

The Criminal Law Solution of Foreigners Committing Crimes Within National States Territory: Take Chinese Criminal Law as An Example

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Abstract

In the era of globalization, foreigners committed crimes in the national territory are mainly subject to the sovereignty governance mode. The national penalty power is not the same to the nationals and the foreigners. Penalty to the nationals aims to confirm self-decision will of the community social contract, and obtain the basic conditions of returning to national community law and order; penalty to foreigners committed crimes within the territory aims to confirm self-decision will of participating in social life and signing the “residential contract”; and whether allow him to return to territorial social life depends on the judgment of his “contracting will” and “performance capabilities”. National penalty justice is the legitimate criminal law value applied under the sovereignty governance, and it should maintain consistency to global penalty justice to achieve a “negotiated justice”.

Key words: Foreigner; Territorial crime; Sovereignty governance; National penalty justice

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INTRODUCTION

Japanese scholar ShujiIwamura has noticed long ago that globalization caused the problem of foreigners committed

crime within national territory (IwamuraShuji, 1994). As the development of globalization, this problem in all countries becomes grim. In 2008in Russia, in every three crimes, one is committed by foreigners (Wang, 2009). French police chief admitted: “In 2012, 20%of all crimes were committed by foreigners (Rui, 2012).” Especially in Switzerland, half of the criminals is foreigners. And since 2004, 70% of the criminals in prison are foreigners (Anonymous, 2013). The situation of foreigners committed crime within the territory of China is not optimistic too. For example, eight consecutive years’ statistical data of Beijing People’s Procurator ate first branch shows, the proportion of foreign criminals to all criminals has increased rapidly: 1.2% for 2003, 4.2% for 2004, 3.4% for 2005, 4% for 2006, 16.9% for 2007, 18.9% for 2008, 18.8% for 2009, and 15.7% for 2010 (Yu, 2012). Obviously, globalization asks for serious consideration of how to correctly use national criminal law to deal with foreigners committed crimes within the territory.

An ideal global governance idea is “to solve the problem of global conflict, ecological, human rights, immigration, drug, smuggling, and infectious diseases through international regimes” (Yu, 2001). However, there is no real unified global power; even the United Nations is a loose alliance facing the problem of lack of operation due to short of money, let alone unified governance for all countries, especially foreigners committing crimes within national territories. In today’s world, national states become earth village due to political mutual trust, economic integration and cultural communication; global justice wanders in Europe, America, Oceania, Africa, and Asia. In such a situation, what kind of criminal law should be adopted by national states to deal with the problem of foreign crimes within the territory, so that no shocking or guilty feeling may be caused in the future?

1. CRIME GOVERNANCE IN THE ERA OF GLOBALIZATION: SUBJECT, MEASURE, AND FOUNDATION

This chapter aims to stipulate that in the era of globalization, who should be responsible for the governance of crimes, especially the crimes committed by foreigners within the national territory, what measures should be taken, and the foundation of penalty rights of national states to govern such issues.

1.1 Governance Subject

“Governance Subject” refers to the individual or organization responsible for govern crimes. In the era of globalization, crime governance has two modes: sovereignty governance mode and global governance mode. Crimes committed within the national territory should take the sovereignty governance. Sovereignty governance is governance activities of national states regarding matters involving its interests based on sovereignty. Fundamentally speaking, the most important thing of sovereignty governance is “protectionism”, as the “protective jurisdiction” in crime. For national states, its interests include all direct or indirect national interests or people interests inside and outside the field of space,¹ such as oil and gas inside the area, the Antarctic research station outside the area, and even the property in space station flying in the space. Area is the natural limitation for national governance. Area provides basic space, resources, environment, and order for production and living of national states. Therefore, the second important thing of sovereignty governance is “territoriality”, as the “territorial jurisdiction” in crime. National state is the state of people, and the people themselves are part of the interests of the state. People are needed to be governed, especially people’s loyalty to the state and law. So the third important thing of sovereignty governance is “people”, as the “personal jurisdiction” in crime. Based on the realistic possibility, modern states adopt sovereignty governance measures in the order of “territoriality” (“territorial jurisdiction”), “people” (“personal jurisdiction”), “protectionism” (“protective jurisdiction”), and in order to avoid concept overlapping, they are generally regarded as different but complementary types. For example, in case of “Chinese kill Chinese in Chinese territory”, Article six of Chinese “Criminal Law” stipulates that “territorial jurisdiction”

¹ If nothing to do with state or national interest, although behavior occurred within the territory, penalties shall not be applied; If relates to the interests of state or nationals, although behavior occurred outside the territory, penalties shall be applied. This is associated with criminal theory of “the principle of protection of legal interests”. Similar views can be found in [Germany] HsuNai-Man: “Criminal Law In globalization”, in ZhengKunshan,: “Devotion to law and justice-Criminal Law Professor HsuNai-Man paper selections,” Tai Pei spring-sun Forum, p185-197, 2006.

governs, but not Article seven “Personal Jurisdiction” or Article eight “Protective Jurisdiction”.

The other mode of governance which is different from sovereignty governance is global governance formed through international conventions and treaties by national unity or international organizations. Global governance often plays a positive influence on global issues. For example, global governance is usually applied to international crimes, such as pirate crime, crime of genocide, and war crimes. Even today, global governance still cannot be done without sovereignty governance, because first, global governance is usually formed by state sovereignty contract, for example, the international conventions and treaties to punish international crimes are contracted and enacted by national states. Second, global governance usually can be fulfilled with the support of national states adopting the forth sovereignty governance-“universalism”(“universal jurisdiction”) - “prosecution or extradition”, for example, Serbia will extradite Karadzic to the International Criminal Tribunal for the former Yugoslavia matters. Third, and more importantly, for most of the non-international crimes, crimes defined only by national states can only be realized by sovereignty governance. Sovereignty governance is still irreplaceable in the era of globalization, and it still is the most widely used criminal governance method. Global governance on the contrary is just the complement of sovereignty governance. For instance, Article one of “Rome Statute” shows: “Hereby the establishment of international criminal court. As a standing body, the court has the right to exercise jurisdiction over individuals committed severe crimes mentioned in this Statute and suffered international attention.

However, in the era of globalization with sovereignties, sovereignty governance mode has many problems: first, national states define crimes according to their own cultural traditions, and the same behavior may have different evaluations in different nations, this will hinder the understanding of standard of the floating populations’ behavior in the process of globalization, and cause the so-called Conflict of Conduct Norm generated by Silliman then cause “cultural conflict type crime” (Thorsten Sellin, 1938). Second, the national states will not only govern crimes within the area, but also outside the area to safeguard their own interests. When different states have same or overlapping definition of crimes, to initiate crime governance according to their respective “territorial jurisdiction”, “personal jurisdiction” or “protective jurisdiction” may cause “conflict of criminal jurisdiction”, and even international disputes. Third, the further problem is that it may cause excessive penalty: because of the existence of multiple governance, it may produce several criminal judgments under several sovereignty governance. If the effective judgments of other countries are denied based on the “extraterritoriality”, it may violate the

balance of criminal justice principle of double jeopardy² Forth, the most challenging thing is, national states that usually pay attention to crime governance system (especially the organization system) of domestic crimes are always very difficult to maintain sufficient tension to achieve effective management of foreign crimes and crimes committed by foreigners within the territory. For example, in Garner, Chinese gold miners often suffer robbery and murder by local police and residents, however, the Chinese government basically can do nothing about it, and the “protective jurisdiction” becomes empty (Fire, Kill and Rob, 2013). As in South Africa, “Citizen of South Africa conducts rape during short trip in China shall be convicted of rape and sentenced to 5 years in prison by Chinese court “.However, the person is not familiar with Chinese culture or Chinese language, then how to conduct “labor reform “effectively for him? This has been the most confused problem in prisons of Dongguan, China (Anonymous, 2013).

One might think “naively”: in the era of globalization, national sovereignty declines, the global village has only one public authority, a set of cultural system, a criminal code; all domestic crimes are international crimes, and then the issue above will be thoroughly solved. For example, Article X of “Earth Village Penal Code” stipulates: “intentional homicide, shall be sentenced to ten years imprisonment or life imprisonment”. When “B killed C”, the criminal justice system of the earth village will launch a criminal prosecution, carry out filing, investigation, prosecution and trial, and the final declaration of the executive magistrate penalty to B; everything is in order, and in accordance with the requirements of justice. Garofalo had a similar idea in his advocated “International Criminal Law” (Garofalo, 1996). However, Michel Mann concluded, after a systematic research on the impact of globalization on national states that “we cannot simply make a conclusion that national states and national states system are strengthened or weakened (Michelle Mann, 2003) Therefore, the final picture of globalization maybe indeed looked like the one pluralist advocates: a human world with closely economic and cultural ties, but always has co-existing sovereignty states. Naturally, as the best proof of sovereignty, criminal law will definitely be the top one on the list of lost due to globalization³, and will continue to implement the task of crime governance in the scope of national governance.

1.2 Measures of Governance

Measures of governance” refers to the method and means applied by the governance body to manage crime. In the era of globalization, national states mainly depend on the standard system, the organization system and the resources system with the center of national criminal

law to govern crime. These systems need to be global transformed in a considerable degree; especially the localized organization system and resource system, because they cannot not handle the crime problem brought by globalization without transformation, and those cannot be transformed will hinder the creation and interpretation of national criminal law.

The so-called “standard system” refers to the system formed by law, moral, and discipline. For governance of crime, the most important is the norm of criminal law, including criminal law, criminal procedure law, prison law and so on; the so-called “organization system” refers to the human resources system that ensures the smooth operation of the standard system. Take criminal law as an example, the organization system to ensure the realization of law includes the investigation organ, procuratorial organs, judicial organs, and the executing organ (prisons, detention house, community correction institutions).The so-called “resources system” refers to place, equipment and funds allocation that ensure the smooth operation of standard system and organizational system. In the system of sovereignty governance, criminal law is undoubtedly of the decisive significance, and is the national foundation of crime governance. It determines the organization system and resource system of crime governance. Crimes defined by national Criminal Law principally need national criminal justice agencies (organizational system) use the state power (resource system) to pursue criminal responsibility in accordance with law no matter the criminal is national or foreigner, unless he has “diplomatic immunity” or other special factors. The crime governance system of national states is based on national criminal law, and national criminal justice organizational system and resource system in whole or in part are always embroiled in criminal prosecution process in order to realize crime governance. In the era of globalization, the organization system and resource system affiliated by national criminal law are facing great challenges, because compared to criminal law, they are far more localized and institutional settings, staffing, funding, and environmental conditions are all subject to local conditions.

For example, the expense of national crime governance is mainly funded from state appropriations, and national appropriations are mainly from national tax income. Therefore, on one hand, the organization system and resource system need for reform to facilitate the criminal law to make more flexible, dynamic response to international crime. For example, as Chinese criminal organization system and resource system, prisons need to be reformed to a certain degree in order to implement “labor reform “to foreign criminals, as well as to be equipped with English regulators and facilities and environmental conditions that respect foreign culture. On the other hand, those parts of organizational system and resources system that cannot be reformed will in turn restrict the creation and application of criminal law due

² About the connotation of criminal justice, see this article.

³ See the above note7, [Germany] HsuNaiMan.

to their localized nature. For example, the community “correction” punitive measures are needed to be done in the community within China, and Chinese government pays for this. The purpose of this is the reintegration of offenders to Chinese society. Therefore, this is obviously not suitable for foreigners who have no intention or condition to reintegrate to Chinese society.

1.3 Foundation of Governance

“Principle of governance” refers to the foundation of legitimacy and rationality of crime governance measures. Specifically means the legitimacy and rationality of crime governance. The foundation that national states use to punish national crime is that nationals violate the national community “social contract” established by themselves; for foreigners who committed crime within the territory, the principle of punishment is that those foreigners violate domestic “residential contract” that they participate in.

The theory of social contract believes that state rights come from the transformation of national rights,⁴ and it is the integrity of freedom of national community members. Countries use penalty to realize crime governance on the basic assumptions of nationals who create the country. The hypothesis of criminal classical school is still the mainstream of criminal law. For example, contemporary giant German criminal law scholar Takobs pointed out: “only the members of groups can be sentenced to punishment”,⁵ his students Michael Pawlik further pointed out: “in the role as citizens, actor undertakes his community and legitimate shared responsibilities. In these shared responsibilities, he is connected with penalty. Therefore, he was respected as rational beings in penalty of last quote” (Pavlik, 2011). More accurately speaking, the national crime is the violation of volunteer state community social contract, national crime is the violation of social contract of the community that he joined voluntarily, and the violator needs to undertake the criminal responsibilities of breaking the social contract of the community. In sovereignty governance mode, how to understand the foundation of penalty of foreigners committed crimes within the territory is difficult. Foreigners are not nationals, and they do not sign the social contract that create a community of nations, so how do they undertake the criminal responsibility of

crimes committed within the territory? In fact, although foreigners do not conclude national community social contract, they have “residential contract” of the normal life within the territory. The foreigner needs to obey the law and social order of the country as the condition when he enters into the national territory; and this “residential contract” is the foundation of his criminal responsibility. Foreigners committed crime in the territory of China violate the “residential contract” of law and social order, which is the foundation of corresponding punishment based on self-determination.

Different penalties mean different social governance targets. As far as nationals concerned, social contract cannot be dissolved principally, and the ultimate goal of the penalty is to revert them to the state community; as far as foreigners concerned, “residential contract” can be removed principally, and if any party of foreigners and national states do not wish to continue the contract, or foreigners do not have ability to continue to fulfill the contract, the application of penalty is at most to confirm his self-determination, but not to revert them to the state community. Of course, if foreigners and the nation are willing to continue to contract, and foreigners also have the ability to continue to perform the contract, they can be treated as the same as nationals.

Furthermore, why the national criminal law can apply to foreigners who committed crime outside the territory? Foreigners committed crime outside the territory is different from the one within the territory, and foreigners committed crimes outside the territory do not have any “residential contract”. “Protective jurisdiction” only provides a superficial argument. In fact, “punishment comes from military”, “soldier with a sentence” archaic provide history clues to metaphor that this criminal responsibility is basically “miniature war” initiated by countries to the foreign members who violate the law, and “is the state right of self-defense in criminal law” (Wang, 2012). Therefore, the “protective jurisdiction” is initiated not because that national criminal law is the norms of the behaviors of nationals or residents, but because of the necessity of self-defense of national sovereignty.⁶

⁴ National legal view tries to develop category theory. For example, “the law of peoples” in era of globalization built by Rawls. Although social contract theory is not quite recognized by scholars as national legal theory, but the liberal society must be based on the social contract to establish the theory of social contract. Social contract theory is the most influential point of view in the more liberal social. It is not only an analytical tool, but also marxism to be worshipped. The concept of Rawls “the law of peoples” can see [US] Rawls: “Law of Peoples, New Theory of the Idea of Public Reason”, translated by Zhang Xiaohui, Jilin People's Publishing House, p.66, 2011.

⁵ [Germany] JacoJacobs: “Specification, Personality, Social”, Law Press, p.100, 2001.

⁶ In this sense, the general understanding of “Generalization” may be wrong. Usually the so-called “Generalization” means whether it is a territorial crime when “territorial jurisdiction” is applied. The application of “the place of behavior”, “the place of results” means that, as long as one of the “place of behavior” and “place of results” is within the territory, “territorial jurisdiction” shall be applied. However, foreigners attack outside the territory with the results occurred within the territory, and these people are not published by national criminal law, than states may apply “protective jurisdiction” and “territorial jurisdiction” because territory is the specific area protected by national criminal law, and anyone within the territory bears the liability of obeying the criminal rules in the states, and when anyone breaks the rule, the applicable rules shall be applied. Therefore, when the “place of behavior” is outside the territory, the “territorial jurisdiction” shall not be applied.

2. CRIMINAL JUSTICE IN THE ERA OF GLOBALIZATION: STANDARD AND REALIZATION

This chapter aims to stipulate the justice standard and realization problem of the applicable penalty of foreigners committed crime within the territory in the era of globalization.

2.1 Standard: "Negotiate" Justice

In the era of globalization, the justice of penalty shall take the "negotiate" justice standard which take national penalty justice as legitimate foundation and global penalty justice as direction.

Criminal justice is a concept of penalty that makes people feel appropriate and equilibrium. It relates to judgment of specific violations of law or whether the behavior should be punished and whether the punishment is appropriate. Eclecticism is idea of appropriate penalty justice which combined retribution and utilitarianism. Eclecticism is an idea of penalty justice which take retribution as the center and deterrence of general prevention as side and specific prevention to criminals in realization. It combines retribution and utilitarianism, and sufficiently covers a variety of modern appealing of basic justice standpoint. It "punishes" crime, and achieves a balanced retribution and deterrence of general prevention of social harmfulness of crimes. It also "corrects" (special deterrence, educate, improve) the criminals, and achieves balanced specific prevention of the dangers of criminals. It is an idea of penalty justice full of rationality, and the person risk balance of special prevention, is a full of rationality of criminal justice idea, actually becomes penalty justice rules of common practice all over the world.

Foreigners committed crimes within national territory often face the question of two standard of justice: "global penalty justice" and "national penalty justice", and it is doubtable when national states choose applicable criminal law. Global penalty justice is understanding and judgment of the justice of penalty that is generally recognized by the international community values. National penalty justice refers to the understanding and judgment of the justice of penalty that recognized by national common values. Generally speaking, from the perspective of respect of sovereignty, there is no doubt or criticism that national states use the standard of national penalty justice on territorial crimes, but there would be a certain degree of challenge when using the national penalty justice standard over foreigners committed crimes within the territory because of foreign factors. In China, "Mr. Shaikh's death penalty case" is very typical. When Chinese court sentenced and executed a British drug dealer Akmal death penalty, it provoked an outcry from the UK, including the prime minister, because they think Chinese death sentence damages the widespread international human

rights value.⁷ In the face of the global penalty justice challenges, the overwhelming view is, if the impact of the global penalty justice is recognized, it means sovereignty would be harmed, and this shall be excluded (Ji, 2010). However, totally rejecting the view of global penalty justice is insular, because it rejects the communication and understanding of national penalty justice and global penalty justice, as well as the possibility of gradual fusion of both.

Theoretically it is disputable that whether global justice (including global penalty justice) exists. Realists think that power relations dominate the relationship between country and country, and there is no value standard of public morality and general application in international affairs. Relativism communitarians argue that justice only exists in internal communities, and global justice is at best a principle of not interfering with others. The globalist thinks that global justice can be achieved in global government, and refuses to admit that the country is the source of law and irreducible subject (He, 2004). I would rather think that global justice is a concept of justice with a strengthening tendency, a concept that more and more free individuals have about common justice, and fundamental and promote value to the integration of civilization of human beings. Under the recognition of the significance of global justice, global penalty justice can be recognized, and it always can be seen in normative documents of international organizations, as well as can be found in the common ideal of penalty in the mind of most people. As far as national states are concerned, since they are the subjects of governance, no doubt they should be led by national criminal justice. Global penalty justice shows its direction value as a trend concept of human value. When national states apply criminal law, they should consciously accept the global penalty justice as the direction of development. In specific case trials, although global penalty justice cannot be used directly, global penalty justice should be headed for consciously along the path between the national penalty justice and global penalty justice. However, the global penalty justice cannot forcibly over the reality to affect national penalty justice; otherwise, it means to interfere in sovereign. In real world, global penalty justice influence national crime governance practice by the way of "interference" and "negotiation". "Interference" ignores right understanding of criminal

⁷ In September 2007, British Akmal carried 4,030 grams of heroin from the Republic of Tajikistan Dushanbe to Urumqi, Xinjiang, China, and was seized by customs security, the Urumqi City Intermediate People's Court sentenced him to death, and in 2009 executed. British Prime Minister Gordon Brown said, "Strongly condemned." See Anonymous: "British met Chinese ambassador twice within 24 hours for death penalty of drug trafficker", in "Yangzi Evening News" December 31, 2009. A similar situation is "Filipino female drug trafficker's death penalty cases." See Anonymous: "Philippine President sent letter to Xi Jinping to exempt Filipino female drug traffickers from death penalty", "Global Times" June 28, 2013.

justice by national states, and denies the existence of subject history, so it is neither the ideal form of justice, nor the proper form of international social relations; it has strong sense of “great justice” or “hegemonic justice”. “Negotiation” means that, by civilized dialogue and communication, identification and consensus of the concept of justice can be reached, and international convention, treaty, or the formation of new consensus within the national state can be reached to realize the combination of national penalty justice and global penalty justice. This is the international society “negotiated” justice that Habeas advocated.⁸

This “negotiated” penalty justice shows that: first, in the situations of communication, the leading effect of global penalty justice: 1.the specific provisions signed and actually transformed into Chinese criminal law. For example, the provisions of the “foreign official bribery” of “Criminal law amendment (eight)”, is the transformation by Chinese Criminal Law of the sixteenth provision of “United Nations Anti-corruption Convention” which was entered into force on the 2005.2, conventions that China has been joined and came into force, but without transformation into the specific provisions of Chinese criminal law, have great influence on legislation and judicial practice. For example, Article twenty-eighth of “United Nations Anti-corruption Convention” stipulates that, “Factors of knowledge, intention and purpose that are necessary for crimes stipulated by this convention, could be estimated according to the actual situation.” This provides an authoritative standard for the cognizance of “knowledge” in money laundering crime in China. 3, conventions that China has been joined, but haven’t come into force still have a considerable influence on legislation and judicial practice. For example, the reduction of death penalty of economic crimes in “criminal law amendment (eight)” is affect by Article six of “Civil Rights and Political Rights Convention” which is not in effect in China. 4, furthermore, international conventions and treaties that have been drawn up, but haven’t entered into force also have some influence on the legislation and judicial practice. For example, provision three of Article fifty-six of United Nations’ “not yet effective” “protection of all migrant workers and members of their families right international convention” stipulates that, “when considering whether to expel a migrant workers or their family members, it should consider humanitarian and the length of residence of the person” This provision has internal rationality, and it should be taken as the foundation of creation and application of Chinese criminal law. Second, the exclusivity of national penalty justice under the situation is of no communication.

⁸ This “negotiated” justice still needs obey the basic human value. Today, government carries out large-scale genocide or promotes racism and trampling the bottom line of human society, shall lead to crisis of legitimate of sovereignty.

Since the national penalty justice could not agree with a global penalty justice in some aspects, and there is a huge difference that unable to obtain realistic or forward communication between them, from the perspective of safeguarding national sovereignty, global penalty justice need to be ruled out.

“Negotiated” national penalty justice integrated with global penalty justice is not only the standard of justice to foreign criminals; it should also be used for Chinese criminals, otherwise it would violate the requirements of equal principle of criminal law.

2.2 Realization: From “Punishment” to “Correction”

For the realization of penalty justice in the era of globalization, “punishing” foreign criminal has no different with national criminals, while “correcting” foreign criminals needs to be decided according to their “willing to contract” and “capacity of contract”.

The essence of “Punishment” is reality punishes retribution and general prevention of justice. It needs to relate punishment to crimes or harm of crimes. Both nationals and foreigners who committed crimes within the territory of China, need to be punished related to the crimes. And this would on one hand realize the retribution, on the other hand realize the general prevention. If the crime is committed within the national territory, the state has the right on the basis of social contract with its nationals and “residential contract” with foreigners to launch a penalty and to confirm the contract will.

The essence of “Correction” is to realize the justice of special prevention. It needs to associate the crime to the dangerousness of the criminal. The “correction” to nationals with the purpose of eliminates or controls the dangerousness of criminal and eventually return to local society is of no ground for blame. However, foreigners are different from nationals, so applying penalties to “correct” to eliminate the possibility of another crime and enhance its compatibility with social order, and help him return to the society is not absolutely necessary, because foreign criminals can choose to “leave” or the country where the crime occurred can also choose to “expel”. Especially in the absence of assistance mechanism of global unified criminal judgment enforcement, with the consideration of the huge cost of penalty execution, it would be better to admit to “leave” or “expel” the foreign criminals after he committed the crime rather than keep him stay within the territory to “correct”.

Therefore, in order to realize penalty justice, national states need special investigation of the “willing to contract” of foreigners to continue to enter into the “residential contract” with the national state, and the “capacity to contract” of the foreigner to continue execute the “residential contract”: first, for foreigners unwilling to continue living within the territory, “punishment” would be carried out to realize penalty justice, because there

is no “willing to contract” and no return to social life; second, for foreigners “willing” to live within the territory, but haven conditions to return to the territory of social life, for example, foreign criminals without fixed residence within the territory committed crimes during short-term travel, because there is no “capacity to contract”, only “punishment” can be applied, but not “correction”; Third, for foreigners willing to live within the territory, they have “willing to contract”, living conditions to return to the society, and the “capacity to contract”, then “punishment” and “correction “to ordinary citizens can be considered.

Foreign criminal should clearly states whether he has “willing” to continue the “residential contract”; as for whether foreign criminals are equipped with “capacity to contract”, the degree of dangerousness of the criminals and the level of social life he would enjoyed should be considered. The greater the degree of dangerousness of the criminals, for example, serious crimes, the consistent performance is not good, and refusing to repent after the crime, the smaller possibility of him to return to social life within the territory, and the smaller his “capacity to contract” ; on the contrary, the bigger the “capacity to contract”. The lower level the foreign criminals enjoyed inthe territory of the actual social life, for example, no fixed residence or stable job, the less possibility of him to return to the territory of social life, and the smaller the “capacity to contract” is; on the contrary, the bigger the “capacity to contract”.

3. SPECIFIC PROBLEMS OF FOREIGNERS COMMITTED CRIMES WITHIN THE TERRITORY OF CHINA

3.1 Conflict of Criminal Jurisdiction

For foreigners committed crimes within the territory of China; China has residential jurisdiction. However, they are also facing the exclusive jurisdiction or personal jurisdiction enjoyed by their own countries, show could this be solved? The first condition is the conflict of residential jurisdiction and exclusive jurisdiction of other country. This conflict could only be occurred when crimes occurred on the foreign ships and aircrafts entered into China. Because crimes stipulated in Chinese criminal law occurred within the territory of China should take residential jurisdiction; however, according to the relevant provisions of international law, crimes committed on foreign ships and aircrafts are within the scope of foreign sovereign government, and this foreign country reserves the right to exercise criminal jurisdiction. This is often considered special exclusive jurisdiction (Chen, 1998). On this situation, foreign jurisdiction should be respected in principle, because ships and aircrafts are high specific spaces, and the judicial authorities of China are often difficult to prove guilty which leads to indulge crime or

international conflicts if foreign jurisdiction is excluded. Therefore jurisdiction would not be interfered unless direct interests of states and nationals are involved (Li, 2003). Some legal documents enacted in coastal area of our country take precisely this point of view, for example, Shanghai City Public Security Bureau issued “some provisions of the disposal of crimes committed in alien ships”.⁹“Persona of Kuwait steals precious Chinese cultural relics in a Kuwait ship heading for Kuwait for exhibition within the territorial waters of China”, the case should be investigated for criminal responsibility by Chinese judicial organs according to the principle of territorial jurisdiction. On the contrary, if the case directly relates to interests of foreign governments, individuals or corporate, the territorial jurisdiction should not be applied, for example, “Person of Kuwait steals precious Kuwait cultural relics in a Kuwait ship heading for China for exhibition within the territorial waters of China”, the case should be governed by Kuwait judicial organs.” The provision of paragraph (1) of Article twelve of The Finland Penal Code worth great attention, it states that “when foreign ships or foreign aircrafts in Finland waters or airspace, foreigners in the ship or aircraft commit crime, and this crime does not aimed at Finland, a citizen of Finland, permanent residence of Finland or Finland company, fund or other legal entity”, the jurisdiction could only be provoked when general attorney prosecutes. On the second circumstances, the conflict of territorial jurisdiction and personal jurisdiction of other country. Because the territorial jurisdiction is the governance by national states to its own territory, so it has natural advantages, and should exclude the personal jurisdiction of other countries. On the third circumstances, the conflict between territorial jurisdiction and protective jurisdiction of other country. Crimes committed by foreigners within the territory of China because damage to the interests of other countries should principally be investigated in accordance with the principle of territorial jurisdiction, and exclude the protective jurisdiction of other countries.

The question is: for the above mentioned conflict of criminal jurisdiction, Chinese judicial organs did not promptly investigate the crime for case investigation and other reasons, and foreign countries have already investigated for criminal responsibility, so should Chinese judicial organs investigate for criminal responsibility again? In this regard, there is no clear provision. Article ten of Chinese Criminal Law stipulates the rules of foreign criminals under similar circumstances, and it says that “Any person who commits a crime outside the territory and territorial waters and space of the People’s Republic of China, for which according to this Law he should bear criminal responsibility, may still be investigated for his criminal responsibility according to this Law, even if he

⁹ Supra note5, in Yu Zhigang

has already been tried in a foreign country. However, if he has already received criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated punishment. "This is the so-called negative recognition principle of foreign criminal judgment. For domestic crimes, although foreigners have already received foreign criminal judgment, they could also be processed with reference to the spirit of this provision. Many countries have made unified regulations of recognition of foreign judgment when a conflict of domestic crime and foreign crime occurred. For example, Paragraph (4) of Article thirteen of "Norway General Citizens Criminal Law" stipulates that, "criminals received criminal punishments in foreign countries, and got punished for the same crime, the punishment has been received should be as far as possible taken into account".

3.2 Foreigners Involve in National Identity Crime

In Chinese Criminal Law, there are some types of crimes that need "national identity" as conditions for the establishment of crime, and we might call it "national identity crime". How should it be dealt with when foreigners abet and help Chinese citizens or they together commit national identity crime?

The conclusion of relevant provisions of "national identity crimes" in Chinese Criminal Law is: first, "National identity" is clearly needed as the constitutional factor. For example, Paragraph (2) of Article three hundred and seventy-six of the Criminal Law stipulates "refusing or escaping serving crime in war time", namely "citizens refusing or escaping serving crime during war time in serious circumstances shall be sentenced to less than two years imprisonment". Second, no need of "national identity" in the constitution of crime, but according to the purpose of legislation and protection of the object, the interpretation shows "national identity" is needed. For example, the crime of "betrayal of the state" of Article one hundred and two of the Criminal Law states that "colluding with foreigner, harm the People's Republic of China's sovereignty, territorial integrity and security, shall be sentenced to life imprisonment or for more than ten years in prison". It is generally believed that, "the subject of this crime can only be Chinese citizens" (Gao, 2011). Third, no need of "national identity" in the constitution of crime, but there is a need for other types of identity, and according to relevant laws and regulations, this type of identity take "national identity" as a prerequisite. For example, the identity of "soldier" of "the military crime of breach of duty" of Chapter ten of Criminal Law should be "citizens of the People's Republic of China", according to Military Service Law of the People's Republic of China. In any case, these three types of crimes are "national identity crimes", and the illegal essence is the violation of duty of loyalty to the country.

Take "crime of treason" as an example. "Foreigners B abets and helps Chinese citizen C betray the state".

According to the general principle of the common status crime, this is a "joint violation of law", and (Nishida Norino, 2007) B should be sentenced as abettors or helper to "crime of treason". But there are also arguments that "no accomplice criminal to duty crime" (Yang, 2001), so the foreigners cannot be sentenced to abettors or helper to "crime of treason". However, despite the illegal nature of the "crime of treason" is the national violation of national loyalty duty, it does not mean that foreigners cannot borrow national power to commit this crime, in other words, the betrayal of national can be triggered by abetting and helping by foreigners, and in this case, the foreigners should bear the joint responsibility. Taking into account the foreigner does not have duty of loyalty just as nationals do, it should admit that foreigners would be sentenced to a mitigated punishment. Furthermore, because of their lack of "national identity", foreigners could not bear the responsibilities of principal offender just as Chinese citizens do, so they should not be sentenced to common principal offender or indirect principal offender of crime of treason. For example, "foreigner D force Chinese citizen E by violence to sign a treaty that would harm Chinese territorial security", while E lacks criminal intention and is forced to signed the treaty, D cannot be sentenced to indirect principal of crime of treason, and at most D bears criminal responsibility of injury of beating. In fact, some seemingly "national identity" type of crimes may completely be carried out by foreigners, so they are not the real "national identity crime", and foreigners can be sentenced to principal offender to these types of identity crimes. For example, there are some types of crimes that require "national staff" identity, for instance, "crime of corruption" and "crime of bribery" etc. Usually, "national staff" is deemed to be Chinese citizen. However, as foreigners integrated with Chinese social life, they may well be the special "national staff" stipulated in Article ninety-three of Chinese criminal law, namely "other personnel engaged in official duties pursuant to law". It is necessary to expand the explanation of "national staff" to cover foreigners. For example, "foreigner F was entrusted by a state-owned enterprise to operate the state-owned enterprise, and during the operation, he transfers property of the state-owned enterprise to himself," foreigners F can be sentenced to "crime of corruption" pursuant to Paragraph two of Article three hundred and eighty two of Chinese Criminal Law. In fact, it is not rare that foreigners take national public management positions, and it is a global trend. In Tang Dynasty, Japanese Abe Nakamaro worked as Wei Wei Shao Qing; Today, many countries amend laws, and absorb brilliant foreigners into the field of public administration. In recent years, South Korea has tried to modify the "national civil service law" to appoint foreigners to be civil servants, minister and Deputy Minister for civil servants, and other senior positions. It is inappropriate to deny foreigners to be the principal offender of identity crime alike.

3.3 Conflict of Culture Leads to the Wrong Illegal Cognition

How should it be dealt with when foreigners that have wrong cognition of his illegal behavior due to the influences of different cultures? For example, “Dutch G buys 500 grams of heroin for self-use during a Chinese trip, and G is not aware of the illegality of his behavior because possession of heroin is legal in Holland.” So in this case is G should be sentenced to “crime of illegal possession of drugs”?

Whether the knowledge of illegality is needed for criminal intention is controversial, and in China, there are basically three points of views: first is the theory of no knowledge of illegality (theory of necessary social harmfulness); second is two points, namely no knowledge of illegality for natural crime, and knowledge of illegality for law established crimes. Third is the theory of necessary knowledge of illegality (Gao, 2003). The Theory of no knowledge of illegality is established based on the rules of intention of Chinese criminal law. Because Paragraph (1) of Article 14 of Chinese Criminal Law states that “knowing that their actions will cause socially dangerous consequences and wishing or allowing such consequences occurred” is deliberate, so it is believed that the factor of cognition in this provision is “social harmfulness”, but not “illegality”. But this understanding cannot solve the problem of establishment of the intention of “killing own family members”, nor did it solve the problem of foreigners who lack of Chinese culture foundation depends on the understanding of legal path to recognize social harmfulness of certain behaviors, which means that if the foreigners lack of the necessary legal knowledge of Chinese culture, they cannot be aware of social harmfulness to Chinese society. The problem of the theory of two points is the “variability” of the division of natural crime and statutory crime, and “consistent with the time and the place, is relative” (OtsukaRen, 2003), so it cannot be the proper criminal law standard. The theory of necessary knowledge of illegality is reasonable. Because, in the era of law, people should be loyal to the law itself, and recognizing the illegality but still enforcing an illegal behavior breaches the duty of loyalty to law, and thus have the recognition of social harmfulness according to criminal law, which is deliberately. On the contrary, if the offender convinced that his behavior is not against the law, he should not be deemed to have criminal intention. For example, after the end of World War II, “behaviors that violate the economic law enacted during the war with the knowledge of expiration of the law” (Feng, 1996). For foreigners, because of its own culture background and lack of awareness of Chinese law, his behavior may constitute a crime, but he should not be considered to have criminal intention, since he is faithful to law of his own country and lacking of awareness of social harmfulness in criminal law sense, so in the above

example, G cannot be sentenced to “crime of illegal possession of drugs”. Professor Feng Yadong confirms, based on the mutual understanding of sub-community culture and mainstream culture, that illegitimacy cognition error blocks intention, and “absorption or transformation of criminal law to community behaviors is a gradual process; this process at the same time is the process of adjustment and compromise and integration of mainstream culture and sub-community culture (Feng, 2006).” In other words, we should not expect to eliminate gaps between mainstream culture and sub-culture of the community by confirmation of intention through criminal judgment, the consistency of illegality of community culture and the mainstream culture depends on the long-term and gradual process. This kind of understanding is also applicable to the situations of wrong recognition of illegality due to exotic culture influence. One opinion is that although there is no knowledge of illegality but there is the possibility of knowing the illegality, the offender should be liable for intentional liability or negligent liability where criminal penalties under the circumstances should bear the responsibility for negligence (Ma, 2003). However, it is a violation of the principle of liability if there is a lack of intention, but the liability of intentional is of strict liability. It is proper to let the offender bear the negligent liability if he has the recognition of illegality under the situation that negligence should be punished pursuant to criminal law. This is consistent with the duty of care of negligent crime. Accordingly, in the judgment of the possibility of illegitimacy cognition (possibility of execution of duty of care), the degree of the foreigner’s knowledge of culture should be considered, including the length of time he is within China, and living and working environment. For example, “German H and his wife come into the mountainous territory of China for a short-term travel, the wife was pinned by giant stone because of landslide, and she is unable to get rid of the stone and extremely painful. Considering there can be no rescue so she sincerely requests H to give her sleeping pills carried for killing herself. H cannot see his wife’s pain, so he gave her sufficient sleeping pills without knowing that Chinese law prohibits helping killing (it’s not prohibited by German law). His wife swallowed the pills and died soon after”. In this case, H lacks of knowledge of Chinese social and culture, and helps his wife kill herself in view of German law; this shall block his crime intention. Besides, H just comes into China, so there is no possibility or the possibility is very small that he gets knowledge of Chinese culture or law. Therefore, it should be deemed that he lacks of the possibility of execution of duty of care, which should block crime negligence. H cannot be sentenced to deliberately killing due to lack of an intention to violate the law; and H cannot be sentenced to negligent killing due to lack of the possibility of execution of duty of care.

3.4 Penalty Application

First, about death penalty. Should death penalty be applied to foreigners? And how to apply? There are two opposing views: the mainstream opinion is that death penalty is stipulated by Chinese Criminal Law, and it should be applied to foreigners without distinction (Du, 2013). The other opinion is that in view of international relationship, death penalty should not be used or be used carefully to foreigners whose own countries have already abolished death penalty (Zhou, 2013). As mentioned before, under the sovereignty governance, national penalty justice is the only legitimate standard, and it is not to deny the important impact of global justice of penalty. Because the global penalty justice rejects death penalty, the national penalty justice should consciously adjust their own judgment, and should strictly limit the application of death penalty since at present death penalty cannot be abolished. In cases of applying death penalty to foreigners, if global penalty justice and national penalty justice cannot communicate, and the intervene of global penalty justice would be a dangerous path of eliminating national independence, and causing international conflicts and disputes, so the basic judgment of national penalty justice should be strictly abided. In addition, based on the requirement of the principle of equality of criminal law, death penalty should be strictly applied to foreigners and citizens equally.

Second, about the qualification penalty. In Chinese penalty system, deportation and deprivation of political rights are qualification penalty. The former aims to deprive the foreigners of his residential qualifications within the territory of China; the later aims to deprive the offender of the political and public management rights of political speech, press, assembly, and association. To apply deportation to foreigners should firstly consider that whether he has the "will to contract" to continue reside in China, and if he does not have the will, he should be deported; while if he has the will, his "capacity" to return to the social life of China would be further considered, and if he does not have this capacity, he would be sentenced to deportation; if he is sentenced to additional deportation, the execution of deportation should be executed after the end of other implementation, otherwise, it cannot be treated as "punishment". As for the deprivation of political rights, the mainstream opinion is that the political right is the right enjoyed by citizens, and foreigners do not have political rights (Liu, 2007); on the contrary, the minority view is that foreigners also enjoy a certain degree of political rights, so the deprivation of political rights can apply to foreigners (Ma, 2002). In fact, political rights can be enjoyed not only because of "national identity", everyone involved in social life must have its corresponding political rights, and political rights are the fundamental tool to maintain existence in society. The difference of political rights of national and residence are only the amount of rights, the level of rights,

but not the existence or not. This point was reflected in international legal documents. For example, Paragraph 2(b),(c) of Article five of "non-citizens' residence personal declaration of human rights" passed by the general assembly of the United Nations in 1985 states that no-citizens' residents enjoy the "right of freedom to speech" and "the right of peaceful assembly"; another example, Article five of "individuals, groups and organs of society provisions in the promotion and protection of universally recognized human rights and fundamental freedoms declaration of rights and obligations" passed by the general assembly of the United Nations in 1998 states that: "in order to promote and protect human rights and fundamental freedoms, everyone has the right to independently and together with others in the national and international levels: (a) hold peaceful gathering or meeting; (b) establish, join and participate in non-governmental organizations, associations or groups." Obviously, the minority opinion should be agreed with.¹⁰

Third, about penalty measures of social return regarding control, probation, parole. These penalties and measures are of social return nature, and take the premise that criminals have local social living foundation. According to the related provisions of Chinese criminal law, they need community "correction", and based on the above statements, the "correction" can only be applied to foreigners with "the willing" and "capacity" to contract. For example, "American J steals a large amount of property of others during a Chinese trip". According to the provisions of Article 264 of China Criminal Law, "stealing public or private property..... in a large amount..... should be sentenced to a fixed-term imprisonment less than three years, criminal detention or control and/or be fined". In this case J is not suitable to continue to stay in China, so J cannot be sentenced to control. Otherwise, it is unable to execute "community correction" to J who is sentenced to control". However, there is also a problem that control, probation, and parole are not the same, and control belongs to penalty system in China. Compared to penalties with the color of "punishment" color, local social community "correction" only belongs to collateral punishment measures. If to stop the application of control because community "correction"

¹⁰ The newly issued "Provisions of Relevant Benefits Enjoyed by Permanent Residence of China" clearly stipulates that, "foreigners enjoy the same rights and bear the same obligations as Chinese citizens, except for political rights and other rights and obligations stipulated by laws and regulations". It is arbitrary to exclude foreigners to enjoy political rights. For example, "Chinese people's Political Consultative Conference Charter" on the CPPCC makes no nationality restriction. Taiwan area in 2011 published statistical data of "Comparative Research of Political Rights of Immigrants in Different Countries" shows that, as of 2007, 65 countries of 192 countries have granted certain political rights to foreign immigrants. See He Yaochen: "Comparative Research of Political Rights of Immigrants in Different Countries", www.rdec.gov.tw, November 27, 2013.

cannot be applied to foreigners, there would lack a ring in the ladder of penalty system, which would lead to the application of greater punishment or lighter additional punishment, and a violation of balanced penalty justice. In this regard, the only way to solve the problem is the improvement of legislation.

3.5 Improvement of Legislation Regarding Foreigners Committed Crimes Within the Territory of China

First, improvement of governance. Because the community “correction “additional to control may not be suitable for foreigners, alternative penalty of control to foreigners needs to be considered. I suggest amending Paragraph (1) of Article thirty-eighth of Criminal Law to: “the term of control shall be more than three months and less than two years; for foreigners not suitable for community correction, they shall be sentenced to control, corresponding criminal detention or imprisonment less than one year.

Second, improvement of deportation. On one hand, the substantial conditions of deportation of foreigners should be specified to those unwilling or not suitable for the return to social life in China; on the other hand, the application relationship of deportation and other penalties and measures should be clear; furthermore, the term of deportation should be clear. And it should be divided into lifelong deportation and term deportation. Term deportation shall not be less than “ten years” pursuant to the administrative punishment means stipulated by Article 81 of “Entry and Exit Management Law of People’s Republic of China”, to show level and cohesion of criminal law and administrative law. I also suggest to amend Article thirty-fifth of criminal law to: “as for foreigners committed crime, the application of deportation independently or supplementary shall consider the will and appropriateness of the foreigner(one);” where additional deportation is applied, the main punishment shall be limited to life imprisonment, criminal detention, probation, and shall not be parole or ruling deportation (paragraph two); “according to the circumstances of crime, foreigners may be sentenced to lifelong deportation or not less than fifteen years of term’s deportation (paragraph three)”.

Third, improvement of related crime and punishment. Firstly, currently the problem of “three not” is obvious and serious grim (Guo, 2012), and the rules and regulations of criminal law are desperately needed. In the traditional system of charges, although the provisions of the “illegal immigrants” crime-secretly cross the national boundary is stipulated, but not consideration of more powerful means to regulate “illegal immigrants”. I suggest creating subsequent criminal clause to “illegal immigrants”. I suggest adding one paragraph to Article 322: “where against the country (border) management regulations, committing other crimes provided in this law after

running the entry, the criminal shall be given a heavier punishment”. “Illegal residence” and “illegal employment” are the illegal acts punished pursuant to “Entry and Exit Management Method of the People’s Republic of China “: Article seventy-eight of this law stipulates that: “foreigners illegally resided shall be given a warning; if the circumstances are serious, shall be given a fine of five hundred yuan per illegal residence day, and total amount shall not exceed ten thousand yuan or more than five days and less than fifteen days’ detention”; Article eighty stipulates that: “ illegally employed foreigners shall be imposed a fine of more than five thousand but less than twenty thousand yuan; if the circumstances are serious, he shall be sentenced to more than five days and less than fifteen days’ detention, and a fine of more than five thousand but less than twenty thousand yuan.” I suggest to add paragraph two to paragraph one of article 322 of Criminal Law that, “foreigners illegally employed or residence” shall form a gradient punishment system. I propose to add paragraph two to paragraph one of Article 322 that, “foreigners illegally employed or resided shall, where the circumstances is serious, be sentenced to detention or be imposed a fine of less than thirty thousand yuan “.Secondly, the identity crime of permanent resident. Permanent residents involves in Chinese society and enjoy many social rights, so crimes shall be established for them if they violate Chinese laws or breach the duty of loyalty, however the criminal liability shall be eased compared with Chinese citizens. Crimes of foreign identities stipulated in Finland Criminal Law are of instructive influence. For example, Article 3 of Chapter 12 of Finland Criminal Law stipulates “crime of treason”, which states that “(1) citizens of Finland, where in ongoing or upcoming wars, armed conflict or occupation that Finland involved in, and joined the enemy forces;..... iv cooperate or by any other means to support the enemy to damage Finland, shall be sentenced to crime of treason with a punishment of minimum one year up to ten years in prison. (2) foreigners who behave as Paragraph iv of Article (1) in Finland or in the implementation of service in Finland , shall be sentenced to crime of treason.” I also suggest to add one paragraph after Paragraph 2 of Article 102 that, “permanent residence committed the above two crimes, shall be sentenced to a lighter or mitigated punishments.” Accordingly, other criminal types relates to national loyalty to their country shall have similar provisions, such as “refused to military requisition during wartime crime” in Article 381.

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