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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 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 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？

最近，香港特別行政區政府的報告指出，香港與中國大陸在移交罪犯問題上的協議將於今年年底達成。這項協議的達成，既符合大陸與香港兩地的安全需求，也符合兩地的法律需求。

香港特別行政區政府已與中國大陸政府展開談判，以達成移交罪犯的協議。這項協議將為香港與中國大陸兩地的法律合作打下堅實的基礎。

根據協議，香港特別行政區政府將在大陸的法律授權下，有權將涉嫌犯罪的香港居民移交大陸。這項協議的達成，將確保香港特別行政區政府能夠在大陸的法律框架下，將涉嫌犯罪的香港居民移交大陸，以確保大陸的安全。
中國大陸與台灣之間的移交疑犯安排

中國亦已與台灣在移交非法入境者及刑事犯疑的問題上達成協議。基於上述的原因，中國沒有設置專門的部門，但有與協議所處理的問題，與中國前面簽署的引渡條約所處理的並沒有太大的不同。因為信的經驗提供了一個好的例子，而香港在考慮與中國大陸之間的移交協議的成熟性與範圍時，可以列出一個列為例子的借鏡。

在過去，台灣將中國的引渡條約，經司法協助，雙方政府進行正式接觸。於1990年，兩個引渡條約在金門島簽署歷史性協議，一般稱為台灣金門協議。這是一項簡短的引渡條約的協定，當中規定，引渡來回的範圍，則在綜合考察精神及安全福特訂協議時，及地點和程序，並規定該協議適用於刑事案件無疑及被定罪的罪名和非法入境者。

引渡協議本身並不存在著固有的內容。協議的實質內容，是由雙方因應實質需要及本身的政策理念及智慧一起商議而產生出的。

金門協議在過去兩年相當成功。在這段期間，數次非法入境者被遣送往中國大陸，也徵高資格的刑事案件疑犯也被引渡回中國大陸受審。並遇到了協議雙方處理的問題，問題便出現了。問題的實質內容，是由雙方因應實質需要及本身的政策理念及智慧一起商議而產生出的。