On the Development of Extradition System from the Perspective of Human Rights Protection

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Abstract

An important impact of human rights protection on the extradition system is that it enables the formation of a series of principles that reject or restrict extradition in the extradition system. Such as "Principle of Non-Extradition of Political Prisoners", "Principle of Non-Extradition of Death Penalty", "Principle of Human Rights Protection" and so on. The formation of these principles is of extremely important significance to guarantee the basic human rights of the person whose extradition is requested, such as freedom, life, religious belief, and right to defense. These principles can also prevent extradition from becoming a tool for the ruler's political rule and exclude dissidents, and at the same time can prevent the person who is requested to extradite from being subjected to illegal treatment and unfair trial. Although the refusal or restriction of extradition impedes the cooperation of certain countries in extradition, on the other hand, it is the recognition of these extradition principles based on the concept of human rights protection that leads to the conclusion of extradition treaties between countries, thus mutual cooperation, the fight against fugitives, to ensure the stability of the country and the international community as a whole order.

Keywords

Human rights protection; Extradition; System

The Impact of Human Rights Protection on the Principle of Non-extradition of Political Prisoners

The Relationship between Human Rights Protection and Non-extradition of Political Prisoners

The principle of non-extradition of political prisoners is the most popular among the principles of extradi-

tion, and it is also the principle with the highest legal status. The penetration of the concept of human rights protection and the development of the practice of human rights protection are the reasons for the principle of non-extradition of political prisoners. In medieval Europe, ordinary crimes can be protected by the state, but political prisoners and people who hold different views of the Catholic Church have become important targets for extradition. In the late 18th and early 19th centuries, with the rise of the Western bourgeois revolution and bourgeois enlightenment activities, the human rights protection movement began to rise. Locke argued in "Two Treatises of Civil Government" that human freedom should be protected (Locke, 1964). Italian criminal jurist Beccaria raised the issue of legal protection for extradited persons for the first time, calling on people not to use extradition as a tool to persecute political opponents and maintain tyranny (Beccaria, 1993). Especially after the Second World War, the voice of the human rights movement became stronger. In 1945, the "United Nations Charter" stipulated for the first time basic human rights: "Reaffirm the basic human rights, human dignity and value, and the belief that men and women have equal rights with all nations. Article 14 of the 1948 Universal Declaration of Human Rights stipulated: "Everyone has the right to seek and enjoy asylum in other countries to avoid persecution." Article 19 stipulates: "Everyone has the freedom of opinion and opinion." Article 20 stipulates : "Everyone has the right to freedom of peaceful assembly and association." These international laws all advocate freedom, religious belief, and national self-determination as basic human rights, which should be universally respected and protected by the international community. However, due to historical, ethnic, cultural, racial and other reasons, countries have great differences in freedom, religious beliefs, political systems, and political concepts. Therefore, the country requested to extradite has the right to legally protect the political rights of the person requested to extradite. This is the result of progress in the protection of international human rights, and it is also a manifestation of the national sovereignty of the country requested to extradite.

The Development Trend of the Principle of Non extradition of Political Prisoners

Although the principle of non-extradition of political prisoners has played an important role in safeguarding human rights, promoting cooperation in criminal justice and political civilization, it must be admitted that although some crimes are of a political nature, they are gross violations of the common values and norms of mankind, and are unanimously condemned by the people of all countries and the international community (Huang, 1997). For these acts, the international community must unite and exclude them from the principle of non-extradition of political prisoners. Only in this way can we realize the protection of the principle of non-extradition of political prisoners and truly advocate the rights of politics, freedom, belief, etc., and prevent it from becoming a protective symbol for criminals to avoid sanctions. Especially since the 21st century, terrorist crimes, corruption crimes, and transnational organized crimes have been rampant, and the scope of the principle of non-extradition of political prisoners has become increasingly limited, mainly in the following aspects:

Terrorist crimes are excluded from "political prisoners".The random killing of people by terrorist crimes is a serious violation of the common values of human society and a violation of human right to life. Italian scholar Lombardi put forward: "The purpose of terrorism is not to attack the enemy, but to create turmoil and fear, and to show indifference to the victims." (Zhao & Chen, 2001).

International crimes such as genocide and war crimes are excluded from political prisoners. These interna-

tional crimes are an integral part of jus cogens. The typical feature of this type of behavior is that if they lose national policy support, they will not have these behaviors. Countries should implement the principle of "extradition or prosecution". For example, according to Article 7 of the UN Convention on the Prevention and Punishment of Genocide Crimes, various contracting states "may not treat the crime of genocide as a political crime and shall not refuse extradition."

The crimes of assassination are excluded from political crime. The earliest origin of this rule is Belgium's "Assassination Clause" in 1856. It provides that acts against the head of state or family members should not be regarded as (related) political crimes when they constitute homicide, murder or poisoning. Now more and more countries have accepted this provision or established the same provision in their extradition laws. The crime of assassination may be carried out for some political purpose, but because of its cruel and anti-humanity characteristics, it does not conform to the principle of contemporary human rights protection, so more and more countries exclude the political prisoners.

Corruption crimes are excluded from political crimes. In recent years, international corruption crimes emerge in endlessly, increasing year by year, and showing the characteristics of transnational. The main body of the crime is usually highly placed members of the administration, so the corrupt elements who flee abroad usually hide their economic crimes, use their political identity to excuse themselves, and fight against the cross-border cooperation procedure. According to the principle of "Non-extradition for political prisoners", it is difficult for countries to extradite corrupt officials. Therefore, more and more countries advocate excluding corruption crime from political crime.

The Influence of Human Rights Protection on the Principle of Non-extradition of Death Penalty

The Relationship between the Protection of Human Rights and the Principle of Non-extradition of Death Penalty

The principle of non-extradition of death penalty refers to: when the requested country has reason to believe that the extradited person may be sentenced to death after extradition, it shall not extradite. The foundation of this principle is to respect and protect the right to life. Its formation stems from the protection of human rights, especially the right to life, by the international community. The right to life has been described in various periods as "the supreme right", "one of the most important rights", "the most fundamental right among all rights", "primitive rights", "the foundation and cornerstone of all other rights" or " The non-derogable core of human rights".

The Development Trend of the Protection of Human Rights and the Principle of Non-extradition of Death Penalty

Although the principle of death penalty non-extradition came into being relatively late, its development speed is quite astonishing. Mainly manifested in the following aspects:

Firstly, the death penalty non-extradition clause appears more and more frequently in international conventions. Countries that abolished the death penalty generally explicitly require the inclusion of a "death penalty refusing extradition clause" in the treaties they concluded, such as Australia and the Netherlands. Article 3(2) of the extradition treaty between the two parties stipulates: "When the alleged crime of the person who is requested to extradite involves the death penalty, he may refuse extradition, unless the requesting country guarantees that the death penalty is not imposed, or the death penalty has been sentenced but not executed." Article 4 of the 1990 UN Model Convention on Extradition also takes the death penalty non-extradition principle as an "optional ground for refusing extradition." The universality of this principle is reflected in the abolition of the death penalty and the countries that retain the death penalty both use it as a reason for refusing extradition. For example, China is one of the countries in the world that currently uses the death penalty more frequently. However, in the extradition treaty signed with Spain, China clearly stipulates: "According to the law of the request, the person requested for extradition may be sentenced to death for the crime targeted by the extradition request, unless the requesting party makes a guarantee that the requested party considers sufficient not to impose the death penalty, or does not execute the death penalty if the death penalty is imposed", the extradition can be granted. The United States is the country that has signed the most bilateral extradition treaties in the world and is also a developed country that retains the death penalty. However, in the bilateral or multilateral extradition treaties it has signed, it also advocates the application of the death penalty without extradition principle.

Secondly, the principle of absolute non-extradition of death penalty is becoming more and more obvious. According to whether it is accompanied with extradition conditions, the legislative mode of the principle of non-extradition of death penalty can be divided into total refusal and partial refusal. Total refusal of extradition means that when the requesting country imposes the death penalty on the extradited person, and the requested country does not agree and completely rejects the requesting country, it does not extradite the extradited person. It is a rigid clause of the death penalty non-extradition principle. Partial refusal of extradition means that under the aforementioned circumstances, when the requesting country promises to meet certain requirements made by the requested country, the requested country can grant extradition (Zhao, 2005). The second method of extradition is more adopted in the current international conventions. Even if the criminal is sentenced to death, the criminal can be extradited as long as the promise is not implemented. Such as the "European Extradition Treaty" and the "Extradition Model Convention." The principle of relative non-extradition of death penalty fully coordinates the common interests of the countries reserving the death penalty and the international community: to pronounce the death penalty but not to carry out the death penalty as an additional condition, so as to protect the right to life of the person to be extradited. At the same time, it can cooperate with the countries reserving the death penalty to promote the fight against criminal crimes and expand the scope of extradition. However, in recent years, the number of countries that abolish the death penalty is increasing, and the principle of relative non-extradition of death penalty is beginning to be challenged. The legislative method of absolute non extradition of death penalty may be advocated by more countries in the future.

Human Rights Protection Becomes a New Principle of Extradition System

In addition to the impact of human rights protection on the principle of non-extradition of political prisoners and death penalty, the most important thing is that human rights protection has become an independent principle in extradition agreements. Mainly manifested in the following aspects:

Non-discrimination Clause

The non-discrimination clause is also called: "human rights clause" or "political prosecution clause" (Zhang, 2004). The non-discrimination clause is generally stated as: If there are significant reasons to believe that after extradition, the accused will be prosecuted or punished because of his race, religion, nationality, participation in social groups or political opinions, or his situation will become difficult for any reason, and extradition is not allowed. Therefore, the provisions of the "non-discrimination clause" can better protect the basic human rights of such extradited persons who commit crimes for political purposes but are not within the scope of "political prisoners".

No Torture or Inhuman Treatment Clause

The definition of "torture" first appeared in a document adopted by the United Nations General Assembly in 1975. Because torture and other cruel, inhuman, and degrading punishments are attacks on the core part of human rights, the prohibition of torture has been established as an absolute right without any restriction in universal and regional international human rights documents. Torture has become an important part of the principle of human rights protection in refusing extradition.

Fair Trial Acquisition Clause

Ensuring that the person requested for extradition receives a fair trial is an important way to protect their basic human rights. International treaties also provide for this right. For example, article 14(1) of the "International Covenant on Civil and Political Rights" provides that a legally established, qualified, independent and unbiased court has the right to conduct a fair and public trial. The extradited person should enjoy the right to a fair trial, and this concept of human rights protection is also reflected in the extradition treaties and conventions. The extradition laws of some countries also use unfair trials as a compulsory reason for refusing extradition. For example, article 8 of New Zealand "Extradition Act 1999" regards the criminal prosecution activities concerned as "incompatible with the requirements of impartial administration of the law" as one of the reasons for refusing extradition.

Humanitarian Clause

Humanitarian clauses in extradition are usually used as optional grounds for refusal to execute extradition. Humanitarian clauses include two aspects: (1) age, that is, extradition for minors or elderly people. (2) health status, that is, the person requested for extradition suffers from serious illness and is not suitable for trial,

imprisonment or execution of extradition. Article 4(2) of the "Sino-Russian Extradition Treaty" stipulates: "If the requested party considers the nature of the crime, but believes that in the criminal case, due to the age, health and other personal circumstances of the requested party, the In accordance with humanitarian principles", extradition can be refused. However, each requested country should respect the will of the requested person, in addition to its own legal standards, within the scope of its discretion to examine whether it is in conformity with the humanitarian spirit and whether to grant extradition.

Non Bis in Idem Principle

"Non Bis in Idem Principle" (continental law system) or "The Rule against Double Jeopardy" (Anglo-American Legal System) originated from the idea that "no one should suffer twice." In criminal proceedings, it is not allowed to conduct two trials and impose two penalties on the same case, otherwise it will cause new injustice. Therefore, "several lawsuits, especially criminal lawsuits, that are competing against the same facts should be mutually absorbed." The basic spirit of the principle lies in safeguarding the justice and authority of the judicial trial, and realizing the value of the litigation economy, but its fundamental significance lies in protecting the human rights of the criminal prosecution.

The Legislative Spirit of China's Extradition Law from the Perspective of Human Rights Protection

China's "Extradition Law" was promulgated relatively late, mainly including the procedural guarantees for the rights of the person whose extradition is requested, and most of the content draws on the international extradition conventions. The legislative purpose stipulated in China's "Extradition Law" reflects the emphasis on the protection of the rights and interests of the requested extradition: ensuring the normal conduct of extradition, strengthening international cooperation in punishing crimes, protecting the legitimate rights and interests of individuals and organizations, and safeguarding international interests and social order . Secondly, the "Extradition Law" has detailed provisions on the rights of the person who is requesting extradition. Article 8 takes "political prisoners, military criminals, torture, and default judgments" as compulsory grounds for refusing extradition; Article 9 takes "the principle of disregarding one matter and the principle of humanitarianism" as arbitrary grounds for refusing extradition. The provisions of these clauses conform to both the legislative direction of the world's extradition system and the legislative purpose of our country to protect the basic human rights of extradited persons. Since China is currently one of the countries that use the death penalty most in the world, in order to ensure the equality and uniformity of the existing laws, the principle of non-extradition of the death penalty has not been included in it.

References

Locke. (1964). *Two Treatises of Civil Government*. Beijing: Commercial Press.

Beccaria. (1993). On Crime and Punishment. Beijing: China Encyclopedia Publishing House.

Huang, F. (1997). *Research on China's Extradition System*. Beijing: China University of Political Science and Law Press.

Zhao, B. Z., & Chen, Y. R. (2001). A Discussion on Political Prisoners Do Not Extradite the Original.

Current Law Science, (1), 35.

Zhao, B. Z. (2005). A Discussion on the Principle of Death Penalty Non-Extradition. *Politics and Law*.

Zhang, X. (2004). *Human Rights and International Criminal Law*. Beijing: Law Press.

Extradition Law Materials Selection. (1998). Beijing: World Knowledge Publishing House.

Civil Law Encyclopedia Selected Translation-Jurisdiction Trial Litigation. (1992). Beijing: China University Press.

Wang, T. Y. (1995). *International Law*. Beijing: Law Press.

Brownlee, L. (2002). *Principles of Public Law of International Law*. (Zeng, L. L., Trans.). Beijing: Law Press.

Huang, F. (2001). *Commentary on Extradition Law of the people's Republic of China*. Beijing: China Legal Publishing House.

Huang, F. (1997). *Research on China's Extradition System*. Beijing: China University of Political Science and Law Press.

Huang, F. (1997). *Extradition System*. Beijing: Law Press.

Liu, Y. J. (2004). *A New Theory on Extradition: A Perspective from International Law*. Jilin: Jilin People's Publishing House.

Chen, R. J. (1985). *The Theory and Practice of Extradition*. Taiwan: Taiwan Sanmin Publishing House.

Xue, S. L. (2008). *Research on Judicial Review of Extradition*. Beijing: Chinese People's Public Security University Press.

Qin, Y. H. (2007). *Study on the Principles of Criminal Extradition*. Beijing: Chinese People's Public Security University Press.

Chen, C. P. (2007). *Special Topics for International Criminal Judicial Assistance*. Beijing: Chinese People's Public Security University Press.

Xu, X. M. (2004). *International Human Rights Law*. Beijing: Law Press.

Cai, G. Q. (2007). *International Protection of Human Rights and Domestic Practice Protection*. Beijing: Law Press.

Zhang, X. (2004). *Human Rights and International Criminal Law*. Beijing: Law Press.

Yue, L. L. (2007). *International Covenant on Civil and Political Rights*. Beijing: Law Press.

Zhao, B. Z. (2005). *International Terrorism Crimes and Countermeasures for Prevention and Control*. Beijing: People's Public Security University of China Press.

L,i W. X. (2002). *Extradition and International Law*. (Ma, X. Z., Trans.). Beijing: Law Press.

Cheng, L. W. (2003). *Criminal Judicial Assistance*. Beijing: Law Press.

Wang, X. M. (2002). *Research on the International Criminal Court*. Beijing: Renmin University of China Press.

Zhang, X. (2000). *Extradition: Thinking from the perspective of human rights.* Beijing: Law Press.

Huang, F. (2006). New development of international extradition cooperation rules. *comparative law study*, (3), 27.

Cai, Y. (2008). A new breakthrough in the traditional obstacles to extradition—from the perspective of new extradition by international organizations. *legal system and society*, (12), 341.

Huang, Feng. (2008). On unconventional alternative measures for extradition, starting from the "Yuan Hongwei case". *Studies in Law and Business*, (2), 3.

Wang, H. H. (2006). On the extradition mechanism in the United Nations Convention against corruption. *Law*, (1).

Zhou, L. L. (2003). The new development of EU extradition system and Its Enlightenment to China. *Law*, (12).

Gao, M. X., & Wang, X. M. (2004). On the legal significance of establishing the International Criminal Court. *Jilin University Journal Social Sciences Edition*, (3).

Wang, X. M. (2007). The judicial concept of international criminal trial: A Perspective of the first case tried by the International Criminal Court. *Journal of Social Sciences of Jilin University*, (6).

Huang, F., & Huang, B. Q. (2007). A study on the transfer of criminals to the International Criminal Court", published in the Journal of sociology. *Journal of Social Sciences of Jilin University*, (6).

Zhu, L. J. (2006). The contribution of the International Court of justice to international human rights law. *diplomatic review*, (10).

Ma, D. C. (2007). An analysis of the principle of non extradition of political prisoners. *Lanzhou academic journal*, (12).

Zhang, X. (1997). On sovereignty and human rights in extradition. *legal system and social development*, (6).

Huang, F. (2006). Research on China's active extradition system: experience, problems and policies. *legal and commercial research*, (4).

Qiu, X. L. (2001). International human rights and death penalty. *modern law*, (4).

Wang, Y. (2005). Human rights thinking in the dimension of international criminal law. *contemporary law*, (5).

Wu, Y. M. (2001). Discussion on extradition of international terrorism crime. *Hebei law science*, (2).

Zhao, B. Z. (2005). A discussion on the principle of non extradition of death penalty from the perspective of China's relevant legislation and practice. *Politics and law*, (1).

Zhao, B. Z., & Chen, Y. R. (2001). On the principle of non extradition of political prisoners. *modern law*, (1).

Yu, G. Y. (2000). Opinion on the ownership of the right to review extradition cases. *Hebei law science*.

Liu, Y. J. (2001). An analysis of the new form of extradition: extradition by the International Criminal Court and the International Criminal Court. *Legal system and social development*, (1).

Cheng, L. W. (2002). Basic principles of international criminal judicial assistance. *Chinese law*, (3).

Li, Y. (2001). An analysis of transnational crimes and the extradition of criminals. *Hebei law science*, (4).

Chen, J. T. (2003). On the conflict and coordination between sovereignty and human rights in extradition. *contemporary law*, (6).