<table>
<thead>
<tr>
<th><strong>Title</strong></th>
<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>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Author(s)</strong></td>
<td>Fu, H</td>
</tr>
<tr>
<td><strong>Citation</strong></td>
<td><em>Hong Kong Lawyer</em>, 1999, v. Jan, p. 51-53 (English) and p. 54-55 (Chinese); 香港律師, 1999, v. Jan, p. 51-53 (English) and p. 54-55 (Chinese)</td>
</tr>
<tr>
<td><strong>Issued Date</strong></td>
<td>1999</td>
</tr>
<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/44889">http://hdl.handle.net/10722/44889</a></td>
</tr>
<tr>
<td><strong>Rights</strong></td>
<td>This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.</td>
</tr>
</tbody>
</table>
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 Administration 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's 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 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 party, 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 ‘extraded’ 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?

Dr Hualing Fu
Assistant Professor, Faculty of Law,
The University of Hong Kong
封面專題

「一國兩制」：
香港與中國大陸能否就移交
罪犯問題達成協議？

在過去十年，中國大陸不少學者曾對區域
層面上的法律衝突問題進行研究。這些問題
的解決方法，必須以居住處為重不國籍為基
礎。中國的公民由中國內地及香港特別行
政區組成。但實際上而言，決定的關鍵不
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 / 她仍是香港特別行政
區居民。原則上，他 / 她不應具有中國大陸
籍。 }

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。

一國兩制」的原則把中國兩個司法管轄地
區分開，但同時容許兩地之間各自權利
協調。這種安排沒有將兩個獨立自成
不司法管轄權的情況下，確定了它們的平
等地位，並沒有在兩個制度之間製造任何對
立的實體。

司法管轄地區之間的法律互助
不同的司法管轄地區在刑事事實上對其他地
區提供的協助，程度各有不同。兩個法域制
的互助範圍及程度可以非常迥異，而決定補
償範圍及程度的元素非常多，當中主要包括
兩地管轄的性質、適用的法律及管轄、兩
個法律制度的互動程度、以及一個確定的
因素，就是兩地制的實際影響。兩地制
的制約及制約的分別愈大，它們的互助程
度愈嚴格，雙方亦會更難合作。樂於中國
大陸與香港的法制及法制有著根本性的分
別，兩地達成和執行移交罪犯協議的過程，
必定會相當困難而曲折。

大陸實務證明，當兩個制度有著不同的政
治傳統，而各自對同一制度的公平及有
效性充滿信心時，雙方會坦誠地、無保留地
及（最終的）無拘束合作。若任何一方對另一
方制度的公平及有效性沒有信心，雙方的合作會相對困難及不齊全，任何談判均須謹慎地進行，而任何合作
協議均須清楚界定各方的權利及義務。

典型的情況是，具有較好評價條件的一
方，會極喜歡使用富有彈性的法律辦法，希
望能夠形成正式或形成行政制度規定。引用同
平的協議下，中國大陸較為普遍接受這種情況
處理問題。另一方面，領航力量弱的一方，通
常較喜歡訂立一份具細部條文的協議，把各
項條款「細列」（或引用香港刑事檢控專
員所用的字眼）爭取最低形式及最簡
單，對較弱的一方是有利的。明顯地，在司
法管轄事宜及移交罪犯事宜，香港特別行
政區政府需要與中國大陸達成正式協議，該
協議亦應詳細列出各項義務及例外情況。

中國的國際引渡
中國的首要引渡協議，乃是於 1993 年與泰國簽
訂。直至 1998 年，中國已經與白俄羅斯、保
加利亞、哈薩克、蒙古、羅馬尼亞、保羅
斯聯盟及芬蘭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，或甚是
完全一樣。

中國簽訂的有關協議中，均有明確列出某
種對引渡的限制。限制之一是政治罪行的例
外情况。這例外情況仍是引渡法的一部分。
引渡協議本身並不存在著固有內容。協議的實質內容，是由雙方因應實際需要及本身的政策理念及智慧一起商議而從而產生出來的。

金門協議實為兩岸方之相互商議。在該段時間，構成協議基礎的協商過程，從國家層面上看，協議的構築過程中，協商的內容，是依據雙方的相互協商及外交溝通而產生的。在實際運作上，協議的實質內容，是由雙方因應實際需要及本身的政策理念及智慧一起商議而從而產生出來的。當金門協議協商在不同時期後，協議的實質內容，是由雙方因應實際需要及本身的政策理念及智慧一起商議而從而產生出來的。