

The Development of Law and Practices on Extradition in China

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Abstract

The paper provides the outline of extradition law system and bilateral treaty on extradition of China signed and ratified, expressed the general principles of extradition law of China, the diplomatic commitment applied in the extradition process, analysis the path of laws have improved, especially with some concert cases that show the successful cooperation with European countries in extradition field.

Keywords: *extradition, international assistance in criminal matters, human rights safeguard, criminal procedure law*

I. Introduction

Extradition is the typical and traditional method of international assistance in criminal matters, as it represents the sovereignty and judicial sovereignty of a country, as well. In the sense of the whole-world, due to the development of globalism, the importance of international assistance increases. Confronting with transnational organized crimes and other serious transnational crimes, or with fugitives or illegal assets frequently transfer from country to country, with the intent to escape the criminal sanctions, the need for international assistance in criminal matters is rapidly increasing. In the last decades, China drew with more attention on the legislation on international assistance in criminal matters and kept moving to carry out this work. China has achieved many goals in this filed, including some successful extradition procedures and cooperation in international assistance in criminal matters with European countries.

II. Extradition Law System of China

In the present years, China has always been committed to promoting political and judicial reform. China's legal system has been constantly improved. Thus, it successively passed the Supervision Law and Supervision Law Implementation Regulations, International Criminal Justice Assistance Law, it revised the Criminal Law and Criminal Procedure Law, promulgated and revised the departmental laws and laws in special fields, providing a solid legal basis for China's international judicial

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cooperation. Rule of law is the basic policy of China. In the field of international cooperation applies the Chinese Constitution, the Extradition Law, the Law on international assistance in criminal matters, the Criminal law, the Criminal procedure law, and the relative laws, all of the these above constituting the law system for carry out the extradition and international judicial cooperation.

2.1. The Chinese Constitution

The Chinese Constitution is the primary law in the law system of China, which also provides legal basis in the field of extradition cooperation. The Chinese Constitution stipulates the power and rights of the judicial organs, limits the line of power as the effective assurance for human rights protection in the whole extradition procedure. Article 5 of the Constitution of the People's Republic of China clearly stipulates: *"The People's Republic of China exercises the rule of law and builds a socialist country under the rule of law. The state upholds the uniformity and dignity of the socialist legal system. All laws, administrative regulations and local regulations shall not contravene with the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated"*. By this article, it is provided the clear meaning that no organization or individual shall have the privilege of transcending the Constitution and the law and must act within the scope of the Constitution and the law.

The Constitution also sets standards for the judicial system to operate with fair, article 131 stipulating: *"The people's courts exercise judicial power independently, in accordance with the law, and are not subject to interference by any administrative organ, public organization or individual"*. Constitution law is the legal support for China's judicial system and complies with the criteria of relevant international conventions.

2.2. Extradition Law and Relative Laws of China

On December 28th, 2000, the Permanent Commission of the National Popular Assembly enacted the Extradition Law. Extradition Law of China, as the specific and basic law in the extradition filed, including four chapters and fifty-five articles, sets out the principles and procedure of extradition, as well as the grounds on which the extradition request shall and may be denied, also including the procedural rights protected for the extradited person.

In particular, the extradition request shall be denied, according to article 8 of the Extradition Law of China¹, if the request is against the "ne bis in idem" principle,

¹ Article 8: *"The request for extradition made by a foreign state to the People's Republic of China shall be rejected if: (1) the person sought is a national of the People's Republic of China under the laws of the People's Republic of China; (2) at the time the request is received, the judicial organ of the People's Republic of China has rendered an effective judgement or terminated the criminal proceedings in respect of the offence indicated in the request for extradition; (3) the request for extradition is made for a political offence, or the People's Republic of China has granted asylum to the person sought; (4) the person sought is one against whom penal proceedings instituted or punishment may be conducted for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings; (5) the offence indicated in the request for extradition is a purely military offence under the laws of the People's Republic of China or the laws of the Requesting State; (6) the person sought is, under the laws of the*

political reason, discrimination treatment, inhuman treatment. All these are grounds for the request to be denied, complying with the international conventions. Also, the Treaty between the People's Republic of China and the Republic of Belarus on Extradition, provides in article 3 the following grounds for denial of the request: "the requested contracting party has sufficient grounds to believe that the purpose of the extradition request is to investigate the criminal liability of the person sought or to execute a criminal sentence on account of his race, religion, nationality, political belief etc. Or that the position of the person sought in the proceedings would be prejudiced for any of these reasons".

The Law of the People's Republic of China on International Criminal Judicial Assistance was adopted by the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China at its sixth meeting on October 26th, 2018. The promulgation of the Law on International Judicial Assistance in Criminal Matters fills in the gaps in China's legislation in the field of international judicial assistance in criminal matters. Together with the multilateral conventions and bilateral treaties that China has signed and approved, it will vigorously promote China's international judicial assistance in criminal matters.

2.3. Examination Mechanism for Extradition Request in China

Extradition process could be divided to the active and passive extradition in respect to the requesting and requested country. As regards the requested country, article 16 of Extradition Law of China stipulates the examination mechanism for extradition request: *"Upon receiving the request for extradition from the Requesting State, the Ministry of Foreign Affairs shall examine whether the letter of request for extradition and the accompanying documents and acts comply to the provisions of Section 2, Chapter II of this Law and the provisions of extradition treaties. The Higher People's Court designated by the Supreme People's Court shall examine whether the request for extradition made by the Requesting State complies with the provisions of this Law and of extradition treaties regarding conditions for extradition and render a decision on it. The decision made by the Higher People's Court is subject to review by the Supreme People's Court"*.

Ministry of Foreign Affairs of China as the central organ and communicate organ is responsible for accepting, issuing, examining and transmitting extradition requests. Upon receipt of a request for extradition, the Ministry of Foreign Affairs shall first conduct a formal examination of the materials to check if they conform to the general provisions. In sense, the examination for extradition request is not from the judicial prospect, in this period, it is an examination for the request whether requestee provide all the materials that would conform with the extradition law of China, bilateral extradition treaty, we can call it administrative review. If the request materials approval by administrative review, the extradition request shall be forwarded to the court, which shall first conduct a specific legal review by the Higher People's Court. After the

People's Republic of China or the laws of the Requesting State, immune from criminal responsibility because, at the time the request is received, the limitation period for prosecuting the offence expires or the person is pardoned, or for other reasons; (7) the person sought has been or will probably be subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting State; (8) the request for extradition is made by the Requesting State on the basis of a judgement rendered by default, unless the Requesting State undertakes that the person sought has the opportunity to have the case retried under conditions of his presence".

Higher People's Court has examined the judicial decision, it will automatically and compulsorily submit it to the Supreme People's Court, which will review the extradition ruling and finally drew a decision on whether to approve the extradition, which is a mandatory procedure for the protection of extradited person's rights.

2.4. Central Authority and Competent Authority

Central authority for extradition decision in China, according to the Extradition Law, includes Ministry of Foreign Affairs, Ministry of Justice, Ministry of Public Security, Supreme Court and Supreme Prosecutor. For example, article 6 of the Treaty between China and Belgium on extradition stipulates that *"the extradition request and supporting documents shall be transmitted through diplomatic channels. All other communications related to the request should be made directly by the Ministry of Foreign Affairs in the case of the People's Republic of China; In the case of the Kingdom of Belgium, by the Ministry of Justice of the Federal Public Service"*.

Besides that, for the major duty-related crimes, such as corruption, bribery, neglect of duty, and malfeasance by public officials, according to the article 52 of the Supervision Law of China, central authority also includes the National Supervisory Commission. The competent authority refers to the specific bodies responsible for extradition, which are the direct organs and department conducting the investigation and examining relevant materials in the extradition process.

III. Diplomatic Commitment of Penalty

3.1. Dropping Death Penalty in Extradition Process

First of all, death penalty is always an important issue in the extradition process. Due to death penalty still provided as criminal punishment by the Criminal Code of China, China faces great challenge with the requested country in the extradition cooperation. As a matter of fact, in these years, China is continuing decrease the number of crimes to be punished by the death penalty as the maximum punishment. Secondly, the death penalty sentencing shall comply with a strict procedure and the Supreme Court of China, as the top juridical organ, is the only and unique court with the review power to the appeal in cases with death penalty sentencing. In this context, the appeal procedure consists in an automatic appeal to the Supreme court, in order to provide the sufficient judicial resources to protect the defendant.

In the international cooperation prospect, death penalty is an issue that cannot be avoided. In the bilateral extradition treaties China has signed and ratified, death penalty can be set as the reserve article, as in the China-Spain Extradition Treaty, article 3: *"Under the law on the method of request, the person whose extradition is requested may be sentenced to death for the offence for which extradition is requested, unless the requesting party gives such assurances as the requested party deems sufficient that the death penalty will not be imposed or, if imposed, will not be carried out."* We can see this specific article refers to the death penalty, even though death penalty is in the criminal code of China, in the extradition process, the specific case still could by negotiate to solve the problem may arouse by death penalty. Therefore, China and Spain have been successful carried out several extradition cases, based on the bilateral treaty on extradition.

Secondly, the diplomatic commitment on no-Death penalty made by Chinese government also is a legal and effective method in extradition process. China's diplomatic commitment on sentencing is based on article 50 of Extradition Law, not being against China's sovereignty. Diplomatic commitment on sentencing is made by the Ministry of Foreign Affairs as a representative and in accordance with the decision of the Supreme Court, which is legally binding China's judicial organs. On the legal validity and international credibility of diplomatic commitments, Chinese law not only stipulates the subjects and procedures for making diplomatic commitments, but also stipulates the system to ensure that the commitments can be fully concluded.

3.2. Diplomatic Commitment for the Specific Sentencing

Sentencing commitment is a kind of commitment made through diplomatic channels in accordance with the requirements of the requested party in the extradition request, which can be regarded as a legal fiction and is legally binding on the trial of the extradited person.

China has also fulfilled the diplomatic commitment to sentencing in practice. The extradition procedure of *Huang case* lasted for nearly eight years, and Huang was finally extradited back to China from Peru. After trial, the domestic judicial authorities finally sentenced him to 15 years in prison. At the same time, considering that he was detained in Peru due to the extradition procedure, the detention period was reduced. It can be seen that China has not only strictly followed the sentencing commitments made through diplomatic channels, but also reduced the term of overseas detention, which not only safeguards China's national authority and judicial sovereignty, but also fully guarantees the relevant rights of extradited person².

The decision of China's diplomatic commitments is made by the Supreme People's Court and the Supreme People's Procuratorate. Among them, the commitment to limit prosecution shall be decided by the Supreme People's Prosecutor, the commitment to sentencing shall be decided by the Supreme People's Court while diplomatic commitment shall be legally binding the judicial organ concerned as well. In practice, China's diplomatic commitments have been fully fulfilled. It has never happened that China's diplomatic commitments not to be fully fulfilled in an extradition process. Each diplomatic commitment made by China can ensure that the human rights of those being prosecuted were fully protected.

IV. Treaties of Extradition Signed by China and Practices

4.1. Snapshot of Treaties of Extradition

Till now, China has signed and ratified bilateral extradition agreements with 46 countries, including 14 European countries³. In practice, there are many successful cases of extradition from Europe to China, such as the extradition case of *Hu* from

² Huang, former head of Yuwei Trading Industry Co Ltd in Shenzhen, Guangdong province, stands accused of smuggling goods worth 1.22 billion yuan (\$179 million) and evading 717 million yuan in taxes. He fled to Peru in 1998 and was detained there in 2008.

³ http://treaty.mfa.gov.cn/Treaty/web/list.jsp?nPageIndex=1&keywords=%E5%BC%95%E6%B8%A1&chnltype_c=all [accessed on 12 May 2021].

Greece in 2015, suspected of illegal fund-raising, of Yu extradited from Bulgaria, suspected of contract fraud, and of Zhang extradited from Italy, suspected of official embezzlement, or of *Ding*, a major economic criminal suspected of illegally absorbing public deposits, money laundering and fraud, who was extradited from Spain. In 2016, *Chen* was suspected of illegally absorbing public deposits and was extradited from France and so on.

4.2. Principles of Extradition Law of China

The Extradition Law of China complies with the international convention. The Extradition Law of China provides the principles of extradition as follows: the principle of double incrimination, the principle of denying the extradition request, including the cases if there was a risk for the extradited person to be confronted with cruel, inhuman, degrading treatment, or discrimination due to political bias, religion, national, gender etc., if the prosecution has reached the statute of limitation, if the extradited person was the alleged to be prosecuted as pure military criminal, and in the case of trial *in absentia*.

In case of lack of bilateral extradition treaty, the principle of reciprocity is regarded as an important supplement to the basis of extradition cooperation in international extradition practice. Reciprocal extradition means that in the absence of an extradition treaty, the requesting country and the requested country undertake to cooperate in extradition on the basis of mutual preferential treatment through consultation. China's Extradition Law has also provided corresponding provisions, emphasizing extradition cooperation on the basis of equality and reciprocity.

4.3. Simplified Extradition Process

Simplified extradition refers to the rapid transfer of the person sought to the requesting country under the condition that the person agrees to accept extradition voluntarily and omits the general judicial review procedure. Simplified extradition may save judicial resources to the greatest extent, and to a certain extent, reflects the will of the person whose extradition is requested.

Yao, the former deputy head of the province Xinchang county, who was also fined 3 million yuan and agreed to forfeit his illicit gains and the interest earned on them, was extradited from Bulgaria on November 30th, 2018. According to the Interpol Red Notice, the Bulgarian police arrested *Yao* in the country's capital Sofia on October 17th, 2018, and temporarily detained after receiving an application from China's National Supervision Commission. During the detainment, *Yao* expressed his desire to surrender and return home when staff from the Chinese embassy in Bulgaria visited him. Considering China and Bulgaria had a bilateral treaty of extradition, with *Yao* clearly expressing his will to be extradited back to China after years of fugitive life, China and Bulgaria agreed to carry out this case by simplified extradition process, based on the bilateral treaty of extradition and successfully cooperated in this case.

VI. Human Rights Safeguard in Extradition Process

As in the common criminal procedure, extradited person benefits from the protection of fundamental rights in the criminal process after been extradited to China. Human rights safeguard is implemented in the whole process of criminal procedure,

including the idoneal treatment for detention, fair sentencing, and the basic rights protection.

China strictly abides by the provisions of the treaty, earnestly fulfills its treaty obligations, pays attention to the connection between domestic legislation, amendment and policy formulation with the provisions of the treaty, and submits timely implementation reports to comprehensively reflect China's achievements and problems in the process of implementation.

5.1. Compliance with the Human Rights Relevant International Convention

Since 2009, China has accepted the periodic review of the United Nations Human Rights Council three times and has successfully passed the approval. China has given serious and responsible feedback to the recommendations made by various countries and has acceded to more than 20 international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and has actively participated in international human rights governance with the commitment to promote the healthy development of international human rights. As a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, China has incorporated the provisions of the Convention into its domestic law and has also strictly abided by its stipulations in its judicial and law-enforcement activities.

5.2. Human Rights Safeguard in Criminal Procedure in China

After the extradition procedure is completed and the extradited person is extradited back to China. Chinese State promises to respect the human rights of the extradited person, whether in the investigation stage, or in the trial stage, as well as in the imprisonment stage.

As in the above *Yao's* case, after extraditing him from Bulgaria through simplified extradition procedure, China confirmed the fact of bribery by Yao through court trial and considered that Yao voluntarily accepted extradition and had the will to surrender truthfully, also confirmed the circumstances of surrender, combined with the circumstances of the case and the confession of other criminal facts⁴. After he was brought back to China, he not only pleaded guilty, but also confessed to some other bribes he had taken that prosecutors had not known about. The court heard *Yao's* case on July 5, 2019 and again on April 3rd, noting in the ruling that his behavior constituted the crime of bribery and the amount of bribes could be defined as "extremely large" under the Chinese Criminal Law. *"But given that he turned himself in, confessed to offenses that the prosecutors hadn't known about, revealed crimes of others and turned over his illicit gains, we leniently penalized him"*⁵.

Article 25 of the Extradition Law of the People's Republic of China stipulates: *"After the Higher People's Court has made the decision that the extradition request meets the conditions for extradition or that extradition shall not be granted, it shall read*

⁴ <https://www.rappler.com/world/217996-bulgaria-extradite-yao-jinqi-china/> [accessed on 5 May 2021].

⁵ <http://www.chinadaily.com.cn/a/202008/28/WS5f48412aa310675eafc55fbf.html> [accessed on 20 May 2021].

the decision to the person sought and, within seven days of issuing the decision, submits the written decision together with the relevant materials to the Supreme People's Court for review". It can be seen that the protection of the rights of the person requested for extradition runs through the whole process of extradition review in China.

China's judicial system ensures that criminal suspects and defendants fully enjoy all due process rights, including the right to defense, and receive a fair and impartial trial, and will not be subjected to inhuman or degrading treatment or forced to confess by torture. China's detention system has strict procedures and restrictions, and any extension of the detention period must go through strict approval procedures.

In the extradition procedure, the protection of the basic rights of the extradited person is consistent with the principles stipulated in the Criminal Procedure Law. According to the provisions of China's Criminal Procedure Law, the extradited person also enjoys the same basic rights as the defendant in the criminal procedure, such as the right to defense, the right to appeal and so on. Articles 52 and 56 of The Criminal Procedure Law of the People's Republic of China exclude illegal evidence obtained by torture, and stipulate that the investigation of major criminal cases should be recorded and videotaped in the whole investigation activities.

For the understanding of the definition of illegal methods such as extorting confessions by torture, the relevant judicial interpretations have made more in-depth and detailed provisions. Article 67 of the Rules of Criminal Procedure of the People's Procuratorate (2019) stipulates that: *"Confessions of criminal suspects obtained by the following methods shall be excluded: (1) a confession made against the will of a criminal suspect by using violent methods such as beating, illegal use of restraints or bad means of disguised corporal punishment, which makes the criminal suspect suffer unbearable pain; (2) a confession made against the will of the criminal suspect by means of violence or serious damage to the legitimate rights and interests of the suspect and his close relatives; (3) Confessions collected by means of illegal restriction of personal freedom such as illegal detention"*.

In the other side, for the extradited person back to China, if he/she had made confession or wanted to be extradited back to China, the court of China will consider the confession to reduce the sentencing. Also, the Chinese court will take into consideration the period of detention abroad because of extradition application and reduce it according to the provisions of law.

VI. Conclusion

China's judicial system is able to ensure that criminal suspects and defendants fully enjoy all basic procedural rights, including the right to defense, the right to a fair and impartial trial, and will not be subjected to inhuman or degrading treatment or extorted confessions by torture. China's detention system has strict procedures and restrictions while any extension of the detention period must go through strict approval procedures.

China's law clearly provides for a system of diplomatic assurances and a mechanism to ensure their full implementation for the extradited person who is finally extradited back to China that he/she would not face the risk of inhuman and degrading treatment or unfair trial after extradition.

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