刑事司法协助

Researches on Criminal Judicial Assistance

成良文 著

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内容提要

刑事司法协助是国家关系的重要内容，是一国司法权的有效域外延伸，具有重要的外交价值和司法价值。开展刑事司法协助问题的研究，对于指导我国对外刑事司法协助和我国区际刑事司法协助的立法和司法实践，具有重要的现实意义。

本文分为两个部分共十一章。上篇为国际刑事司法协助部分，论述了国际刑事司法协助的概念、范围及其诉讼特征；指导国际刑事司法协助的基本原则；国际刑事司法协助的发展趋势；国际刑事司法协助中的引渡、调查取证、诉讼移转管辖、外国刑事判决的承认和执行等问题。下篇为中国刑事司法协助部分，论述了中国国际刑事司法协助的实践；中国对外刑事司法协助存在的主要问题及对策；刑事司法协助在中国区际间的适用；我国区际刑事司法协助中的重点和难点问题：逃犯移交和共同司法管辖权的界定等。

国际刑事司法协助是主权国之间依照有关国际条约或双向互惠原则，协助或代为履行一定的刑事诉讼程序或刑事实体权利的活动。从协助的内容、适用的条件和程序等角度，可以将其归纳为六大类：文书送达、信息通报、调查取证、引渡、刑事事件的诉讼转移、外国刑事判决的承认和执行。作为诉讼行为的国际刑事司法协助具有本身所特有的三大特征：国际法与国内法相协调；条约义务与互惠原则相互补；司法审查与行政审查相互统一。

经过长期的司法实践，现代国际刑事司法协助业已积累了一

些基础性、概括性的规则，形成国际刑事司法协助的基本原则。它们是：国家主权原则、平等互惠原则、法制原则、特定性原则、人权保护原则。国际刑事司法协助就是在这些原则的指导、限制、规范之下有序地进行。

在经济日益全球化的今天，跨国犯罪的增多和国家间交往范围的扩大，使得作为打击跨国犯罪主要合作手段的国际刑事司法协助制度在国家对外活动中的重要性愈益突出，国际刑事司法协助领域正呈现出一些新的发展趋势：一是刑事司法协助的范围逐渐扩大；二是立法规范得到迅速发展；三是国际组织在国际刑事司法协助中的作用进一步增强；四是刑事司法协助在国家关系中的作用日显重要；五是人权保障的范围进一步扩大；六是刑事司法协助的程序向简便化方向发展。

引渡在现代国际刑事司法协助的各种表现形式中，历史最为悠久，诉讼的特征最为典型，有关引渡的理论也最为成熟。一些规范引渡的规则（也有的称其为原则）如政治犯罪不引渡、本国国民不引渡、死刑不引渡、财税犯罪不引渡、或起诉或引渡等，虽然也是对其他刑事司法协助形式限制的规则，但在国际刑事司法协助的实践中，它们对引渡规范的严格性要远远超过对其他刑事司法协助形式的规范。然而，这些限制和规范引渡制度的规则随着历史的发展也都各自呈现出一些新的特色。

刑事诉讼移转管辖是近几年来在世界上日益受到重视的国际刑事司法协助的基本形式。它是指一国将本应由其管辖的刑事案件委托他国进行刑事诉讼的一种司法协助制度。刑事诉讼移转管辖符合现代刑事诉讼发展的需要。外国刑事判决的承认和执行，是一国应他国请求对其他主权国家的审判机关代表国家依照法定程序对刑事案件进行审理所作出的具有法律效力的判决和裁定的承认和执行。已决在押犯的移管从某种意义上讲是外国刑事判决的承认和执行的继续，它与被判刑人的引渡在目的、原则、条件和程序上均有差别。已决在押犯的移管是为了被判刑人在熟悉的环

境中服刑，克服在异国服刑的各种困难，尽快复归社会的一种良好方式。有条件判刑或有条件释放罪犯的转移监督也是为了更有效地对罪犯实行监外教育改造，争取在有利于罪犯的环境里促其悔过自新，而将该罪犯移交给有关国家监督教育的一项司法合作制度。本专题研究论述了上述两种国际刑事司法协助制度所适用的规则、条件和程序。

我国国际刑事司法协助的开展起步较晚，但发展较快。从我国现阶段对外签订和加入的双边或多边条约以及我国国际刑事司法协助的实践来看，业已开展的国际刑事司法协助的范围主要有以下几个方面：引渡；刑事司法文书的送达；刑事调查取证以及与之有关的诉讼事务；信息通报；刑事诉讼转移；已决犯的移管。我国《引渡法》的出台是我国对外刑事司法协助的一个重要里程碑。《引渡法》的价值意义主要体现在三个方面：一是对我国未来有关引渡方面国际条约的制定给予规范；二是建立了较为规范的引渡诉讼模式；三是确定了我国国际刑事司法协助的国内立法方向。当前，我国国际刑事司法协助存在的主要问题是：(1)法律规范之间的矛盾或不一致。一是我国刑事法律规范与我国所签订或加入的有关国际条约之间的矛盾或不一致；二是条约规范之间的不一致；三是刑事司法协助方面的基本法律规范与刑事司法协助条约之间的不一致。(2)有关职能机关职责不清。一是与外国有关刑事司法协助条约的签订，由何部门代表中华人民共和国签字不统一，表明了我国与外国就刑事司法协助问题缔结条约尚未固定专门的机关来承担此责任。二是联系机关、主管机关、中央机关在条约内规定的很混乱。(3)审查制度的空白与弊端。我国现阶段的对外刑事司法协助中，除引渡外，其他方面的刑事司法协助，在审查程序上应属空白。我国《引渡法》对引渡制度根据国际间的一般标准和我国的行政、司法制度，确立了以外交部作为行政初审机关，最高人民法院为司法审查机关，国务院作为最后行政决定机关的“行政审查—司法审查—行政决定”程序，这一程序从我国的刑

事司法制度角度讲,可以明显地看出检察机关在这一程序中未能发挥其在我国刑事司法制度中应当发挥的功能。针对我国目前对外刑事司法协助所存在的问题,为适应我国对外刑事司法协助发展的需要,我国现阶段应做好以下几个方面的工作:一是加大立法步伐,尽快制定其他有关国际刑事司法协助方面的基本法律;二是做好法规之间的协调;三是建立并执行国际刑事司法协助方面的审查制度。可以将国际刑事司法协助方面的审查制度分为两类:一类执行"行政审查—司法审查—行政决定"审查程序,即外交部的初级行政审查,最高人民法院、高级人民法院的司法审查,国务院的行政决定模式。也就是引渡法所确定的审查程序,这类审查程序的适用对象是:引渡、诉讼移转管辖、被判刑人的移管、有条件判刑和有条件释放罪犯的转移监督几个方面的协助事项。另一类刑事司法协助案件的审查,可以考虑只使用"行政审查—司法审查"模式,即由司法部作为对外刑事司法协助行为的联系机关,并对有关刑事司法协助的请求进行行政审查,公安部、最高人民检察院、最高人民法院、国家安全部等部门具体负责司法审查,并执行有关刑事司法协助行为。

区际司法协助是近年来在我国法学领域出现的一个新的概念,它是随着香港、澳门回归祖国,适应内地与港、澳地区司法部门之间相互协助的需要而产生的一个必须认真研究的课题。我国区际间的司法协助关系与其他国家区际间的司法协助关系的不同点在于:"一国两制"与一国一制;多元法系与一元法系;行政区域的不等与法律区域的平等;终审权的有无;宪法约束力的大小。"一国两制"是我国处理中国内地与香港、澳门特别行政区事务的总方针,也是处理内地与香港、澳门特别行政区司法协助事务的根本原则。这项原则在内地与香港、澳门特别行政区开展刑事司法协助过程中包含有四个方面的内容:主权统一,相互尊重,平等协商,务实高效。

对于国际刑事司法协助的一些惯例和规则能否在我国的区际

刑事司法协助中适用问题，应当运用“一国两制”原则去具体审视这些惯例和规则的内容及其内涵。基本观点应为：凡是与国家主权相冲突，与某一法域基本法律原则相冲突，不利于有效惩治犯罪的惯例和规则必须坚决剔除。凡是反映刑事司法协助的科学性要求，并与各个法域法律基本原则不相抵触的惯例和规则可以适当的方式使用于区际刑事司法协助之中。对个别惯例或规则的适用，从“一国两制”原则出发，可以限制性使用。具体而言，政治犯罪、军事犯罪、死刑犯罪案件、本地居民的犯罪案件、财税方面的犯罪案件不予协助等规则均不能适用于我国的区际刑事司法协助；基于种族、宗教、国籍、性别或政治见解而提起的刑事诉讼案件不予协助，一事不再理，犯罪已过追诉时效或已被赦免的案件不予协助，缺席审判的案件不予协助等，既是国际刑事司法协助中的惯例和规则，也是我国各个法域法律上的基本原则，完全可以而且应该适用于我国的区际刑事司法协助。但是，由于是在我国不同法域的区际间适用，加之一些条例的内容涵盖较为复杂，易于发生错用滥用的情形，故在区际刑事司法协助的规范性法例的订立中，其规定的方式要区别于国际刑事司法协助中国家间条约的立法规定；双重犯罪规则应当适用于我国区际刑事司法协助之中，这是“罪行法定原则”的基本要求。通过相互协商，签订有关司法协助协议，以规范司法协助的执行是现阶段我国区际司法协助的最佳可行模式。在协助的内容方面，从长远的角度看，对我国区际间合作打击犯罪有利的下列互助行为，都属于区际刑事司法协助的内容：犯罪情报信息交流；缉捕、遣送犯罪嫌疑人；文书送达和调查取证；赃款、赃物的追还和移交；刑事案件的管辖移交；诉讼转移；已决犯的移管。

我国区际间刑事司法协助的难题主要在于逃犯移交和共同司法管辖权的界定。在逃犯移交方面，我国区际间有关规范性协议的制定必将面对两个方面的问题：逃犯的移交范围和移交程序。建议区域之间共同协商，在双重犯罪原则的基础上制定罪类清单，

本着先易后难的原则解决重要犯罪案犯的移交问题，并保持罪类清单的开放性，随时增补。建议比照英国与爱尔兰之间有关逃犯移交使用“签注逮捕令”程序作为我国区际间逃犯移交的程序。“签注逮捕令”移交程序以司法机关的直接合作为移交的渠道，省略了区际间不必要的行政审查方式和复杂的司法审查程序，正是我国区际间逃犯移交所追求的目标。在共同司法管辖权的界定方面，解决我国区际间刑事管辖的可采性原则是：属地原则为基础，有限的属人原则为补充，协商原则具有终局决定权。

Summary

Criminal judicial assistance, as an important part in the state relations, is an effective extension of a state's juridical power out of its territory, having significant value diplomatically and judicially. Studies of criminal judicial assistance will have practical significance in guiding China's practice in the criminal judicial assistance and China's legislation and judicial practice in terms of interregional criminal judicial assistance.

This dissertation consists of two parts, ten chapters. The first part is about international criminal judicial assistance. It discusses about the concept, scope and lawsuit features of international criminal judicial assistance; the basic guideline of international criminal judicial assistance; the development tendency of international criminal judicial assistance; and some problems touched in international criminal judicial assistance, such as extradition, transfer of proceedings of a case, and recognition and execution of foreign rulings. The second part is about the international criminal judicial assistance vs. China. It discusses about China's practice in international criminal judicial assistance; the major problems facing China in this field; proposals of China's steps in the development of international criminal judicial assistance; application of criminal judicial assistance in interregional cases; and major and tough

problems related with the interregional criminal judicial assistance, such as transfer of fugitives, and definition of common legal jurisdiction.

International criminal judicial assistance is activities between sovereign states, whereby assistance or service as proxy is offered in handling of criminal proceedings or execution of criminal entity rights pursuant to relevant international treaties or reciprocal principle. From the angle of content, applicable conditions and procedures, such assistance may be classified into six major categories, service of documents, reporting of information, investigation of evidence, extradition, transfer of criminal proceedings, and recognition and execution of foreign rulings. International criminal judicial assistance, as a legal action, has three major inherent features: coordination of international law and domestic laws, complementation between the treaty obligations and reciprocal principle; and unification of judicial review and administrative review.

Through long-term judicial practice over the decades, some basic and generalized rules have been formed in the international criminal judicial assistance, thus forming the basic principles of the international criminal judicial assistance. They are: the principle of sovereignty of each state, the principle of equality and reciprocity, the principle of law, the principle of specificity, and the principle of protection of human rights. Under the guide, restriction and control of these principles, the international criminal judicial assistance is systematically rendered.

In the present days, along with the increasing pace of globalization, the increasing number of transnational criminal cases and expansion of the scope of intercourse between the states are

making the system of international criminal judicial assistance, as an important means cracking down on transnational crimes, more important in foreign affairs. Some new development tendencies are appearing in this field. First, the scope of criminal judicial assistance is broadened. Second, the legislative regulations are developing rapidly. Third, the international organizations are playing a more important role in the practice of international criminal judicial assistance. Fourth, criminal judicial assistance is playing an increasingly important role in the relation of states. Fifth, the scope of human right protection is further expanded. Finally, the procedures in criminal judicial assistance are moving towards simplification.

Among the existing forms of international criminal judicial assistance, extradition has the longest history, most typical proceeding features and most mature theory. Some regulations(also called principles or rules) governing the extradition activity, such as non-extradition of political offenders, non-extradition of own citizens to another state, non-extradition of criminals sentenced to death, non-extradition of financial & tax offenders, legal proceedings, and extradition, are stipulated to restrain other forms of criminal judicial assistance. In practice, execution of the extradition rules is much tighter to the extradition activity than to other forms of international criminal judicial assistance. However, along with evolution of the history, these rules restricting and normalizing the extradition activity are showing some new features.

Transfer of jurisdiction of criminal proceedings is another basic form of international criminal judicial assistance drawing broad attention now. It is defined as a criminal judicial assistance system under which a state may commission another state to handle criminal

procedure of a case in the jurisdiction of the former. Transfer of jurisdiction of criminal procedings is in line with the development of modern criminal procedures. By recognition and execution of foreign rulings, a state, upon request by another state, recognizes and executes legally effective rulings by a foreign judicial organ on behalf of its sovereign state in accordance with the legal procedures of that state. Transfer of surveillance of a sentenced prisoner in jail, in a sense, is continuation of recognition and execution of the foreign criminal ruling. It is different from extradition of a sentenced person in objective, principle, conditions and procedures. Transfer of surveillance of a sentenced person in jail is aimed to have the sentenced person to serve the sentence in an environment familiar to him, so as to overcome the difficulties facing him when serving the sentence abroad, and return to the society as quickly as possible. Transfer of surveillance of a person subject to conditional sentence or conditional release is a judicial cooperative system under which a criminal is transferred to a relevant state for surveillance and reeducation, with the aim of more effective reeducation and reform of such criminals out of jail so that they repent and turn over a new leaf in a better environment. This present study discusses about the rules, conditions and procedures applicable to the foregoing two systems of the international criminal judicial assistance.

The international criminal judicial assistance started late but develops fast in China. According to the concluded bilateral or multilateral treaties and the practice of international criminal judicial assistance so far, China has carried out the practice of international criminal judicial assistance in the following aspects: extradition; service of criminal procedure documents; criminal investigation evidence collection and relevant proceeding affairs; reporting of

information; transfer of criminal proceedings; and transfer of jurisdiction of sentenced prisoners. In China, the promulgation of the Extradition Law marked an important milestone in China's practice in this field. It has great value in the following three aspects: first, it sets out regulations governing China's practice in the future in terms of international treaties of extradition. Second, it has established a standard mode of extradition procedure. Third, it sets the national legislative direction in international criminal judicial assistance. Currently, the major problems facing China in the international criminal judicial assistance include: (1)contradiction and inconsistency between the laws and regulations. First, the national criminal law and regulations conflict or disagree with the international treaties to which China is a signatory party. Second, the treaties and regulations do not agree with each other. Third, discrepancy of the basic law and regulations governing criminal judicial assistance from the relevant treaties. (2) Unclear division of responsibilities of the relevant functions. First, there is no an agreed department responsible for signing treaties of criminal judicial assistance with foreign states on behalf of the People's Republic of China. In other words, China does not have a fixed organ to assume the responsibility of concluding treaties with foreign states in respect of criminal judicial assistance. Second, the contact department, department in charge and central department set out in the treaties are confused. (3) Blank and malpractice of the review system. Currently, China stays blank in the review procedures of the international criminal judicial assistance, except for the extradition activity. According to the international practice and the state administrative and judicial systems, the Extradition Law sets out the extradition procedure of "administrative review→judicial review→

administrative decision". For this purpose, the Ministry of Foreign Affairs serves as the preliminary review organ, the Supreme People's Court as the judicial review organ, and the State Council as the organ making the finial administrative decision. From the angle of the criminal judicial system of China, such procedure reveals neglect of the function of the procuratorial organ. Targeted at the existing problems in the foreign criminal judicial assistance, and to adapt to the need of the development of international criminal judicial assistance, the immediate steps to be taken by China in the present time are: first, to accelerate the pace of legislation to formulate the basic law governing other aspects of the international criminal judicial assistance as early as possible; second, to coordinate the laws and regulations so that they are consistent with each other; and finally, to establish and execute the review system of international criminal judicial assistance. Such review system may be divided into two groups, one of them is to execute the review procedure of "administrative review→judicial review→administrative decision", namely the model of preliminary review by the Ministry of Foreign Affairs, the judicial review by the Supreme People's Court and High People's Court, and administrative decision by the State Council, as specified in the Extradition Law. Such review procedure applies to extradition, transfer of jurisdiction of criminal procedure, handover of surveillance of sentenced persons, and transfer of surveillance of prisoners subject to conditional sentence and conditional release. The other group is about review of cases touching criminal judicial assistance. For this purpose, the model of administrative review plus judicial review may be considered, in other words, the Ministry of Justice should serve as the contact department of the affairs touching the international criminal judicial assistance, and conduct the

administrative review upon request. The functions like the Ministry of Public Security, the Supreme People's Procuratorate, the Supreme People's Court, and the State Ministry of Security should be responsible for the specific judicial review and execution of relevant criminal judicial assistant actions.

Interregional judicial assistance is a new concept appearing in China's jurisprudence field in the recent years. Along with Hong Kong and Macao's return to China, to adapt to the need of the mutual assistance between the China mainland's judicial department with the counterparts of Hong Kong and Macao, this issue is an immediate subject to be studied carefully. Such interregional judicial assistant relation facing China is different from that facing other countries in "one country, two systems" vs. "one country, one system", .plural law system vs. monadic law system, different administrative regions vs. equal legal regions, and other issues related with final instance and the binding force of the constitution. "One country, two systems" is the general policy of the China towards handling the affairs between the China mainland and Hong Kong & Macao, also the basic principle for handling the judicial assistance affairs between the mainland and Hong Kong/Macao. This principle covers four aspects in the process of criminal judicial assistance between the China mainland and Hong Kong/Macao: unified sovereignty, mutual respect, consultation on an equal basis, and efficiency & practicality.

As to application of some practices and rules of international criminal judicial assistance to China in handling interregional criminal judicial assistance, we should follow the principle of "one country, two systems" when considering the content and meanings of these practices and rules. In my opinion: any practices and rules

conflicting with the state's sovereignty, or conflicting with the basic law principle of a certain jurisprudence field, or not good to punishment on crimes should be eliminated absolutely. Any scientific requirement reflecting criminal judicial assistance and not conflicting the basic legal principles of each jurisprudence field may be used in the practice of interregional criminal judicial assistance as appropriate. As to applicability of some individual practices or rules, starting from the principle of "one country, two systems", they may be used under some restrictions. To be specific, the exemptions of political, military, death penalty, local citizens and financial/tax cases should not apply to the interregional practice of criminal judicial assistance between the China mainland, Hong Kong and Macao. No assistance should be offered for criminal suits started on the basis of clan, religion, nationality, sex or political opinion. Any request of such cases should be denied. No assistance should be offered for cases exceeding the limitation or already exempted. No assistance will be offered to cases judged by default. These are practices and rules of international criminal judicial assistance, also basic principles to be followed by us in each jurisprudence field. They are absolutely suitable and should be followed in China's practice in interregional criminal judicial assistance. But, considering these practices and rules will be used in regions with different jurisprudence fields, and some articles may cover complex content and might be abused, they should be expressly specified in the regulations governing interregional criminal judicial assistance. Such regulations should be specified in a way different from those legislative stipulations in bilateral or multilateral treaties. The rules of double criminality should apply to China in the practice of interregional criminal judicial assistance. This is a basic requirement