



BOSHI WENKU

〔法学·国际刑法〕

引渡原则研究

YINDU YUANZE YANJIU

彭峰 著

知识产权出版社



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内容提要

引渡是主权国家间开展刑事司法合作的重要方式和有效途径。为了保障引渡合作的顺利进行,在长期的国际实践中逐渐形成了一些旨在规范引渡行为,且为有关国际条约和国内立法普遍认可的原则。随着时代的变迁,引渡原则也不断被注入新的内容。因此,如何准确理解和适用引渡原则直接关系到各国能否合理运用引渡手段,从而更有效地惩治外逃罪犯以及防止跨国犯罪和国际犯罪。本书采取比较的、历史的研究方法,结合完善我国引渡制度、提高相关缔约水平和指导引渡实务操作的现实需要,对引渡原则进行了梳理和有益的探讨。

责任编辑:蔡虹

图书在版编目(CIP)数据

引渡原则研究/彭峰著. —北京:知识产权出版社,2008. 8

ISBN 978-7-80247-130-6

I. 引… II. 彭… III. 引渡法—研究—中国 IV. D922.144

中国版本图书馆CIP数据核字(2008)第117851号

引渡原则研究

彭峰 著

出版发行:知识产权出版社

社址:北京市海淀区马甸南村1号

网 址: <http://www.ipph.cn>

发行电话:010-82000893 82000860 转 8101

责编电话:010-82000860 转 8324

印 刷:知识产权出版社电子印制中心

开 本:880mm×1230mm 1/32

版 次:2008年8月第1版

字 数:160千字

ISBN 978-7-80247-130-6/D·705

邮 编:100088

邮 箱:bjb@cnipr.com

传 真:010-82000893

责编邮箱:caihong@cnipr.com

经 销:新华书店及相关销售网点

印 张:6.875

印 次:2008年8月第1次印刷

定 价:20.00元

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中文摘要

引渡是主权国家间开展刑事司法合作的重要方式和有效途径。为了保障引渡的顺利进行,在长期的国际实践中逐渐形成了一些旨在限制或规范引渡行为的原则。这些原则通过有关国际条约和国内立法的确认,成为各国在引渡活动中普遍信守的准则。随着经济全球化进程的加快,引渡原则也不断被注入新的内容。因此,如何准确地理解引渡原则,将直接关系到各国主管机关能否合理运用引渡手段,从而更有效地惩治外逃罪犯以及防止跨国犯罪和国际犯罪。自 20 世纪 90 年代,我国的引渡法制建设不断加强。近几年来,还加快了同其他国家谈判签订引渡条约的进程,在引渡合作中采取了更为积极、灵活、务实的态度。所以,从完善我国引渡制度、提高相关缔约水平和指导引渡实务操作的角度,也有必要深入研究引渡原则。

本书共分七章。

第一章概述引渡原则的基本问题。首先,明确了引渡的概念,阐明了对引渡条约基础问题的两种基本立场,介绍了引渡的类型和程序。其次,从法理学上规则与原则的辨析入手,厘清了引渡原则和引渡规则的关系。在此基础上,认为引渡原则在逻辑结构上实为引渡规则。所谓引渡原则,是指通过国际惯例逐渐形成的、为有关国际条约确认的、限制或规范引渡行为的规则。基于这一定义,引渡原则的特征可概括为三点:①引渡原则为相关国际条约明确规定;②引渡原则在各国的引渡实践中被普遍遵循;③引渡原则集中体现了引渡活动的基本规律

及各国在引渡合作中的共同价值取向。最后,就理论上有关引渡原则的范围和分类的各种见解进行了分析,提出了值得研究的七个引渡原则,即双重犯罪原则、特定性原则、政治犯不引渡原则、军事犯不引渡原则、本国国民不引渡原则、死刑犯不引渡原则、或引渡或起诉原则,认为对引渡原则进行分类并无太大必要。

第二章探讨双重犯罪原则。双重犯罪原则设定了引渡合作的一个基本前提,即引渡请求所针对的行为按照请求方和被请求方的刑事法律均构成犯罪,或者是双方共同参加的条约所指定的罪行。双重犯罪原则的提出,既是为了相互尊重国家主权,也是为了保护被请求引渡人的基本人权,有关引渡的国际条约和国内立法普遍规定了这一原则。不过,在双重犯罪原则的具体适用上,理论与实践均存在许多争议,其中的主要争议在于,应该对双重犯罪原则做具体的解释还是抽象的解释。基于务实的立场,抽象的解释方法更为可取。

第三章探讨特定性原则。特定性原则是对引渡合作的请求方设定的一项基本法律约束,要求请求国只能针对引渡请求载明的特定犯罪对被引渡人实行追诉或执行刑罚。特定性原则是与政治犯不引渡原则相关联而逐渐形成的,在历史上经历了由“温和的特定性原则”到“纯粹的特定性原则”的变迁。从目的论角度看,特定性原则不仅保护被请求国的主权,而且保护犯罪人的人权。特定性原则的要求具体表现为:①刑事追诉或处罚之限制;②刑事强制措施之限制;③再引渡之限制。基于请求国司法运作的现实需要,特定性原则的适用允许一定条件下的例外。

第四章探讨政治犯、军事犯不引渡原则。政治犯不引渡原则,是18世纪末期法国资产阶级革命以后逐渐形成的一项国

际法原则，是指当请求引渡的对象是政治犯时，请求国可拒绝引渡。政治犯不引渡原则虽已为国际法所确认，但其中许多问题，甚至是关键性问题并未得到解决。主要表现为：各国政治制度和观念上的差异，导致衡量或认定政治犯罪的标准大不相同，因而政治犯罪很难有一个统一的定义。由此导致政治犯罪不引渡原则成为引渡原则中最复杂、最不确定的一项。目前，政治犯不引渡原则的适用正沿着限制政治犯范围的方向发展，非政治化努力越来越广泛。军事犯罪具有与政治犯罪相同的特性，即都具有鲜明的排他性和政治性。正因为如此，军事犯罪不引渡原则也是限制引渡的一项原则。

第五章探讨本国国民不引渡原则。本国国民不引渡原则是指当请求引渡的对象是被请求国国民时，被请求国可以不予引渡。许多国家基于刑事管辖中的属人原则，拒绝向外国引渡本国国民，也有一些国家基于刑事管辖中的属地原则，容许向外国引渡本国国民。从各国引渡立法看，不引渡本国国民的禁止性规范分为绝对不引渡和相对不引渡两种。在我国与其他国家签订的引渡条约中，这两种情况都有相应的表现。准确适用本国国民不引渡原则，有必要明确国民的范围以及认定国民身份的时间标准。

第六章探讨死刑犯不引渡原则。死刑犯不引渡是指当请求国有理由认为引渡后被引渡人可能被处以死刑时，不予引渡。死刑犯不引渡原则是随着人权观念的兴起逐步形成和发展起来的。随着死刑废除运动的高涨，死刑不引渡原则更是成为现代引渡制度中的一项重要原则。在立法方式上，死刑不引渡原则分为绝对不引渡与附条件引渡两种，比较而言，后者在实务上更为可取。在死刑犯不引渡原则的适用中，废除死刑和保留死刑的国家应相互尊重、相互合作。在中国与外国签订的双边引

渡条约中,已经出现了明确肯定死刑犯不引渡原则的范例,我国引渡法也应作出相应的调整。

第七章探讨或引渡或起诉原则。在国际法上,或引渡或起诉原则形成于19世纪后期。进入20世纪,这一原则日益受到国际社会的广泛关注,其内容不断丰富和完善。在适用或引渡或起诉原则时,首先应准确地理解“起诉”的含义及性质。这里的“起诉”,应该理解为“将案件提交其主管当局以便起诉”;对犯罪人所在国而言,“起诉”具有义务性。或引渡或起诉原则与普遍主义联系密切,相对于利害关系国的刑事管辖权,犯罪人所在国的刑事管辖权具有辅助性。在我国与外国签订的双边引渡条约中,普遍存在或引渡或起诉原则的规定,但在体系安排上又有所不同。从或引渡或起诉原则的实践价值及制度的协调性看,我国引渡法中应明确规定这一原则。

Abstract

Extradition is an important form and effective approach of cooperation in criminal justice between sovereign states. To ensure successful extradition, there have been some gradually formed principles for restricting or standardizing extradition behavior in the long international practice. These principles have been established in the international treaties and national legislation and become criteria for all countries to abide by in extradition activities. However, with the quickening of economic globalization, new contents have increasingly been breathed into the extradition principles. Thus, how to fully understand the extradition will directly concern whether the departments responsible of all countries can apply the proper forms of extradition to effectively punish criminals fleeing to other countries and prevent transnational and international crimes. China has been strengthening the legal system of extradition since 1990s. In recent years, China have paced up the process of negotiating with other countries and signing extradition treaties with them, holding a more active, flexible and practical attitude in the cooperation of extradition activities. In this sense, it is necessary to probe into extradition principles from the angle of perfecting extradition system of China and the extradition treaties with other countries so as to guide the

extradition practice.

The present article is composed of seven chapters.

Chapter I outlines the fundamental issues concerning extradition principles. First of all, it defines extradition, introducing two mainstream viewpoints on the basic issues concerning extradition treaties as well as types and procedures of extradition. Secondly, it clarifies the relationship between extradition principles and extradition rules by distinguishing the rule and principle from perspective of jurisprudence. In fact, extradition principles are believed to be extradition rules in logical structure. Based on this, extradition principles can be defined as the rules which have been formed through international practice, established in international treaties concerned and applied to restrict and standardize the extradition behavior. From this definition, the characteristics of extradition principles can be summarized in three points as follows: ① extradition principles are explicitly stipulated in international treaties concerned; ② extradition principles are generally followed by all countries in extradition practice; ③ extradition principles embodies the basic laws of extradition activities and orientation of common value in the extradition cooperation between all countries. Finally, it theoretically analyzes a variety of viewpoints concerning the scope and classification of extradition principles, and advances seven extradition principles worth considering, namely, the principle of double criminality, the principle of specialty, the principle of non-extradition of political offenders, the principle of non-extradition of mili-

tary criminals, the principle of non-extradition of nationals, the principle of non-extradition for capital punishment, and the principle of aut dedere aut judicare. The author holds that it is unnecessary to classify the extradition principles.

Chapter II discusses the principle of double criminality. The principle of double criminality sets the precondition for extradition cooperation, that is, the conducts indicated in the request for extradition constituting an offense according to the criminal laws of the requesting and requested parties, or the crime designated in the treaties that both parties participate in. The putting forward of double criminality principle serves to respect the state sovereignty reciprocally and to protect the basic human rights of the person sought. This is the reason why the principle is prescribed in the international treaties and national legislation concerning extradition. As for the specific application of the double criminality principle, however, there have existed many controversies in both theory and practice. The major controversy is whether concrete interpretation or abstract interpretation should be given to this principle. On the practical position, abstract interpretation is preferred.

Chapter III dwells on the principle of specialty. The principle of specialty is a basic legal binding set for the demander party of the extradition cooperation, demanding that the requesting state can only prosecute or punish the person extradited in accordance with special crime indicated in the request for extradition. The formation of the principle of specialty is relevant to the principle of non-extradition of political offences. It



experiences the change from the gentle specialty principle to the pure specialty principle. From the angle of teleology, the principle of specialty protects the sovereignty of the requested country and human rights of the offenders. Its requirements are as follows: ① restriction on criminal prosecution or punishment; ② restriction on compulsory criminal measures; ③ restriction on re-extradition. On the basis of the actual need of the requesting country for judicial operation, the principle of specialty allow of exceptions under certain conditions in its application.

Chapter IV elaborates on the principles of non-extradition of political offenders and non-extradition of military criminals. The principle of non-extradition of political offenders, a principle of international law gradually formed after French bourgeois revolution at the end of 18th century, means that the requested can refuse extradition where the person sought is a political offender. Although this principle has been recognized in international law, a majority of issues, even crucial, haven't been tackled. In particular, the differences in political system and ideology of all countries lead to great different criteria for judging or determining political offenders. The difficulty in having a unified definition of political offenders causes the principle of non-extradition of political offenders to be the most complicated and uncertain among all the principles of extradition. At present, the application of this principle is advancing in restricting the scope of political offence. The efforts have increasingly been made to non-politicization towards some

sorts of offence. The principle of non-extradition of military criminals enjoys the same features as the principle of non-extradition of political offenders do in terms of explicit exclusiveness and politicization, which makes it a principle restricting extradition.

Chapter V probes into the principle of non-extradition of nationals. The principle means that the requested country can refuse extradition where the person sought by requesting country is a citizen of the requested country. The majority of countries refuse to extradite their citizens to foreign countries on the basis of the principle of personality in the criminal jurisdiction. Some countries permit extraditing their citizens to foreign countries on the basis of the principle of territory in criminal jurisdiction. Considering the legislation on extradition of all countries, the prohibitive rule for non-extradition of nationals can be divided into absolute non-extradition and relative non-extradition. Both of them appear in the extradition treaties signed by and between China and foreign countries. For the purpose of applying this principle accurately, it is necessary to clarify the scope of nationals and the time criterion for determining the national status.

Chapter VI makes a study of the principle of non-extradition for capital punishment. According to this principle, extradition shall not be granted where the requested country justifies its belief that the person sought is punishable by death after extradited to the requesting country. The principle comes into being and develops due to the rise of human right idea.

With the upsurge of the movement of abolishing death penalty, the principle of non-extradition for capital punishment has become an important principle of the modern extradition system. In legislation, the principle can be divided into absolute non-extradition and conditional extradition. The latter is comparatively practical and preferable. In the application of this principle, the countries for or against death penalty should display mutual respect and cooperation. There have emerged examples of clearly applying the principle of non-extradition for capital punishment in the treaties signed by and between China and foreign countries. Thus, the extradition law of China should make corresponding revisions.

Chapter VII deliberates on the principle of *aut dedere aut judicare*. In international law, the principle of *aut dedere aut judicare* came into existence in the late 19th century. In the 20th century, this principle increasingly became the concern of international community. In the application of the principle, it is primarily vital to fully understand the meaning and nature of *judicare*. *Judicare* hereby should be understood as submitting the case to the authority responsible so as to be prosecuted. As far as the offender's country is concerned, prosecution is obligatory. The principle of *aut dedere aut judicare* has a close relationship with universalism. The criminal jurisdiction of the offender's country is auxiliary compared with that of the interested country. The principle of *aut dedere aut judicare* is widely implied by means of different system arrangement in the treaties signed by and between China and foreign countries.

Considering the practical value of the principle and coordination of the system, it is a must to explicitly prescribe the principle of aut dedere aut judicare in the extradition law of China.

目 录

引 言	(1)
第一章 引渡原则概论	(4)
第一节 引渡概说	(4)
一、引渡的概念	(4)
二、引渡的条约基础	(11)
三、引渡的类型和程序	(16)
第二节 引渡原则的概念	(18)
一、引渡原则的内涵	(18)
二、引渡原则的特征	(24)
第三节 引渡原则的范围	(29)
一、引渡原则的内容	(29)
二、引渡原则的分类	(37)
第二章 双重犯罪原则	(41)
第一节 双重犯罪原则概说	(41)
一、双重犯罪原则的渊源、概念及例外	(41)
二、双重犯罪原则的根据	(48)
三、双重犯罪原则的规定方式	(52)
第二节 双重犯罪原则的适用	(53)
一、双重犯罪判断的法律依据	(53)
二、双重犯罪判断的方式	(59)
三、双重犯罪判断中的可罚性问题	(68)
四、双重犯罪判断中的其他相关因素	(73)



第三章 特定性原则	(77)
第一节 特定性原则的确立及其目的	(77)
一、特定性原则的确立	(77)
二、确立特定性原则的目的	(79)
第二节 特定性原则的适用	(84)
一、特定性原则的基本要求	(84)
二、特定性原则的例外事由	(89)
第四章 政治犯、军事犯不引渡原则	(97)
第一节 政治犯不引渡原则的沿革及意义	(97)
一、政治犯不引渡原则的沿革	(97)
二、政治犯不引渡原则的意义	(98)
第二节 政治犯罪的规定与类型	(100)
一、政治犯罪的规定	(100)
二、政治犯罪的类型	(103)
第三节 政治犯不引渡原则的发展动向	(111)
第四节 我国引渡制度中的政治犯不引渡原则	(116)
一、关于政治犯罪的表述	(116)
二、关于政治犯罪不引渡原则的例外	(118)
第五节 军事犯不引渡原则	(120)
一、军事犯不引渡原则概说	(120)
二、我国引渡制度中的军事犯不引渡原则	(123)
第五章 本国国民不引渡原则	(125)
第一节 本国国民不引渡原则的演进与实践	(125)
一、本国国民不引渡原则的历史沿革	(125)
二、本国国民引渡问题上的立场	(128)
三、本国国民不引渡的根据	(130)
四、不引渡本国国民的模式	(137)

第二节 本国国民不引渡原则的适用范围·····	(140)
一、国民的范围·····	(140)
二、认定国民身份的时间标准·····	(143)
第三节 本国国民不引渡原则的发展动向·····	(145)
第六章 死刑犯不引渡原则·····	(151)
第一节 死刑犯不引渡原则概说·····	(151)
一、死刑犯不引渡原则的沿革和称谓·····	(151)
二、死刑犯不引渡原则的规定模式·····	(156)
三、死刑犯不引渡原则的性质·····	(159)
第二节 死刑犯不引渡原则中的人权·····	(161)
一、死刑犯不引渡原则的人权蕴涵·····	(161)
二、死刑犯不引渡原则中的主权与人权·····	(162)
第三节 死刑犯不引渡原则的发展动向·····	(165)
第四节 我国引渡制度中的死刑犯不引渡原则·····	(168)
一、死刑犯不引渡原则在我国的确立·····	(168)
二、我国确立死刑犯不引渡原则的意义·····	(170)
第七章 或引渡或起诉原则·····	(174)
第一节 或引渡或起诉原则的形成和发展·····	(174)
一、或引渡或起诉原则的形成·····	(174)
二、或起诉或引渡原则的发展·····	(177)
第二节 或引渡或起诉原则的适用·····	(181)
一、或引渡或起诉原则中“起诉”的理解·····	(181)
二、或引渡或起诉原则与普遍主义·····	(184)
第三节 我国引渡制度中的或引渡或起诉原则·····	(188)
参考文献·····	(193)