



A Comparative Study of the Extradition of Criminals in Iranian and Afghan Legal Systems

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Abstract

The criminals and crimes are no longer confined to nations' internal borders in this modern age. Criminals immediately flee from one country to another, disturbing human societies' security and order as well as stealing peace of mind. Unfortunately, this problem has come to gradually become a grave international issue, engaging all countries, due to the advancement in the transport industry and the ease with which criminals can be transported across countries. With the intention of instilling justice and justice in societies and with the intent to make offenders and criminals punishable—on the other hand, for not giving any protection to criminals in any state—states recognizing the importance of this matter, have worked increasingly on the issue of the need to extradite criminals as an element in tandem with other jurisprudence and judiciary matters. They seek to solve this issue by entering into bilateral or multilateral extradition agreements. For this, sensible individuals across the globe have agreed long ago that effective warfare against crime is only possible when all governments cooperate and assist one another and create channels to fight such forms of criminality as a group. Afghanistan and Iran, being two friendly and

neighboring countries, signed an extradition treaty a long time ago and both have enacted some laws on extradition. In this article, based on a comparative analysis, an attempt has been made to discuss and analyze the terms and provisions of extradition of criminals in the legal systems of Afghanistan and Iran.

Keywords: *Extradition of Criminals; Extradition Treaties; Afghan Law; Iranian Law*

Introduction

Historically, the idea of criminal extradition goes back to ancient history. But earlier, because there were limited and inaccessible means of transportation, people had immense hardships in migration and travel. Criminals, who are a part of human society, could not easily escape from the country where a crime had been committed and enjoy the proceeds of crime in another country.

Every passing day and the development of the transport industry made it easier for criminals to easily escape the crime scene and move into another country, hence evading justice and reaping the rewards of their criminality. This has increasingly worsened, posing a threat to the social fabric of human societies and public peace and security, prompting countries to correct the situation through extradition mechanisms.

Extradition is a two-way or many-way judicial step between countries by means of agreements and treaties with the purpose of prosecuting and punishing criminals, carrying out criminal and judicial sentences, and spreading justice, equity, order, and security. Extradition makes it possible for countries whose security and order have been undermined to request extradition of criminals who escaped their authority and took refuge in another country.

Extradition serves to have the criminal fugitives tried in the judicial courts of the country that is most capable of processing the crimes that have been committed and, at the same time, leads to the removal of unwanted elements from the country of origin of extradition.

1) Definition of the Extradition of Criminals and Related Terms

To define and clarify the meaning of extradition in a proper manner and not confuse it with similar or related terms, first we will define extradition itself and then move on to similar terms.

1.1) Definition of the Extradition of Criminals

"Extradition" is a word derived from the Arabic root "radd" which means to seek the return or to demand the restoration of something. In the context of international criminal law, it is defined as:

"The request on the part of one government by a government in whose territory the criminal is found, for prosecution or execution of a criminal judgment." (Jafari Langroudi, 2002, Vol. 1, p. 320)

Extradition of criminals is the retrieval of a criminal who has fled from one state to another, by a request from the prosecuting state to the state to which the criminal has fled—this is effected in accordance with an agreement or treaty between the two states. (Jafari Langroudi, 1991, p. 36)

Extradition of criminals is the return of an accused or convicted individual who, having completed the crime or before the execution of the sentence, has escaped the jurisdiction where the offense was committed. (Validi, 2003, p. 175)

1-2) Concepts that Are Similar to the Extradition of Criminals

1-2-1) Judicial Assistance

Judicial assistance is the association between two courts of two nations which have come to terms of agreement or have made treaties in order to pool and provide the paperwork and evidences required during the trial of a prosecuted individual from another foreign country. That is, judicial aid, as a two-state activity, involves a series of mutually assisting acts states provide one another in their bilateral relations for purposes of facilitating proceedings in the judiciary of a foreign state in a case having some connection with the assisting state. In international law, this is summarized in international instruments, specifically multilateral conventions and treaties, and also by way of bilateral treaties—mainly in the guise of extradition agreements—and reciprocal measures (in the guise of judicial commissions). (Vafaei, 2020; p. 3)

The Islamic Republic of Afghanistan has, over decades, entered cooperation agreements on judicial assistance and legal cooperation with neighboring countries. Its initial extradition agreement was with the Islamic Republic of Iran in 1928 titled "Protocol on the Extradition of Criminals." It has in recent times followed this cooperation with the signing of agreements on the transfer of convicted persons with nations such as Tajikistan, Russia, and Iran and extradition agreements with the United Arab Emirates and Iran.

As a supplement to effective cooperation from Afghanistan with other nations in its neighboring and neighboring nations on convict transfers and extraditions of criminals, the Law of Legal Assistance and Judicial Cooperation was released by the Official Gazette No. 1103 in accordance with being ratified on 13 April 2013.

In the second paragraph of Article 3 of the Law on the Extradition of Criminals in Afghanistan, judicial cooperation and legal assistance are explained as follows:

"The following terms in this law have the following meanings:

Judicial cooperation: exchange of information, transmission of documents and evidence, summoning witnesses, and other evidence in the process of detection, investigation, and prosecution of suspects and enforcement of court judgments."

In addition, Article 26 of the legal cooperation and judicial assistance law stipulates:

"A request for legal cooperation in the investigation, detection, and prosecution stages shall, depending on the case, be authorized by the Ministry of Interior Affairs, the Attorney General's Office, or the High Council of the Supreme Court and shall be accepted in the following cases:

1. Gathering of evidence or taking statements from concerned people.
2. Assistance in transferring detainees and summoning other individuals to provide documents and assist investigations by the requesting state's judiciary.
3. Transmission and execution of judicial decisions.
4. Conducting searches and confiscating goods.
5. Examination of goods and visits to premises.
6. Presentation of evidence and criminal documents.

7. Preparing originals or certified copies of records and documents, including bank statements, account books, and other records revealing a company or business activity.
8. Other matters within the jurisdiction, provided they do not contravene the provisions of this law and other legislative instruments.

1-2-2) Transfer of Convicted Persons

One of the relatively new tools of cooperation between states in criminal matters is extradition of the convicted. In this type of cooperation, a person who has committed a crime in one state and has been convicted by its courts to serve time in prison is extradited to his country of origin to serve out the remaining balance of his sentence with an eye towards rehabilitation and reintegration into society.

The transfer of a convicted person must be carried out with their consent, due to the fact that prison conditions can vary greatly from one country to another, and the convict may have legitimate reasons for not consenting to the transfer.

The Islamic Republic of Afghanistan, recognizing the growing necessity to collaborate with other nations in judicial and legal terms—especially with neighboring nations—has implemented relevant treaties with neighboring nations. Some such treaties are those with the Republic of Tajikistan, the Russian Federation, and the Islamic Republic of Iran, in accordance with Presidential Decrees (102), (103), and (100), dated Official Gazette No. 931, 17 November 2007.

1-2-3) Delegation of Jurisdiction

Delegation of jurisdiction, or passive cooperation, refers to the waiver of judicial authority by a state that originally has jurisdiction over a crime to another state where the suspect or supposed party is generally found. (Bakhtiar Nasr Abadi, 2021; p. 462)

Historically, the exercise of judicial jurisdiction, particularly of criminal proceedings that relate to public order and security, has been an essential part of sovereignty and state power. Thus, the delegation and transfer of criminal proceedings from the state where the crime was perpetrated to another state is a novel and exceptional practice.

When reviewing international legal documents regarding such a type of legal and judicial cooperation, only two such documents are noteworthy:

The first is the European Convention on the Transfer of Proceedings in Criminal Matters signed in 1972 and entered into force in 1978.

The second is the Model Agreement on the Transfer of Proceedings in Criminal Matters approved by the United Nations General Assembly in 1990. (Bakhtiar Nasr Abadi, 2021; p. 462)

2) Historical Background and Theoretical Foundations of Extradition in Afghan and Iranian Law

2-1) Historical Background of Extradition

Although the complexity of modern societies has made extradition a very critical issue, extradition as such is not a novel international or societal phenomenon. It has existed in various forms under the guise of treaties and agreements between states for thousands of years.

The first recorded agreement in history regarding this issue is an agreement entered by Ramses II, King of Egypt, and Hattusili III, King of the Hittites, thirteen centuries before Christ on the surrender of fugitives between the two kingdoms.

The Roman and ancient Greek empires, who often conquered other nations, forced them to surrender enemies of the empire who had escaped into their territory.

In the past, extradition was mainly used against suspected plotters against kings or plotters to kill them, and was often requested with the intent of revenge against the asylum-providing state. Bilateral treaties between states for extraditing criminals were documented. (Abbasi, 1998; p. 23)

Fourteen centuries back, Islam formulated treaties on the extradition of criminals in various written documents. A lot of emphasis in Islamic jurisprudence and political law has been placed on extradition, cooperation between various judicial authorities, and asylum based on contracts and treaties.

The Qur'an itself, the strongest source, clearly expresses the doctrine of universal responsibility of criminals. The first written extradition agreement in Islamic history was that between the Prophet Muhammad (PBUH) and Abu Sufyan, the leader of Meccan polytheists.

Muslim jurists refer to asylum as *istijarah wa aman* (seeking refuge and protection) and hold fulfillment of obligations arising from contracts and treaties as legally binding.

With Islam, extradition became simpler and more common.

So while the historical roots of extradition are ancient, its emergence as a modern scientific and legal field is comparatively recent.

The oldest extradition treaties that loosely approximate the modern concept of extradition and were concluded in the medieval period are:

1. The 1174 treaty between Henry II, King of England, and William the Lion, King of Scotland.
2. The treaty of 1303 between Edward III, the King of England, and Philip the Fair, the King of France.
3. The treaty of 1375 between Count of Savoy and Charles V, the King of France.

"One of the typical features of extradition treaties during the Middle Ages was that the parties to the treaties of peace and alliance obligated themselves to extradite the political enemies and pretenders to the throne of one another." (Keynia, 1961; p. 272)

Since the 19th century, the changing structure of human societies has triggered a new phase in the evolution of extradition. Extradition has ever since been a subject of debate at various international conferences and forums.

2-2) Theoretical Foundations of Extradition of Criminals

The most compelling theoretical foundations advanced by jurists for the extradition of offenders—enshrined in the extradition rules and agreements—are based on the objective of ensuring the facilitation of the application and implementation of justice and the prevention of impunity for offenders. In fact, the consensus among legal theorists is that extradition and treaties of offenders are in the interest of the administration of justice because, in theory, even if an offender or accused person leaves the state

in which the offense has occurred, they may still be tried and punished through extradition treaties, thereby doing criminal justice and avoiding impunity.

2-3) Historical and Legislative Background of Extradition in Iranian Law

In the Iranian criminal legal system, the subject of extradition of criminals does not have a long history. The first extradition treaty of Iran was signed in 1928 with Afghanistan, which became invalid due to the expiration of its term. The second extradition treaty was concluded with Turkey in 1937. The government of Iran has concluded extradition treaties with only a few other states since that time.

Iran passed its Law on the Extradition of Criminals in 1960. Article 1 of the law provides:

In case of the existence of an extradition treaty between the Government of Iran and a foreign government, extradition shall be carried out in line with the treaty provisions. In case such a treaty is nonexistent, or if it exists but has no necessary provisions, extradition shall be carried out based on this law, in observance of the principle of reciprocity.

This clarifies that the legal foundation of extradition in Iran is primarily the agreements Iran makes with other states. However, in the absence of a treaty or if the treaty lacks the necessary specifics, the provisions of the 1960 law will apply. Therefore, despite the fact that Iran lacks treaties with the majority of countries, extradition has still been carried out under this law and on the grounds of the principle of reciprocity. (Mohseni, 1997; p. 408)

2-4) Historical and Legislative Background of Extradition in Afghan Law

In Afghan law, extradition of offenders and suspects also lacks a long history. Legally speaking, the first extradition treaty Afghanistan entered into was on 15 June 1928 (25 Jawza 1307) with Iran. This protocol renewed automatically in 1930 (1309) but terminated in 1932 (1311), and the parties are no longer obligated to extradite under it.

After the fall of the Taliban in 2003 (1382) and the establishment of a new government and relative stability, judicial cooperation was again prioritized, and new agreements were signed with neighboring countries.

These include treaties on the exchange, delivery, and transfer of detainees with the Islamic Republic of Afghanistan, the Russian Federation, the Islamic Republic of Iran, and the Republic of Tajikistan, and separate extradition agreements with Iran and the United Arab Emirates.

The landmark in Afghanistan's law for extradition is indicated by the year 2012 (1391), when the Law on Extradition of Suspects, Convicts, and Judicial Cooperation was ratified via Presidential Decree No. 8492 and was published on April 13, 2013 (25/1/1392), in Official Gazette No. 1103. Since then, Afghanistan has been recognized internationally as a state with official extradition law and can enter into agreements accordingly with other states.

3) Extradition Rules in Iranian Law

3-1) Rule of Non-Extradition of Nationals

Since 1840, there have been provisions that exclude a state's nationals from the scope of extradition treaties and extradition in customary international law, which prohibits the delivery of nationals to a foreign state. (Abbasi, 1994; p. 138)

This principle finds its origin in states' skepticism about foreign courts and their duty to protect their nationals. Extradition of a national is argued to be in contradiction to the right of political protection; no state extradites a person whom it can prosecute and punish itself. Since the purpose of extradition is punishment, Article 8(1) of Iran's Law on the Extradition of Criminals stipulates:

If the individual requested is a national of Iran, the Government of Iran shall not accept the extradition."

In this regard, Article 9 of the extradition treaty between Iran and Afghanistan provides:

"If the request for extradition under Article 2(1) is not acceded to, the requested party shall prosecute the accused before its own tribunals. The requesting party, in that case, shall furnish the evidence and means of crime to the requested party."

Similarly, the protocol of 1928 (1307) on the extradition of offenders between Iran and Afghanistan stipulates:

If the offender or accused is a national of the state to which they have fled, they shall not be extradited. The state where the offence has been perpetrated may provide the evidence and request prosecution or punishment according to the law of the other state."

This principle appears in other extradition treaties Iran has signed:

Article 1 of the 1937 (1316) treaty between Iran and Turkey

Article 1 of the 1949 (1328) treaty of Iran and Pakistan

Article 2 of the 1966 (1345) treaty between Iran and France:

"The High Contracting Parties shall not extradite their own nationals.

Article 3(1) of the treaty with Azerbaijan 1999 (1378)

Article 56(1) of the treaty with Russia 1999 (1378)

Both contain the principle of non-extradition of nationals.

3-2) Principle of Non-Extradition for Political Offenses

Nearly all states have accepted the principle of non-extradition of political offenses. The basis is that the object of the political offense is the state, and to extradite a political opponent to the state that he is facing is against the principle of justice.

Political crimes, thus, form an excellent exception to the extradition law. It is so because political criminals are thought to endeavor noble causes and should hence not be prosecuted like ordinary criminals. Due to this reason, such a clause has been included in all the treaties of extradition Iran enters into with other states.

For example, Article 3(2) of the Iran-Afghanistan treaty reads:

If the offense for which extradition is requested is a military or political one, the classification of crime shall be at the discretion of the requested state."

In the same way:

Article 3(1) of the Iran-Pakistan treaty

Article 3(2) of the Iran-Azerbaijan treaty both follow this principle, the latter stating explicitly that it is up to the requested state to classify or not classify an offense as political.

Although Article 56(1) of the Iran-Russia treaty makes no mention of political offenses, it states:

"Extradition shall not take place if the requested person is a national of the requested party or has sought asylum there."

Political offenses are not mentioned specifically, but this would imply protection against extradition in such instances.

Furthermore:

Article 3(2) of the Iran-Uzbekistan treaty

Article 50(1) of the Iran-Syria treaty

Both explicitly exclude extradition for political offenses.

3-3) Principle of Non-Extradition in Military Offenses

One of the fundamental principles of non-extradition is the non-extradition of alleged military criminals. This is guaranteed in Iran's laws and extradition treaties. In article (4) of article (8) of Iran's Criminals Extradition Law, it is stated: "If the committed offense is a military offense, it is non-extraditable." In article (2) of article (3) of the Extradition Treaty between Afghanistan and Iran, the same thing is mentioned and it is stated: "If the offense for which extradition is requested is a political or military offense, the characterization of the offense shall be determined by the requested party." In article (5) of the Extradition Treaty between Iran and France signed in 1966, it is stated: "If the offense for which extradition is requested is purely related to a breach of military obligations, extradition will not be granted." Also, Section B of article (3) of the Extradition Treaty between Iran and Pakistan renders military offenses non-extraditable: "If the offense for which extradition is requested is fundamentally and exclusively a military offense and subject to military law."

Therefore, as a conclusion following the discussion of military offenses, military crimes are non-extraditable and jurists concur therewith, as compiled in the following opinions:

- 1- Professor Abd al-Qadir Audah believes: "There is consensus on the non-surrender of political and military offenders." (Abbasi, 1994; 160).
- 2- Dr. Abdolhossein Aliabadi is certain: "Foreign states do not accept extradition requests for perpetrators of military offenses and generally reject them." (Abbasi, 1994; 160).

3-4) Principle of Non-Extradition When Iran Has Jurisdiction

Article (8) of the Extradition of Criminals Law, Clause (3) thereof, establishes another case where extradition is not received: "If the offense was committed in the Iranian territory or, if committed outside the territory, the offender has been prosecuted and convicted in Iran." According to laws currently in effect, at least four cases fall within the authority of the Government of Iran. The first situation is where the crime or its part was committed within the territorial jurisdiction of Iran, where Iranian courts, pursuant to Articles (3) and (4) of the Islamic Penal Code of 2013, have jurisdiction based on the principle of territorial jurisdiction. The second scenario is when the crime is against the essential and life

interests of Iran, and Iranian courts have jurisdiction under Article (5) of the Islamic Penal Code based on the principle of real jurisdiction. The third is where a crime has been committed internationally and the perpetrator is in Iran, and where the Iranian courts, by virtue of Article (9) of the Penal Code and under the general principle of universal jurisdiction, have jurisdiction. The fourth is where the crime has been committed against the Iranian people, and the Iranian courts, under Article (8) of the Penal Code, have jurisdiction. Accordingly, if Iran is entitled to jurisdiction under any one of the four principles—territorial, real, passive personality, or universal—the extradition request shall not be granted.

3-5) Non-Extradition Principle for Minor Offenses and Minor Convictions

In theory, criminals should be extraditable for all crimes, but because extradition entails vast amounts of money and numerous forms, governments have made efforts to exempt minor offenses from extradition agreements. Previously, governments would write a list of extraditable offenses and exchange them, and extradition would be subject to this list. But this was causing a lot of problems. Crime became rampant, and legislators broadened the list of punishments, and as these new offenses were not listed in extradition agreements, the lists were constantly being updated. To aid in solving this issue, states left out petty offenses—such as military and political offenses, which impede extradition—out of the extradition list of offenses. (Abbasi, 1994; 170). Sub-article one and two of Article (4) of Iran's Extradition Law of Criminals authorize extradition requests for felonies and misdemeanors, punishable by felonies or misdemeanors, respectively, and only for misdemeanors when the highest penalty is no less than one year's imprisonment or where over two months' sentence has been granted. According to reverse interpretation, crimes outside this article's jurisdiction cannot be referred to extradition. Thus, misdemeanors and offenses punishable by less than one year of imprisonment are not extraditable. Similarly, if the sentence is two months or less, extradition is not accepted.

3-6) Principle of Dual Criminality

The conclusion of Article (4) of the Law on the Extradition of Criminals emphasizes this principle where it is mentioned: "In all cases mentioned in this article, extradition shall be accepted by the Government of Iran only if the act is punishable under Iranian law by a felony or misdemeanor." Likewise, clause (5) of Article (8) of the Law on the Extradition of Criminals stipulates one of the reasons extradition will not be accepted: "If under the laws of Iran or the requesting state, prosecution or punishment is barred by the statute of limitations or the person is, for legal reasons, not subject to prosecution or punishment under the requesting state's laws."

4-) Governing Principles of Extradition under Afghan Law

Afghanistan is an independent state enjoying political sovereignty and has signed many treaties with countries of the world, especially neighboring states, in various areas such as economy, culture, military, etc. Some of the most important treaties that the Islamic Republic of Afghanistan has signed in the area of law with regional states include treaties on the extradition of criminals and the transfer of sentenced individuals. The oldest extradition treaty is the one between the former Kingdom of Afghanistan and Iran in 1928. Extradition of offenders and prisoner transfer are therefore conducted on the basis of certain principles, which are described here under Afghan law.

4-1) Principle of Non-Extradition of Nationals

In extradition talks of suspects and offenders, extradition of nationals has not been emphasized heavily under sovereignty concerns and mainly applies to nationals of the requesting or third state. Non-extradition of nationals is so important to some states that they enshrine it expressly in their constitutions, and the extradition of their nationals to third states becomes illegal.

The principle of non-extradition of nationals, as enshrined in the majority of national laws and extradition treaties, is based on a kind of distinction between the administration of justice and the imposition of punishment by a foreign country on the nationals of the requesting state. It should be noted that this principle has not produced any positive results in practice and is not acceptable as a rule, especially among civilized states with equal judicial standards. This is because there is always a risk that absolute non-extradition will lead to impunity, i.e., where the requesting state does not consider itself competent to prosecute its own nationals for offences which are the subject of an extradition request, or facilitates the prosecution and punishment of its own nationals for offences committed abroad. But this does not permit the criminal to be punished. (Fatemi, Shariat Panahi; 1971)

This is the doctrine universally held by states that under no circumstance should countries surrender their own nationals for prosecution and punishment to another state—even if the individual is charged or even if the offense has been established. There are also countries that prioritize territorial jurisdiction over personal jurisdiction and agree to extradite their own nationals if the crime was committed in the requesting state. Such nation-states as the United States, the United Kingdom, and Italy extradite their nationals for prosecution in the requesting state on the basis that territorial jurisdiction takes precedence over personal jurisdiction. It must, however, be noted that extradition in these states is premised on reciprocity, which more often than not leads to no action being taken because most states accord greater significance to personal than territorial jurisdiction. (Fatemi, Shariat Panahi, 1971; 110)

The Constitution of Afghanistan addresses this important issue in Article 25 in the following terms: "None of the citizens of Afghanistan shall be extradited to a foreign state due to accusation of a crime, unless based on the principle of reciprocity and international treaties to which Afghanistan is a party." By legislating this article, the Afghan legislator has protected its citizens and accorded priority to personal over territorial jurisdiction. For example, if an Afghan national offends in India, flees to Afghanistan, and India requests extradition as place of commission of offence and whose security has been jeopardized, Afghanistan, based on Article 25 of its Constitution, will refuse extradition and prosecute its national on the grounds of personal jurisdiction.

Although Article 25 of the Constitution is not absolute (as evidenced in the clause "unless"), Afghanistan is able to extradite its nationals to states with which it has a reciprocal agreement or common membership of international treaties. It is also necessary to note that the Law of Afghanistan on the Extradition of Criminals has one additional general rule: it never extradites Afghan women, Afghan children, or stateless children and puts them on trial for their crimes according to Afghan law.

Article 7 of the Law on the Extradition of Criminals of Afghanistan states: "An Afghan woman accused or child national or stateless child shall not be extradited to foreign states and shall be prosecuted in accordance with the domestic laws of Afghanistan."

The Islamic Republic of Afghanistan, in line with international treaties and agreements it has ratified regarding women's and children's rights, does not extradite them and tries them based on its own national laws and regulations.

The reasons for prohibiting extradition of a state's nationals to a foreign state are fundamental issues such as national sovereignty, the state's duty to protect its citizens, lack of confidence in the equality of foreign trials, and procedural issues such as unawareness of the accused with foreign law, language, and culture.

4-2) Principle of Non-Extradition in Political Offenses

One practice and principle evolved in the middle of the 19th century and which came to be known as the principle of "political asylum" is the principle of non-extradition of political offenders.

(Abbasi, 1994; 149). Extradition of offenders, which was earlier applicable only to political offenders, is not today applicable to political offenders. If we look into the past and study the history of the rise and fall of extradition, we naturally find that the reason behind extradition was firstly to extradite political criminals to enable kings and rulers to capture and punish their political opponents.

"Extradition of offenders was originally practiced in political offences, and states collaborated with each other to extradite their political opponents who had fled to their territories, prosecuting and punishing them severely." (Abbasi, 1994; 119).

In the case of political crimes, it is agreed that they are not extraditable, but opinions might differ as to what constitutes a political crime. "For instance, after World War I—1914, the Allies, basing themselves on Article 227 of the Versailles Treaty, demanded the extradition of Wilhelm II on the basis that his policies had hurt international honor and damaged the credibility of treaties. But their demand was rejected by the Netherlands on the grounds that extradition is allowable only for crimes with purely political motives." (Ali Abadi, 1975; 56).

It is uncontroversial that political offenders are not extraditable, but the issue is that lawmakers do not provide a clear and specific definition of political offenses. Therefore, it is difficult to determine such offenses, and in most cases, it becomes tricky because states would readily label political rivals as offenders. Because of this, certain legal thinkers found the definition of political crimes on the basis of motives, whereas others look to the objective of the accused. At the international level, there is as yet no commonly agreed approach, but the predominant view is that offences which are political in their inherent nature and objective are regarded as political crimes and are non-extraditable.

Political offenses are excluded from the enforcement of extradition laws today in almost every extradition treaty states have signed or extradition law that has been enacted. (Qamberi, 2020; 151).

Afghanistan's Law on the Extradition of Criminals in Article (25) clause (1) sets out one ground for obligatory refusal of extradition:

"If there is sufficient evidence to establish that the extradition request is made on grounds of racial, religious, nationality, ethnic origin, political opinions, or social status of the person, or if it is likely to harm their personality."

Clause (2) of Article (3) of the Extradition Treaty between Afghanistan and Iran also states refusal of extradition as follows:

"If the crime solicited is a political or military crime, it is the duty of the requested party to decide the character of the crime."

Article (4) Subsection (1) of the Extradition Treaty between the United Arab Emirates and the Islamic Republic of Afghanistan concluded in 2010, states:

"Extradition under the provisions of this Agreement shall not be permitted in any of the following situations: a) Where the offense for which extradition is requested is political in nature or where it is determined that the extradition, trial, or punishment is requested on the basis of a political offense. b) Where the person whose extradition is requested has been granted political asylum by the requested state."

4-3) Principle of Non-Extradition in Military Offenses

The non-extradition of military offenders is an established principle under international law, and this issue is included in the domestic law of most states as well as in most extradition treaties, wherein the non-extradition principle of military offenders is also included. (Abbasi, 1994; 159).

Therefore, there is common agreement among all the legal scholars about the non-extradition of military offenders, but there exist different opinions about some military offenses. Some jurists opine that military crimes are criminal acts which may be committed exclusively by members of the armed forces, e.g., sleeping on guard duty, desertion, abandoning stations, and disobeying orders. These are acts which are particular to members of the armed forces. When a member of the armed forces commits an offense away from their activities as members of the armed forces, the offense is deemed to be a public offense and beyond the purview of military crimes.

Military officers, due to the gravity of their duty, must adhere to certain rules and regulations. Failing to do so amounts to a crime and punishment. Civilian employees, however, do not follow such strict rules, and violation of office rules can lead to administrative offenses, not criminal punishments, and they are liable for only administrative punishments.

Whereas legal minds initially concurred on the non-extradition of military offenses, over time this has changed such that today military offenses are gradually finding their way into the list of offenses for which the criminal can be extradited.

Hence, today in extradition treaties, countries seek to expand the class of extraditable offenses, covering previously non-extraditable offenses under extradition. This is because military personnel are the guardians of the security of society and defenders of a country's borders, independence, and territorial integrity. Mutiny, desertion, treason, and other military-specific crimes specifically can jeopardize the independence and territorial integrity of states. The rules and penalties for military offenses are therefore more severe compared to other offenses. (Hosseini, 2015; 102). Thus, when war crimes are made extraditable, soldiers will not commit such crimes because they would be punished and held accountable when applying for asylum in another country. This, in turn, can be used to uphold national sovereignty.

In the Afghanistan-Iran Extradition Treaty, this issue is addressed in Clause (2) of Article (3), which states:

"Extradition shall not be accepted in the following situations: 2. Where the crime for which extradition is sought is of a political or military character, the nature of the crime shall be decided by the requested party."

4-4) Principle of Non-Extradition in Petty Offenses and Minor Convictions

Doubtless, extradition of criminals and suspects comes with significant expense, involving the Ministry of Foreign Affairs and the judiciary of both nations. Additional expense of shipping a suspect or criminal to the requesting state's authorities is considerable. Extradition treaties consequently typically exempt lesser crimes and minor convictions from being extraditable. (Pourbafrani, 2020; 219).

Consequently, Article 11 of Afghanistan's Law on the Extradition of Criminals, prescribing conditions for extradition, lists minor crimes as grounds for non-extradition. Article 11, besides requiring the crime for which extradition is requested to be the subject of an extradition treaty, provides in its second paragraph:

"The act, both under Afghan and foreign state laws, must be a criminal offense and the penalty for it in both countries' laws must be over one year of imprisonment." (Hosseini, 2015; 94).

4-5) Principle of Non-Extradition in Crimes Subject to Statute of Limitations and Amnesty

Crimes subject to statute of limitations or amnesty, like the passage of time or pardon, are not subject to extradition. "The statute of limitations is the period after which legal prosecution, investigation, and adjudication of a public case, and eventually the execution of punishment, are no longer possible." (Ashouri, 2005; 205).

4-5-1) Non-Extradition Principle in Crimes Subject to Statute of Limitations

The statute of limitations has always been the focus of argumentation by supporters and detractors alike, and the proponents' argumentations have emerged victorious in law practice and infiltrated criminal as well as civil law. Supporters' argument takes this form:

1. With the passage of time, the painful recollections of a crime weaken and its intensity loses. Thus, if prosecution and trial are carried out after a long period, it can awaken the painful recollections of the crime, which creates unrest and anxiety among people.
2. Since human beings can change, offenders who have committed offenses, having been rehabilitated and returned to normal life, can be subjected to renewed public scrutiny if retried after decades. This could lead them back to crime, which is neither beneficial to the individual nor society.

Additionally, advocates of the statute of limitations argue that over time, evidence and footprints of the crime will dissipate, and it will become increasingly difficult to present evidence. This opens up the potential for judicial error, and thus, they believe cases should be concluded after a particular period of time.

The Afghan penal code, based on the gravity and extent of the offense, sets the statute of limitation. The more serious the crime, the more severe the consequence. Based on the penal law of Afghanistan, Article 11 of the Law of Criminal Procedures in 1965 states:

"If a felony criminal prosecution is not commenced within ten years from the time it was committed, a misdemeanor within three years, and a petty offense within one year, the proceeding shall be dismissed except when otherwise provided by law." Such is one of the exceptions to the extradition of criminals and is included in the extradition laws as well as agreements among countries. Apparently, if the statute of limitations provisions are the same between the requesting country and the requested country, there will be no extradition problem. But if the statute of limitations for crimes is dissimilar in the two countries, extradition problems will arise, which must be settled on an ad hoc basis.

4-5-2) Principle of Non-Extradition in Crimes Subject to Amnesty

Amnesty in criminal law language means an action authorized by governmental agencies for the suspension of prosecution of suspects or pardon of all or part of the punishment of convicted offenders. The foregoing broad definition covers private and general amnesty. The Afghan Penal Code of 1976, Chapter Five on the expiration of crimes and punishments, Section One of the General Provisions, Article (167), states: "A crime is extinguished by one of the following causes: 1- Death of the accused, 2- General amnesty."

In addition, in Articles (170 and 171), general and private amnesty is addressed as follows:

Article 170:

- 1- General amnesty is declared by law and, as such, the case is eradicated and the conviction is erased. General amnesty annuls all principal, accessory, complementary punishments, and security measures and does not affect previously applied punishments unless otherwise stipulated by the amnesty law.
- 2- If a general law is promulgated regarding one element of the punishment, it is considered private amnesty and private amnesty regulations become effective.
- 3- General amnesty has no encroachment on public rights.

Article 171:

- 1- Private amnesty is granted by presidential decree and accordingly all or some of the final punishment is revoked or replaced with a lighter punishment specified by law.
- 2- Private amnesty does not waive accessory, complementary, or other punitive penalties and security measures. It also does not waive punishments already inflicted unless the amnesty decree so provides.

Therefore, under amnesty or statute of limitations, society does not punish, since there is no apparent gain. Therefore, domestic law and bilateral or multilateral international agreements provide that in cases of amnesty or statute of limitations, extradition of criminals will not be granted.

Article 22 of the Afghan Law on the Extradition of Criminals on the gain from reduction of sentences, amnesty, and other concessions states:

"If an extradited individual is sentenced to imprisonment, he will be privileged to avail the amenities of amnesty decrees, remission of punishment, and other amenities as provided in the current laws of the nation. Money punishment amnesty is excluded here and can be permitted with the foreign state's approval."

Also, Article 25 of the Law on Extradition of Criminals, compulsory refusal of extradition, clause one, paragraph three states:

"The High Council of the Supreme Court will not issue an order for extradition in the following cases: 3- If according to the law of Afghanistan or the requesting state the prosecution or enforcement of the punishment is dispensed with by statute of limitations or general amnesty."

4-6) Principle of Specialty of Criminal Extradition

Specialty in criminal extradition is an elementary principle. The principle is already extensively practiced in extradition treaties among states and is respected in cooperative relations with states. Under the law of specific protection, any prosecution or punishment beyond that envisaged in the very offence in the process of extradition may occur only upon receipt of explicit consent by the requested granting state authorizing extradition. The consent required is on request to the aforementioned mentioned state and cannot be substituted by agreement on the party to be extradited. (Ardebili, 2003; 167).

Under the age-old doctrine of extradition law, the extradited person cannot be tried, prosecuted, or detained for a crime other than the one for which extradition was justified. The foundation is the concurrence between the two countries on a specific crime. The rule of limitation, or the rule of specialty, is provided in extradition treaties that the accused shall be charged and punished only for the crime for which the accused was extradited.

The importance of the specialty rule in extradition is that, if this condition is violated, other conditions for the acceptance of the extradition request—i.e., non-extradition of political criminals and dual criminality—can easily be violated. (Delkhosh, 2011; 208).

In relation to the specialty principle, Article 6 of the Law on the Extradition of Criminals of Afghanistan states:

"The extradited person shall be prosecuted, tried, and punished only for the enforcement of imprisonment or the crime for which extradition was requested. Post-extradition crimes are excluded from this principle."

In addition, the rule of specialty is also addressed in the Extradition Agreement between Afghanistan and the United Arab Emirates, Article 6 of which states:

"The requesting state shall not arrest, charge, prosecute, or punish the person extradited under this treaty for any other offense than that for which extradition was granted except in the following cases:

- a) If a new crime is committed within the period of accusation, prosecution, or during enforcement of the sentence."
- b) When the extradited person does not leave the territory of the requesting state within 45 days from the date of release.
- c) When the extradited person leaves the territory after extradition and voluntarily returns to it.

Likewise, in the Extradition Agreement between Afghanistan and Iran, Article 6 states that:

- 1- "Without permission of the requested state, the extradited person shall not be tried or punished for any offense committed before surrender other than that for which extradition has been granted except with the permission of the requesting state."
- 2- If the extradited person does not leave the requested state's territory within 15 days from when criminal proceedings ceased, or does so voluntarily after having left, consent of the requested state is no longer required. Time which the person is unable to leave due to grounds outside his will is not reckoned in the time.
- 3- In the event of a change during proceedings in the legal qualification of the offense, the extradited person shall not be tried or punished except in so far as the newly characterized offense, according to its constituent elements, conforms to Article 2 of this treaty.
- 4- The extradited person shall not be surrendered to a third country for crimes prior to delivery with the consent of the latter party.

4-7) Principle of Reciprocity of Criminal Extradition

A further major criminal extradition principle demonstrating respect for sovereignty of state is compliance with the principle of reciprocity among nations in extradition. The rationale being that a state's criminal legislation is an indicator of its fundamentals. It is clear that if a behavior is not criminalized and not punishable in a country, then it is not a fundamental value. Thus, if a state that does not criminalize an act surrenders a foreign citizen discovered on its soil to the government of the state that does criminalize the act, it would be unreasonable and regarded as a violation of its criminal law and safeguarded values. (Pourbafrani, already quoted; 22).

Article (28) of Afghanistan's Constitution states:

None of the Afghan citizens will be extradited to a foreign country on the basis of criminal charges, except on the principle of reciprocity and international conventions to which Afghanistan is a signatory."

This Afghan constitutional article is utilized in many cases, including matters concerning the personal status of foreigners and for countries that have not signed an extradition treaty with Afghanistan.

4-8) Non Bis in Idem Principle (Prohibition of Double Jeopardy) in Extradition of Criminals

The non bis in idem principle, or prohibition of double prosecution and double punishment, is the most fundamental principle and ideal of a fair trial today. The double punishment is prohibited as an effect and consequence of the non bis in idem principle since if there is no allowance for retrial, then there is no room for the second punishment. Thus, when there is no new trial resulting in a new conviction, by nature, a second punishment will never be possible as well. The doctrine of non bis in idem is self-explanatory and consistent with justice and fairness principles, and any doubt or controversy regarding this rule is remote. Nevertheless, this fundamental principle of law has experienced numerous ups and downs in its confrontation with different subjects and matters like state sovereignty, varying criminal laws, and distrust of foreign court decisions in the international community and international criminal law. These have made its original clarity and unquestionable acceptance a bit questionable.

The Afghan Extradition Law for Criminals has addressed this problem and, under Article 11, Clause 5, has stated:

(5- Refrain from retrial of a person whose extradition is requested for the crime for which a final court ruling has already been made.)

In addition, in Paragraph (b) of Article 4 of the United Arab Emirates-Afghanistan Extradition Treaty, *res judicata* in criminal cases is listed as one of the extradition obstacles, and it states:

(b) When the individual requested has either been prosecuted before the courts of the requested party or a third state for the same crime for which extradition is sought and convicted or acquitted.

Conclusion

Iran and Afghanistan, two countries who are conscious of the importance of the matter of the transfer of the criminal and the convicts, and through the ratification of extradition legislation and the signature of cooperation agreements in the field of extradition and prison transfer with adjacent and nearby countries, have long been actively engaged in this field and have gained successful and prosperous cooperation in their judicial records. Afghanistan, with the enactment of the Law on the Extradition of Criminals in 2012 (1391), was a landmark year in the field of extradition, and likewise, Iran with the enactment of its extradition law in 1960 (1339) opened the door to cooperation with other countries in this field.

Given that Afghanistan has signed and ratified the Human Rights Treaty, the International Covenant on Civil and Political Rights, and the Convention against Torture, it always strives in the context of extradition to uphold human dignity and moral treatment of criminals.

In Afghan and Iranian legal systems, extradition of nationals, extradition in political and military crimes, extradition in minor crimes and minor convictions, and extradition where the state itself has

jurisdiction, are banned. Extradition laws of Afghanistan and Iran are equal and synchronized in these regards.

The second law is different from the first one in that Afghanistan extradites its nationals reciprocally and where international treaties signed by Afghanistan clearly provide that extradition of Afghan nationals is permitted. However, the Islamic Republic of Iran does not extradite its own nationals under any circumstances and under any treaties or protocols, which somehow is a benefit of Iran's extradition law compared to that of Afghanistan.

While Afghanistan allows for the extradition of its nationals under specific conditions and provisions in Article (25) of its Constitution, Article (7) of the Law on the Extradition of Criminals involves the non-extradition of Afghan women and stateless foreign children, whose cases must be handled in accordance with Afghan law.

References

- 1- Pourbafrani, Hasan (1399). International Criminal Law, Tehran: Jangal Javidaneh Publications.
- 2- Ashouri, Mohammad (1380). Criminal Procedure, Vol. 1, Tehran: SAMT Publications.
- 3- Ardebili, Mohammad Ali (1382). Judicial Assistance and Extradition of Criminals, 1st Edition, Tehran: Mizan Publications.
- 4- Delkhosh, Alireza (1390). Combating International Crimes: The State's Duty to Cooperate, 1st Edition, Tehran: Shahr-e Danesh Publications.
- 5- Abbasi, Mahmoud (1373). Extradition of Criminals, Tehran: Ganj-e Danesh Publications.
- 6- Ali Abadi, Abdolhossein (1354). Criminal Law, Vol. 3, Tehran: Ferdowsi Publications.
- 7- Validi, Mohammad Saleh (1382). Basic Principles of General Criminal Law, 1st Volume, Tehran: Khorshid Publishing.
- 8- Jafari Langroudi, Mohammad Jafar (1380). Complete Terminology of Law, 12th Volume, Tehran: Ganj-e Danesh Library.
- 9- Mohseni, Morteza (1376). Series of General Criminal Law, Vol. 1 and 3, Tehran: Ganj-e Danesh Publications.
- 10- Keynia, Mehdi (1340). Introduction to Public International Law, Tehran: Tehran University Press.
- 11- Panahi Shariat Fatemi, Seyyed Kazem, Extradition of Criminals, Judicial and Administrative Science School, Hikmat Publisher, Qom.
- 12- Hosseini, Azizullah (1394). The Extradition of Criminals in the Context of Afghan Jurisprudence, Master of Laws thesis, University of Tehran.
- 13- Abdolhamid Qanbari (1399). Treaties of Extradition and Exchange of Prisoners with Regard to Regulations by the Islamic Republic of Afghanistan, Biennial Scientifico-Corporative Fiqh Journal and Judiciary No. Vol. 17.

- 14- Bakhtiar Nasr Abadi, Razieh & Ardebili, Mohammad Ali (1400). Transfer of Criminal Proceedings Between States: Redefining the Concept and Its Legal Challenges in Iran, Comparative Legal Studies Journal, Vol. 12, No. 2.
- 15- Vafaei Nejad, Milad & Rouhani, Karen (1399). Analysis and Explanation of International Judicial Assistance in the Fight Against Crime, 2nd National Conference on Humanities and Development.

Laws

Constitution of Afghanistan, adopted in 1382.

Afghanistan Law on Judicial Cooperation and Extradition of Criminals, enacted in 1391.

Iranian Law on Extradition of Criminals, enacted in 1339.

Treaties

Protocol on Extradition between Iran and Afghanistan, endorsed in 1307.

Extradition Treaty between Iran and Afghanistan, endorsed in 1385.

Extradition Treaty between Afghanistan and the United Arab Emirates, endorsed in 1389.

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