

Legality of “The Fugitive Economic Offenders Act, 2018” in light of the already existing “Extradition Act, 1962”

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This article examines the **Fugitive Economic Offenders Act, 2018**¹ (the FEO Act) in light of the national and international jurisprudence. The FEO Act was promulgated with the main objective of ensuring that offenders return to India to face prosecution.

The Statement of Objects and Reasons of the Act is as under:

There have been several instances of economic offenders fleeing the jurisdiction of Indian courts anticipating the commencement of criminal proceedings or sometimes during the pendency of such proceedings. The absence of such offenders from Indian courts has several deleterious consequences, such as, it obstructs investigation in criminal cases, it wastes precious time of courts, and it undermines the rule of law in India. Further, most of such cases of economic offences involve non-repayment of bank loans thereby worsening the financial health of the banking sector in India. The existing civil and criminal provisions in law are inadequate to deal with the severity of the problem. In order to address the said problem and lay down measures to deter economic offenders from evading the process of Indian law by remaining outside the jurisdiction of Indian courts, it is proposed to enact a legislation, namely, the Fugitive Economic Offenders Bill, 2018² *to ensure that fugitive economic offenders return to India to face the action in accordance with law.*

(emphasis added)

The Act also has serious consequences if an accused does not return to India. In this case, the Act is empowered to confiscate the properties of the accused person and even dispose it off, even before the trial begins (Section 15³) and also disallows the accused from filing or defending any civil claim in India (Section 14⁴).

Let us see the relevant sections of the FEO Act:

4. Application for declaration of fugitive economic offender and procedure therefor.— (1) Where the Director or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that any individual is a fugitive economic offender, *he may file an application in such form and manner as may be prescribed in the Special Court that such individual may be declared as a fugitive economic offender.*

(2) The application referred to in sub-section (1) shall contain—

- (a) reasons for the belief that an individual is a fugitive economic offender;
- (b) any information available as to the whereabouts of the fugitive economic offender;
- (c) a list of properties or the value of such properties believed to be the proceeds of crime, including any such property outside India for which confiscation is sought;
- (d) a list of properties or benami properties owned by the individual in India or abroad for which confiscation is sought; and
- (e) a list of persons who may have an interest in any of the properties listed under clauses (c) and (d).

(3) The authorities appointed for the purposes of the **Prevention of Money Laundering Act, 2002⁵** (15 of 2003) shall be the authorities for the purposes of this Act.

(emphasis supplied)

10. Notice. — (1) Where an application under Section 4⁶ has been duly filed, the Special Court shall issue a notice to an individual who is alleged to be a fugitive economic offender.

(2) The notice referred to in sub-section (1), shall also be issued to any other person who has any interest in the property mentioned in the application under sub-section (2) of Section 4.

(3) *A notice under sub-section (1) shall—*

(a) require the individual to appear at a specified place and time not less than six weeks from the date of issue of such notice; and

(b) state that failure to appear on the specified place and time shall result in a declaration of the individual as a fugitive economic offender and confiscation of property under this Act.

(4) A notice under sub-section (1) shall be forwarded to such authority, as the Central Government may notify, for effecting service in a contracting State.

(5) The authority referred to in sub-section (4) shall make efforts to serve the notice within a period of two weeks in such manner as may be prescribed.

(6) A notice under sub-section (1) may also be served to the individual alleged to be a fugitive economic offender by electronic means to—

*(a) his electronic mail address submitted in connection with an application for allotment of permanent account number under Section 139-A⁷ of the **Income Tax Act, 1961⁸** (43 of 1961);*

*(b) his electronic mail address submitted in connection with an application for enrolment under Section 3⁹ of the **Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016¹⁰** (18 of 2016); or*

(c) any other electronic account as may be prescribed, belonging to the individual, which is accessed by him over the internet, subject to the satisfaction of the Special Court that such account has been recently accessed by the individual and constitutes a reasonable method for communication of the notice to the individual.

(emphasis supplied)

12. Declaration of fugitive economic offender. — (1) After hearing the application under Section 4, if the Special Court is satisfied that an individual is a fugitive economic offender, it may, by an order, declare the individual as a fugitive economic offender for reasons to be recorded in writing.

(2) *On a declaration under sub-section (1), the Special Court may order that any of the following properties stand confiscated to the Central Government—*

(a) the proceeds of crime in India or abroad, whether or not such property is owned by the fugitive economic offender; and

(b) any other property or benami property in India or abroad, owned by the fugitive economic offender.

(3) The confiscation order of the Special Court shall, to the extent possible, identify the properties in India or abroad that constitute proceeds of crime which are to be confiscated and in case such properties cannot be identified, quantify the value of the proceeds of crime.

(4) The confiscation order of the Special Court shall separately list any other property owned by the fugitive economic offender in India which is to be confiscated.

(5) Where the Special Court has made an order for confiscation of any property under sub-section (2), and such property is in a contracting State, the Special Court may issue a letter of request to a court or authority in the contracting State for execution of such order.

(6) Every letter of request to be transmitted to a contracting State under sub-section (5) shall be transmitted in such form and manner as the Central Government may, by notification, specify in this behalf.

(7) The Special Court may, while making the confiscation order, exempt from confiscation any property which is a proceed of crime in which any other person, other than the fugitive economic offender, has an interest if it is satisfied that such interest was acquired bona fide and without knowledge of the fact that the property was proceeds of crime.

(8) All the rights and title in the confiscated property shall, from the date of the confiscation order, vest in the Central Government, free from all encumbrances.

(9) Where on the conclusion of the proceedings, the Special Court finds that the individual is not a fugitive economic offender, the Special Court shall order release of property or record attached or seized under this Act to the person entitled to receive it.

(10) Where an order releasing the property has been made by the Special Court under sub-section (9), the Director or any other officer authorised by him in this behalf may withhold the release of any such property or record for a period of ninety days from the date of receipt of such order, if he is of the opinion that such property is relevant for the appeal proceedings under this Act.

(emphasis supplied)

14. Power to disallow civil claims. — Notwithstanding anything contained in any other law for the time being in force,—

(a) on a declaration of an individual as a fugitive economic offender, any court or tribunal in India, in any civil proceeding before it, may, disallow such individual from putting forward or defending any civil claim; and

(b) any court or tribunal in India in any civil proceeding before it, may, disallow any company or limited liability partnership from putting forward or defending any civil claim, if an individual filing the claim on behalf of the company or the limited liability partnership, or any promoter or key managerial personnel or majority shareholder of the company or an individual having a

controlling interest in the limited liability partnership has been declared as a fugitive economic offender.

Explanation. — For the purposes of this section, the expressions—(a) “company” means anybody corporate and includes a firm, or other association of persons; and (b) “limited liability partnership” shall have the same meaning as assigned to it in clause (n) of sub-section (1) of Section 2¹¹ of the **Limited Liability Partnership Act, 2008**¹² (6 of 2009).

15. Management of properties confiscated under this Act. — (1) The Central Government may, by order published in the Official Gazette, appoint as many of its officers (not below the rank of a Joint Secretary to the Government of India) as it thinks fit, to perform the functions of an administrator.

(2) The administrator appointed under sub-section (1) shall receive and manage the property in relation to which an order has been made under sub-section (2) of Section 12 in such manner and subject to such conditions as may be prescribed.

(3) The administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under Section 12:

Provided that the Central Government or the administrator shall not dispose of any property for a period of ninety days from the date of the order under sub-section (2) of Section 12.

These important points emerge from the above sections—

- (1) Under Section 4, the prosecution files an application seeking declaration that the person is a fugitive.
- (2) A notice is issued on that application under Section 10 in which the court requires the person to appear within 6 weeks from the date of the notice and if the person fails to appear, then the court can declare him a fugitive.
- (3) After he is declared a fugitive under Section 12, his properties are confiscated to the Central Government and the same can even be disposed of at the pre-trial stage.
- (4) The accused is disallowed from filing and defending any civil claims in India.

Keeping this law in mind, let us now take a factual situation:

There is a person who left India and settled abroad. Thereafter, a criminal case is lodged in India against him by CBI alleging cheating and corruption and by the Enforcement Directorate for money laundering. Both these agencies conducted investigation and filed their report. The Indian Government issued an extradition request to the requested State where the accused is residing. *At this stage, the prosecution files an application before the Indian court under Section 4 of the FEO Act seeking declaration that since the accused has not returned to India, he should be declared a fugitive.* A notice is issued under Section 10¹³ of the FEO Act on the requiring the accused to appear before the court within 6 weeks of the date of notice failing which the court shall declare him a fugitive and confiscate his properties to the Central Government.

The important moot question that arises is:

Whether the FEO Act, 2018 is a bad law for that it seeks a declaration that since the accused has not returned to India, he should be declared a fugitive and consequentially his properties be confiscated, and he be disallowed to file and defend civil claims in India?

Let us examine some case law (Indian and international) to understand these issues better.

It is interesting to read a 1954 Supreme Court ruling¹⁴ wherein the Court held that the scheme of the Fugitive Offenders Act is that it classifies fugitive offenders into different categories and then prescribes a procedure for dealing with each class. Regarding persons committing offences in the United Kingdom and British Dominions and foreign countries in which the Crown exercises foreign jurisdiction, the procedure prescribed by Part I of the Act has to be followed before surrendering them and unless a prima facie case is established against them, they cannot be extradited. Extradition with foreign States is, except in exceptional cases, governed by treaties or arrangements made inter se. Extradition of offenders between the United Kingdom and the native States in India is governed by the Extradition Act.

This ruling makes it amply clear that the purpose of Fugitive Offenders Act had always been prescribing a procedure to seek extradition of accused persons and not to seek declaration and confiscation of properties and disallowing them to contest and defend civil claims.

English case law

In *Pillar-Neumann v. Public Prosecutor's Office*¹⁵, the English Court held that:

“67. The respondent argues, and the Judge found, that the appellant is a fugitive because in 2004 she became aware that a domestic warrant for her arrest had been issued in Austria and that, by failing to leave her home in the UK and to go to Austria, so that she could be arrested pursuant to that warrant, she was evading arrest and was therefore a fugitive.

68. In my judgment, even if she was aware of the domestic warrant, which is disputed, *lawfully remaining in her established country of residence does not mean she was evading arrest or was a fugitive.*

69. *She was not fleeing the country or concealing her whereabouts. She was not taking any positive steps to evade or avoid arrest. She was simply carrying on living in her country of residence, as she was lawfully entitled to do.*

70. *Nor was she knowingly placing herself beyond the reach of a legal process. She took no positive steps to place herself anywhere. The respondent's case is that she was somehow obliged to place herself within the reach of a legal process instituted in another country and to leave and give up her home and lawful residence in the UK in order to do so. Not surprisingly, we have been shown no case in which it has been found, or even suggested, that failing to act in this way makes someone a fugitive.*

* * *

72. ... [I]t is unsurprisingly not suggested that a person who fails to give himself up, go to the country seeking extradition and submit to arrest there is evading arrest or acting as a fugitive, but that is where the logic of the respondent's argument leads.”

(emphasis supplied)

In *De Zorzi v. Attorney General Appeal Court of Paris*¹⁶, the Divisional Court held:

57. ... In my judgment, mere receipt of a document from a foreign court by a person in the country of their residence informing them of their conviction in that foreign State and requiring their return does not make them a fugitive. It cannot be said that that person knowingly placed herself beyond the reach of a legal process when they were already beyond its reach. As Hamblen, L.J. put it in *Pillar-Neuman*¹⁷ (Admin) at [70], “*She took no positive steps to place herself anywhere*”; she was already back home. [See to similar effect the judgment of Julian Knowles, J. in *Verluis v. Public Prosecutor’s Office*¹⁸ (Admin).]

* * *

59. Third, the Judge pointed to the fact that the appellant chose not to surrender herself to the French prison authorities when required to do so. *But to surrender herself would have amounted to abandoning her resistance to extradition, and both parties before us agreed that resisting extradition does not render an individual a fugitive. In any event, declining to surrender herself to the requesting State does not constitute knowingly placing herself beyond the reach of a legal process. It amounts instead to declining to place herself within the reach of that process.*

(emphasis added)

The italicised portion of the above English judgments clearly say that an accused cannot be declared fugitive if he declines to surrender himself/herself to the requesting State. Therefore, in the given factual scenario, the prosecution cannot seek a declaration under the FEO Act from the court on the ground that the accused did not return to India.

The very fact idea of seeking a declaration under the FEO Act is absurd for the reason that the Extradition Act of 1962¹⁹ itself defines who is a fugitive criminal. Therefore, there is no need for any kind of declaration. The intent behind seeking this declaration is solely to confiscate and dispose of the properties of the accused (*see Sections 12²⁰ and 15 of the FEO Act*) and to bar him from filing or defending civil claims (*see Section 14 of the FEO Act*). Both these consequences are not only draconian, but *ex facie* appears to be unconstitutional. Let us examine the situation in international jurisdictions:

The Fugitive Offenders Act have been enacted in various jurisdictions but a cursory look at the Act reveals that the Act contained a detailed procedure to extradite a person from the requested State to the requesting State and it was not made to circumvent already existing Extradition Act or not made to merely seek a declaration and consequently to confiscate properties and disallow him from filing and defending civil claims. New Zealand enacted its Extradition Act, 1999²¹ and it repealed its Fugitive Offenders Amendment Act, 1976²². At the time when 1976 Act was in place, the Act had similar inbuilt safeguards for the accused like we find in the Extradition Act (*see Section 29-A of the 1976 Act*²³) because at that time the Extradition Act was not applicable.

Likewise, Canada’s Extradition Act, 1999 by Section 130 repealed its Fugitive Offenders Act. It categorically states that the Fugitive Offenders Act repealed shall continue to apply only if the hearing before the Provincial Court Judge in respect of return had already begun on the day which this Act comes into force²⁴.

In United Kingdom, the Extradition Act, 1870 was in force until it was repealed by Fugitive Offenders Act of 1881. This Act was repealed by the Fugitive Offenders Act, 1967, which was in then repealed by the Extradition Act, 1989. Then, the Extradition Act, 2003²⁵ repealed the 1989 Act. Also, the Fugitive Offenders Act always provided for the inbuilt safeguards same as given under the Extradition Act.

All this points to one fact, the Fugitive Offenders Act was enacted for extradition purposes when there was no separate Extradition Act applicable, and the Fugitive Act was repealed as and when the Extradition Act came into force. This brings home the point that the main objective of the Fugitive Act has always been akin to extradition and not to seek any declaration and consequently to deprive an accused of his properties and disallow him to file and defend civil claims. Even though the English judgment in *Pillar-Neuman*²⁶ talks about declaration but the same is in the context of Section 14 of the UK's Extradition Act, 2003. Section 14 of the Act gives protection to an accused from extradition by reason of "passage of time" if it appears that it would be unjust and oppressive to extradite him due to the passage of time. In this context, the term fugitive was discussed in the said judgment because if a person is considered a fugitive, then Section 14 protection will not be available to him. The court held that merely by not voluntarily subjecting himself/herself to the country seeking extradition will not make him/her a fugitive so as to decide his/her fate under Section 14 of the Extradition Act, 2003. Therefore, seeking a declaration that a person is a fugitive must be in the context of tradition and particularly when the Extradition Act provides for protection to the accused from extradition on the "passage of time" ground. It is interesting to note that there is no such ground available under the Extradition Act, 1962 (India). Further, the 1962 Act repeals the Fugitive Offenders Act of 1881. The Fugitive Offenders Act in all jurisdictions has always been an Act in kin to Extradition. It cannot and must not be such so as to render the Extradition Act redundant and it cannot be used as a bait that is intrinsically illegal or a mechanism that is one-sided unilateral trade between return of the accused person and his properties in which the accused is adversely prejudiced in either way.

1. *Fugitive Economic Offenders Act, 2018.*
2. *Fugitive Economic Offenders Bill, 2018.*
3. *Fugitive Economic Offenders Act, 2018, S. 15.*
4. *Fugitive Economic Offenders Act, 2018, S. 14.*
5. *Prevention of Money-Laundering Act, 2002.*
6. *Fugitive Economic Offenders Act, 2018, S. 4.*
7. *Income Tax Act, 1961, S. 39-A.*
8. *Income Tax Act, 1961.*
9. *Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016, S. 3.*
10. *Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.*
11. *Limited Liability Partnership Act, 2008, S. 2.*
12. *Limited Liability Partnership Act, 2008.*
13. *Fugitive Economic Offenders Act, 2018, S. 10.*
14. *State of Madras v. C.G. Menon, AIR 1954 SC 517.*
15. *2017 EWHC 3371 (Admin) Hamblen, L.J. (now Lord Hamblen JSC).*
16. *(2019) 1 WLR 6249.*
17. *2017 EWHC 3371.*
18. *2019 EWHC 764.*
19. *Extradition Act, 1962.*
20. *Fugitive Economic Offenders Act, 2018, S. 12.*
21. *Extradition Act, 1999 (New Zealand), available at <https://www.legislation.govt.nz/act/public/1999/0055/latest/whole.html#DLM25632>.*
22. *<<https://legislation.govt.nz/act/public/1999/0055/28.0/DLM27331.html>>.*
23. *Fugitive Offenders Amendment Act, 1976 (New Zealand), <http://www.nzlii.org/nz/legis/hist_act/foaa19761976n2302/>.*
24. *Extradition Act, 1999 (Canada), <<https://www.icj.org/wp-content/uploads/2013/05/Canada-Extradition-Act-1999-eng.pdf>>.*

25. *Extradition Act, 2003 (United Kingdom)*, <<https://www.legislation.gov.uk/ukpga/2003/41/contents>>.
26. 2017 EWHC 3371.