where Indian assurances have been rejected.[90] On the contrary, in India v Chawla[91] the Divisional Court quoted from a case setting out the position on assurances, Giese v US, that "…"whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept".[92] It then notably followed that passage with "India is a friendly foreign government".[93] The court then went on to examine the nature and specificity of a third assurance India had provided as regards prison space and conditions, intra-prisoner violence and medical facilities in Tihar prisons in Delhi and concluded that it was satisfied that it was sufficient to demonstrate that there was no real risk that Chawal would be subjected to impermissible treatment in Tihar prisons.[94] Similarly, the assurances given by India in Mallya's case were accepted by both Westminster Magistrates' Court at his initial extradition hearing and the Divisional Court when considering leave to appeal. The Divisional Court held "… the court is bound, in accordance with the presumption of good faith, to accept such assurances at face value unless there is cogent evidence which calls them into question. In this case the senior district judge considered the assurances given to be clear, binding and sufficient, and on any appeal

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[87] (1997) 23 EHHR 413.
[88] Ibid at para 105, footnotes omitted.
[89] R v Secretary of State for the Home Department ex parte Chahal (No. 2) [1995] 1 WLR 526 at p 536.
[90] A Canadian case where this happened is India v Badesha 2016 British Columbia Court of Appeal 88. Note, however, the Canadian Supreme Court allowed the appeal against this judgment, in India v Badesha, 2017 SCC 44.
[91] Supra note 20.
[92] [2018] EWHC 1480 (Admin) at para 38.
[93] Supra note 20 at para 14.
[94] Ibid at para 21. Admittedly, three separate assurances were required to get to this decision. That fact, though, goes to the subject matter and detail of the assurances, rather than the trustworthiness of the Indian authorities in the eyes of the UK court.

that assessment is entitled to great respect".[95] The terms of the willingness to accept Indian assurances by UK courts appears to signal a new stage in India-UK practice.[96] The clear judicial support for Indian assurances in line with those given by the UK's trusted extradition partners supports the minimisation of the divergence in the UK's extradition practice towards India more generally.

3.6 New Geopolitical Realities and a Desire for Enhanced Co-operation

The final argument in favour of the reform of the India-UK extradition relationship is that it would reflect geopolitical realities and an enhanced desire for co-operation. The former takes the form of the rise of India economically and politically and the UK's pivot away from the EU. Accordingly, it is appropriate that the extradition relationship between the two countries adjust to these facts and more effectively facilitate international criminal justice between them. In support of this facet of the argument are both the statement of Prime Ministers Mohi and May following their 2016 meeting and a House of Commons Foreign Affairs Committee Report. The Joint Statement between the Governments of the UK and India, 7 November 2016, affirmed "… their strong commitment to enhance co-operation under the Mutual Legal Assistance Treaty. The 2 leaders agreed that fugitives and criminals should not be allowed to escape the law. They expressed their strong commitment to facilitate outstanding extradition requests from both sides".[97] The statement also contained a specific section on 'extradition, returns and mobility'. It *inter alia* stated that the Prime Ministers "… directed that the officials dealing with extradition matters from both sides should meet at the earliest to develop better understanding of each countries' legal processes and requirements, share best practices, and identify the causes of delays and expedite pending requests. They also agreed that regular interactions between the relevant India-UK authorities would be useful to resolve all outstanding cases expeditiously".[98] From the UK perspective, the House of Commons Foreign Affairs Committee published a report in June 2019 entitled Building Bridges: Reawakening UK-

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[95] Mallya v India, supra note 24 at para 23.

[96] A further example is Shankaran v India, 19 Dec. 2011 and 27 March 2013, where the District Judge at first instance was of the view that, but for adequate undertakings, extradition potentially followed by many years' pre-trial detention, would constitute a 'flagrant breach' of the Appellant's rights under Article 5 ECHR, as noted by the Divisional Court in Shankaran v India [2017] EWHC 957 (Admin) at para 54.

[97] Cited at https://www.gov.uk/government/news/joint-statement-between-the-governments-of-the-uk-and-india.

[98] Ibid.

India Ties.[99] The Summary of this Report provides "India's place in the world is changing fast, and UK strategy has not yet adjusted to this new reality. As the UK prepares to leave the EU, it is time to reset this relationship. We cannot afford to be complacent or rely on historical connections to deliver a modern partnership".[100] The Committee clearly recognises the importance of enhancing the UK's relationship and co-operation with India. The Report concluded that "In an increasingly unstable world threatened by autocratic states with contempt for the rules-based international system, it is more important than ever before that the UK and India support each other—and our mutual allies".[101]

4. What Reform is Needed

The case in favour of the reform of India-UK extradition and practice law is clear. The arguments are weighty and varied. Having made that case, it is necessary to highlight the changes required. These are, of course, closely related to the case for reform – any changes must act to address or at least minimise the problems identified. They must also reconfigure the relationship in order to reflect the affinity between the countries and the new political will to co-operate more fully. The single most important reforms required are those which lead to more effective and timely co-operation between the Indian and UK authorities. In this vein amendment of the 1992 Treaty is not required. Evidential concerns, speciality arguments, possible political influence in trial and punishment, the passage of time and doubts about prison and detention conditions can all be addressed through improved extradition practice not changes in international or domestic law. These must largely take place in India. They must also be driven by enhanced and effective communication between the UK judiciary and prosecutors and the CPV Division of India's Ministry of External Affairs. If changes to practice facilitated by improved communication of UK requirements and in the light of the jurisprudence discussed above were to occur the factors impeding rendition from the UK to India would largely be addressed. It is important to note here, however, that India is not wholly responsible for the problems affecting the relationship. There is no doubt also that the UK subjects extradition requests from all states to specific and detailed conditions of a more stringent nature than most other countries. With reference to US outgoing practice, for example, the Baker Review stated "… extradition proceedings in the United Kingdom are far more elaborate than their equivalent procedures in the United States. This latter point explains why, as a matter

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[99] 24 June 2019, Eighteenth Report of Session 2017-2019, HC 1465, cited at https://publications.parliament.uk/pa/cm201719/cmselect/cmfaff/1465/1465.pdf

[100] Ibid at p 3.

[101] Ibid at p 33.

of practice, extradition from the United Kingdom to the United States is generally more difficult to secure than vice versa".[102] Accordingly, in light of the UK's relatively demanding approach, Indian practice must be specifically tailored to its needs and requirements. This need not be overly burdensome. It does require, though, diligence, consistency and efficiency in order to satisfy UK law.[103] This is precisely what the Prime Ministers of India and the UK argued for in 2016.

A reform that is needed in UK law is the designation of India as a territory not required to provide *prima facie* evidence in conjunction with a request. By taking this step the UK would include India with the Category 2 partners it has placed a higher degree of trust. As noted, there are states that are not party to the ECE that have been designated. In debating the possibility of including such non-parties Baroness Scotland in 2003 said in the House of Lords, after noting that the United States would not be required to provide that level of evidence:

> "There is a case for removing the prima facie evidential requirement for a small number of Commonwealth partners whose criminal justice systems can be trusted and with whom we have a significant volume of business. No final judgments have been made, but we have in mind… countries such as Australia, Canada and New Zealand…. Our relations with those countries are based on the Commonwealth extradition scheme…".[104]

It appears clear that the time has come for India to be included amongst these states and territories. Both the political statements in favour of enhanced co-operation as well as the judicial dicta confirming that India is a 'friendly foreign government' and one in which trust should be placed militate in favour of this move. The 1992 Treaty does not bar this development. Whilst article 11(3) requires requests to be accompanied by evidence that would justify the committal for trial, the particular use of that evidence within UK extradition hearings is governed by the 2003 Act. If India was designated, UK courts would simply no longer apply the *prima facie* evidence requirement. The effect of a move is clear. India would be a partner on par with Canada, the United States and Australia – not to mention all those states party to the ECE. Practically, it would also affect cases such as Mallya's – whose leave to appeal application has been allowed

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[102] Baker Review, supra note 14 at para 7.46.

[103] Subramanian, supra note 1, argues that Indian extradition law calls for a complete overhaul. It is argued here that for the purposes of addressing the difficulties besetting extraditions from the UK to India what is needed instead is an enhancement of India practice that leads to timeous requests that meet the particulars of UK law.

[104] House of Lords Hansard, 8 July 2003, at cols GC88-89, cited at https://publications.parliament.uk/pa/ld200203/ldhansrd/vo030708/text/30708-45.htm.

on the sole ground that it was arguable that the Senior District Judge erred in finding that the *prima facie* requirement was satisfied.[105] The crux of the decision about designation is whether it is appropriate to continue to, in effect, look behind Indian requests or whether instead the UK should place trust in India's prosecutors and judicial system and accept that only *bona fide* requests will be made.

5. Conclusion

The efficacy of the law, historical precedent, ending differentiation in treatment, India's rise and the UK's new international outlook and the stated desire of both countries to enhance criminal co-operation all lend support to the reform of India-UK extradition law and practice. The most important reforms are not legal, however. They concern the operation of the existing law, rather than the rules themselves. Evidential difficulties and the passage of time, for example, have frustrated Indian requests. These can be immediately addressed with improvements in practice and processes. The relationship would also, however, benefit from India being designated under the 2003 Act as not being required to provide evidence in support of a *prima facie* case with its extradition requests. There is precedent for this under the Fugitive Offenders Act 1881 and provision for it under the Commonwealth Scheme. Modern international and transnational criminality demand an effective response that acts to facilitate criminal justice across borders and yet protects the rights of accused and convicted persons. There is a strong case that India and the UK reform their law and practice to meet these important goals.

[105] Mallya v India, supra note 23 at paras 10-14.