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<th>One country and two systems: will Hong Kong and the mainland reach an agreement on rendition?; 「一國兩制」：香港與中國大陸能否就移交罪犯問題達成協議？</th>
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The recent trial of 'Big Spender' Cheung Tze-keung and his gang, and the looming trial of Li Yuhui, the suspected Telford Gardens murderer, have both generated intense discussion on the necessity and possibilities of a formal rendition arrangement between Hong Kong and the Mainland.

The Basic Law and Hong Kong’s New Legal Sovereignty

The creation of the Hong Kong Special Administrative Region under the 'One Country, Two Systems' doctrine has fundamentally changed the division of jurisdictions in the PRC unitary state and calls for a reinterpretation of jurisdictional matters within the new constitutional context. There are, under a single PRC political sovereignty, two legal sovereignties or jurisdictions. Each of them is independent of each other and equal to the other. Each jurisdiction has its own laws and legal system supported by its own unique political economy and legal culture. Moreover, there is no truly concurrent central jurisdiction of the sort one finds in a federal system. There are thus two different criminal laws in China. In practice, it is clear that the criminal law of the PRC can only be a Mainland law in spite of the fact that, like many other Mainland laws, it states that it applies in the PRC to all Chinese citizens. Hong Kong, as a Special Administrative Region, is not part of the ‘legal territory’ of the PRC within the meaning of Mainland criminal law.

Regional conflict of law problems have been the subject of academic studies in the Mainland over the last decade. The solutions to these problems need to be based upon residence rather than nationality. The PRC citizenry is composed of residents from the Mainland and the Special Administrative Regions. However, for all practical purposes, what counts is not whether one is a PRC citizen, but what kind of PRC citizen one is. An SAR resident, while being a PRC citizen, is still primarily an SAR resident. He or she, in principle, should have no duty to abide by PRC criminal law while he or she is not in the Mainland. Since the application of PRC criminal law is intended to be limited to the Mainland and its residents, ‘PRC citizen’ within the meaning of PRC criminal law ought not to include an SAR resident.

The Basic Law protects Hong Kong’s legal system from any possible Mainland intrusion by conferring upon it an equal status to that of the Mainland, no less and no more. Importantly, it does not confer any primary rights on either system. The 'One Country, Two Systems' doctrine separates the jurisdictions, while still allowing them to negotiate on how they should interact. This arrangement does not create any positive or affirmative powers on one system as opposed to the other. It simply recognises their equal status without depriving either system of its jurisdiction according to its own law.

Mutual Legal Assistance between Jurisdictions

The degree to which different jurisdictions assist one another in criminal law matters varies. There is a wide spectrum of legal interaction between any two systems, and the exact location in the spectrum where their interaction takes place depends on a variety of factors. The most important among them are the nature of their political systems, the law and legal systems that apply, confidence and trust in each other's systems, and above all, the practical necessity of dealing with each other. The more inherently different their political and legal systems, the less confidence one system will have in the other and the more difficult it will be for the parties to co-operate with each other. Given the fundamental differences between the political and legal systems in the Mainland and Hong Kong, the conclusion and operation of a rendition agreement is bound to be a difficult and tortuous process.
International practice has shown that where two systems share the same political tradition and have full confidence in the fairness and effectiveness of the other system, the two parties tend to co-operate freely, fully and mostly importantly, informally. On the other hand, where one party has no confidence in the fairness and effectiveness of the other party’s system, the co-operation between the two tends to be formal and partial. Any agreement will have to be carefully negotiated with a clearly delineated scope of rights and obligations.

Typically, the party with the stronger bargaining power prefers a flexible approach and seeks to deal with issues informally or administratively. That is, to use Lu Ping’s words, the Mainland’s preference is to handle the issue on a ‘case-by-case basis’. The weaker party, on the other hand, tends to prefer a carefully written agreement with its terms ‘cast in stone’, to use the words of the DPP in Hong Kong. It is to the benefit of the weaker party to insist on formality and regularity. It is clear that the SAR government needs to reach an agreement with the Mainland on both jurisdictional matters and matters concerning the rendition of criminal suspects. Such an agreement should be formalised, with specific obligations and equally specific exceptions.

China’s International Extradition Regime

China signed its first extradition agreement in 1993 with Thailand. By 1998 China had entered into extradition agreements with seven countries: Belarus, Bulgaria, Kazakhstan, Mongolia, Romania, the Russian Federation and Thailand. The structure and substance of each of the agreements are the same or very similar.

There are a number of restrictions on extradition, which are expressly provided for in the treaties China has entered into. One of them is the political offence exception. This exception remains a ‘hot issue’ in extradition law, but it has been expressly accepted by China. Under the treaties signed by China, a political offence is a bar to extradition to or from China. As it happens, counter-revolutionary offences have been replaced by offences endangering state security in China’s 1997 Criminal Law Amendment, partly for the purpose of strengthening China’s co-operation with the international community in extradition and other criminal matters.

Another important exception relates to the extradition of nationals. Following the civil law tradition, China refuses to extradite its own nationals to a foreign country to face criminal trial. Correspondingly, China will not request a foreign national to be extradited to the Mainland to face a criminal trial. It should be noted that, within the meaning of these treaties, it is clear that China means the Mainland, and Chinese national means Mainland resident.

The death penalty has proven to be the most controversial issue during treaty negotiations. All foreign parties involved in such treaties with China have insisted on making the possible application of the death penalty a bar to extradition in the agreements. China’s position, however, has consistently been firm in excluding the death penalty from the list of exceptions to extradition.

While China has been consistent in ensuring that the death penalty exception is not stated in the treaties, it has nonetheless been flexible in accepting other less formal mechanisms to facilitate the demands of foreign parties to control the use of the death penalty. In other words, although China has rejected the death penalty exception in the treaties, at the same time it has been willing to give assurances at a less formal level that the death penalty would not be applied after extradition. China has agreed to compromise its position as long as the death penalty is not stated as a formal bar to extradition. A treaty can be silent on the death penalty exception but still state that an extradition request should be rejected if the extradition contravenes the legal provisions of the requested party. The treaty with Russia follows this model. Alternatively, the parties can make a separate statement declaring that, where the offence for which extradition is requested is punishable by death under the law of the requesting country, the requesting party shall respect the law of the requested party and both parties shall negotiate a solution mutually acceptable. The extradition treaties with Belarus and Romania follow this model.

Where extradition is achieved through negotiation without a treaty, whether the extradited suspect can be sentenced to death depends upon the position of the requested country and subsequent negotiations. A few suspects have been extradited to the Mainland from some East Asian and South East Asian countries without the assistance of treaties and some of them have been sentenced to death. One notable exception is a hijacker extradited from Japan in 1989. The suspect was extradited without the assistance of a treaty. He was sentenced to 8 years’ imprisonment — very lenient by Chinese standards. The lenient sentence was said to have been a pre-condition imposed by the Japanese authorities in return for the extradition.

Rendition of Criminal Suspects between the Mainland and Taiwan

The Mainland has been able to reach a rendition agreement with Taiwan for the transfer of illegal immigrants and criminal suspects. For very obvious reasons, the Mainland does not have a treaty with Taiwan but the rendition agreement deals with much the same
issues as the formal extradition treaties China has signed. The Taiwan experience provides an example, which Hong Kong may refer to as a basis for determining the nature and scope of a local rendition agreement with the Mainland.

In 1990, the Red Cross Associations from both sides of the Taiwan Straits, which have been used from time to time as informal representatives of the two governments for the purpose of making contact, reached a landmark agreement on the Island of Quemoy, referred to as the Quemoy Agreement (the Agreement). It is a short rendition agreement, which stipulates the principles, locations and procedures of rendition and the offenders to whom the Agreement applies. The Agreement states that 'humanitarian spirit' and 'safety and convenience' are the guiding principles. It is applicable to criminal suspects, convicted offenders and illegal immigrants.

The operation of the Agreement proved successful in the two years following its implementation. Several groups of illegal immigrants were sent back to the Mainland and a few high profile criminal suspects were returned to the Mainland to face trial. However, problems began to surface when both sides had to deal with the issue of aircraft hijacking from Mainland to Taiwan. A crucial issue related to the scope of the Agreement: did the Agreement apply to the offence of hijacking or not?

Direct dialogue between Taiwan and the Mainland took place in Singapore in April 1993. These negotiations were conducted by two newly established non-governmental organisations from each side respectively. Representing the Mainland was the Association for Relations Across the Taiwan Straits (ARATS). Representing Taiwan was the Straits Exchange Foundation (SEF). In negotiating the matter of hijacking and the possible rendition of hijackers, Taiwan insisted on exercising jurisdiction over the offence of hijacking on the grounds that such offences took place in both places and thus, under international law, Taiwan was entitled to prosecute. The Quemoy Agreement, according to Taiwan, was not specific on what crimes were covered and because of the political significance of hijacking and Taiwan's concern over its jurisdiction, the rendition of hijackers had to be treated differently. It was said that there should be a formal agreement before there could be rendition. In essence, Taiwan was demanding that the Mainland recognise its lawful jurisdiction in criminal matters. Taiwan further insisted that, in any future rendition agreement, a suspect would not be returned if the offence concerned was political, was punishable by death, the case was in judicial process, or the offender was a Taiwanese 'citizen'.

After tense negotiations, a tentative agreement was reached in August 1994, which has yet to be approved by Taipei and Beijing. It is clear, however, that the Mainland has made major concessions. The new agreement was originally intended to be supplementary to the Quemoy Agreement, with a narrow focus on the offence of hijacking. But, at the insistence of Taiwan, the supplementary agreement on the rendition of hijackers is also made applicable to all other offences, thus effectively replacing the Quemoy Agreement. According to the new agreement, there will be no express 'political offence exception', but the requested party is allowed to refuse a rendition request if, in 'special circumstances', the offence is 'closely related' to the requested party or its 'interest is seriously affected' by the offence. Otherwise, the party holding the suspect will surrender the suspect after appropriate investigation. It appears that the new agreement, even though it has not been approved, is in actuality governing the rendition of suspects across the Taiwan Straits. Another major concession made by the Mainland relates to the 'extradition' of 'citizens' from one side to the other to face criminal trial. While both sides have agreed that the 'citizen exception' should not be referred to in the agreement, they nevertheless agreed that the requested party has the right to determine whether its 'citizens' should be 'extradited' to the other side.

One Country as Form, Two Countries as Substance

The key to interaction between two legal systems is not state sovereignty but the independence of each system. That is, the legal sovereignty of each system. Hong Kong is clearly within the 'One Country' and this is simply no longer an issue. How the 'Two Systems' can survive, and how they should interact, is the overriding question. The substance of mutual legal assistance in general, and extradition — or rendition — in particular, in a domestic context is not necessarily different from that in an international context. Such assistance will be the subject of an agreement between two jurisdictions arrived at through a process of negotiation and agreed upon by both parties. There is no inherent substance in any extradition agreement, international or otherwise. The substance is negotiable depending upon necessity and the parties' political will and political skill. No one party should impose its will on the other. The Mainland's rendition agreement with Taiwan is not in substance different from the extradition treaties China has signed with other foreign countries. The only question is what are the terms that should go into a rendition agreement between Hong Kong and the Mainland?

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「一國兩制」：
香港與中國大陸能否就移交
罪犯問題達成協議？

傅華玲博士探討香港與中國大陸就移交罪犯事項
達成協議過程中涉及的一些問題

近「大富豪」張子強及其黨羽的審訊，
以及涉嫌槍斃周蔣生的張繼顯案有關的李
育賢即將受審，引起了廣泛及激烈的爭論，
其中一項議題是香港與中國大陸是否有需要
及有可能正式達成移交罪犯協議。

《基本法》與香港的新主權
香港特別行政區及「一國兩制」原則的誕
生，對於中國這個中央集權制國家內的司法
管轄權的分佈帶來了根本性的改變，亦代表
著我們要為一個全新的憲制環境下對各種司
法管轄權重新作詮釋。中國仍維持唯一的
政治主權，但其下卻存在兩個獨立且對等的
法律主權及司法管轄權。它們各自有着本
身的法律及法理，建基於其各自獨有的政治
環境及法律文化。與此同時，我們並找不到
像聯邦制那樣一個中央司法管轄權。這
即是說，中國同時並存有兩個不同的刑法。

儘管中國刑法像很多其他中國大陸法律一樣
訂明適用於中國境內及所有中國公民身上，
但清楚的是，中國刑法實際上只是中國內地
的法律。香港作為特別行政區，並不適用中
國刑法所指的「法域」。

在過去十年，中國大陸不少學者對區域層
面上的法律衝突問題進行研究。這些問題
的解決方法，必須以居住地而非國籍為基
礎。中國的公民由中國內地及香港特別行政
區居民組成。但實際上而言，解決的關鍵不
是某人是否中國公民，而是他／她是何種中
國公民。一名香港特別行政區居民固然是中
國公民，但基本上他／她仍受香港特別行政
區居民原則上，當他／她並非身處中國大陸
時，他／她沒有義務遵守中國刑法。對於
中國刑法只適用於中國大陸及其居民，因此
就該法律而言，中國公民不應包括香港
特別行政區居民。

台灣的經驗提供了一個
好的實例，而香港在考慮
與中國大陸間的移交協議
的性質與範圍時，
可以台灣的例子為借鏡

《基本法》賦予香港法制及中國法制不同的
地位，從而保障香港法制免受中國大陸
的侵蝕。重要的是，《基本法》並沒有對中
國法制或香港法制賦予任何較之優越權利。

「一國兩制」的原則把中國兩個司法管轄地
區分開，但同時容許兩地自行商議如何互相
協商。這種安排在沒有特別兩個制度各自在
合法司法管轄權的情況下，確定了它們的等
等地位，並沒有在兩個制度之間製造任何對
立的實質。

司法管轄地區之間的法律互助
不同的司法管轄區在法刑事上對於其他地
區提供的協助，程度各有不同，二種法制當
的互助範圍及程度可以非常遙遠，而決定這
實質範圍及程度的要素非常多元，當中主要的包
括兩地政策的性質、適用的法律及法制、兩
個制度內的互相信賴、以及一個最重要的因
素，就是互相合作的實際性質。兩個制
度的政策及法制的分別愈大，它們的互信
度便愈低，雙方亦愈難合作。基於中國
大陸與香港的政制及法制的有根本性的分
別，兩地達成並執行移交罪犯協議的過程，
必定會相當困難和曲折。

國情實質證明，當兩個制度有著相同的政
治取向，而各自對另一制度的公平及互
效性可以實現時，雙方會達成協議。雙方
在這方面的合作可以較容易達成。雙方
若任何一方對另一制度的公平性及互信
不遺餘力，雙方的合作將會在鋼索上及不
安全，任何違反亦須謹慎地進行，而任何合作
協議均應清楚界定雙方權利和義務。

典型的情況是，具有較好法律條件的一
方，會較輕易地改善有利條件。香港
希望採用形式或以行政法規形式去
定義該法律的性質。引用法律
論，中國大陸較高法律級別情況處理
問題。另一方面，要求對於較弱的一方，通
常較輕易訂立一份詳細的協議，把各
項條款「寫在紙上」（引用香港刑事檢察
員所用的字眼），爭取做得合理及達成規
範，對較弱的一方是有益的。顯然地，在司
法管轄事宜及引渡疑案事宜上，香港特別政
府無須與中國大陸達成正式協議，該
協議亦適當列舉所有協議及例外情況。

中國的國際引渡
中國的首份引渡協議，乃於 1993 年與泰國簽
訂，直至 1998 年，中國已與白俄羅斯、保
加利亞、哈薩克、蒙古、羅馬尼亞、俄羅斯
聯盟及柬埔寨等七個國家達成引渡協議，而這
些協議的結構和實質內容大同小異，基本上
是完全一樣。

中國簽訂的有關條約中，均有明確列出種
種對引渡的限制。限制之一是政治罪行的例
外情況。這例外情況仍是引渡法上的三個

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中國大陸與台灣之間的移交疑犯安排

中國亦與台灣在移交刑法典中刑法條款的規定上達成協議。基於明確的原因，中國沒有將相關議案簽署，而有關協議所處理的問題，與中國曾於1994年提交的引渡條約所處理的並沒有很大分別。引渡的經驗提供了一個好的範例，而香港在考慮與中國大陸之間的移交協議的性質與範圍時，可以台灣的例子作為借鏡。

在過去，台灣海峽兩岸的紅十字會組織，曾經代表兩岸政府進行正式接觸。於1990年，兩岸紅十字會組織在金門島達成歷史性協議，一般稱之為金門協議。它是一個簡短的移交犯人協議，當中規定移交犯人的原則（該協議指出，兩指移交原則是「人文精神」及「尊重人的尊嚴」）

引渡協議本身並不存在著固有的內容。協議的實質內容，是由雙方因應實際需要及本身的政治理念及智慧而相互協商從而產生出來的。

金門協議實為兩岸關係中的一個重要里程碑。它在實質上保障了雙方的權益，亦為雙方的關係奠定了一個良好的基礎。金門協議的實施為兩岸關係的發展開闢了一條新的道路，對促進兩岸的關係及發展具有重要的意義。