One Country and Two Systems: Will Hong Kong and the Mainland Reach an Agreement on Rendition?

Dr Hualing Fu takes a look at some of the issues involved in the reaching of an agreement between Hong Kong and the Mainland over rendition

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 treatises, 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？

傅華伶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

最近「大富豪」張子強及其黨羽的審訊，以及涉嫌與德福花園五屍命案有關的李育輝即將受審，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，亦代表著我們要在一個全新的憲制背景下對各種司法管轄事項重新作詮釋。中國仍維持單一的政治主權，但其下卻存在兩個獨立及對等的法律主權或司法管轄範圍。它們各自有著本身的法律及法制，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度一般的一個中央司法管轄權。這即是說，中國同時並存著兩套不同的刑法。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，並不屬於中國刑法所指的中國「法域」。

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*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，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，當他／她並非身處中國大陸時，他／她沒有義務遵守中國刑法。鑒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》賦予香港法制跟中國法制絕對同等的地位，從而保護香港法制免受中國大陸侵擾。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優越權利。「一國兩制」的原則把中港兩個司法管轄地區分隔，但同時容許兩地自行商議如何互相協調。這種安排在沒有剝奪兩個制度各自的合法司法管轄權的情況下，確認了它們的對等地位，並沒有在兩個制度之間製造任何對立的實權。

司法管轄地區之間的法律互助

不同的司法管轄地區在刑法事宜上對其他地區提供的協助，程度各有不同。兩個法制間的互助範疇及程度可以非常遼闊，而決定確實範疇及程度的因素非常多，當中主要的包括兩地政制的性質、適用的法律及法制、兩個制度間的互相信賴、以及一個最為重要的因素，就是互相合作的實際必要性。兩個制度的政制及法制的分別愈大，它們的互信程度便愈低，雙方亦從而更難合作。鑒於中國大陸與香港的政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，必定會相當困難和曲折。

國際實務證明，當兩個制度有著共同的政治傳統，而各自對另一方制度的公平性及有效性充滿信心時，雙方會坦誠地、無保留地及（最重要的）無拘束地合作。另一方面，若任何一方對另一方制度的公平性及有效性沒有信心，雙方的合作會傾向於拘謹及不完全，任何磋商均須謹慎地進行，而任何合作協議均須清楚界定雙方的權利和義務。

典型的情況是，具有較好議價條件的一方，會較喜愛使用富有彈性的方式辦事，希望不拘形式或以行政手法處理問題。引用魯平的說話，中國大陸較喜愛按個別情況處理問題。另一方面，議價能力較弱的一方，通常較喜愛訂立一份經細心草擬的協議，把各項條款「鑄在石上」（引用香港刑事檢控專員所用的字眼）。爭取做足形式及遵從規範，對較弱的一方是有利的。明顯地，在司法管轄事宜及引渡疑犯事宜上，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

中國的首份引渡協議，乃於 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、俄羅斯聯盟及泰國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，甚或是完全一樣。

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一個

「熱門辯題」，但中國已明確接受該情況。根據中國簽訂的各份條約，政治罪行均被列為禁止將有關人士引渡進入或離開中國。中國於 1997 年對刑法作出的修訂中，反革命罪已被危害國家安全罪取代，相信其中一個用意是加強中國與國際社會間在引渡及其他刑事問題上的互相合作。

另一個重要的例外情況，是關於國民的引渡。中國一向奉行羅馬（大陸）法系的傳統，拒絕引渡其國民到另一國家接受刑事審判。相應地，中國亦不會要求海外國民被引渡至中國大陸接受刑事審判。應注意的是，在這些條約中，「中國」顯然是解釋為中國大陸，而「中國國民」是指中國大陸居民。

在商議條約內容的過程中，最受爭議的是死刑的問題。所有與中國商議條約的國家，均曾爭取在協議內規定，若有關犯人可能被判死刑，他 / 她便不可被引渡。但中國一直堅持，死刑不可包括在引渡的例外情況之列。

然而，中國縱使在這問題上態度強硬，但亦曾彈性地接受其他較非正式的機制，以順應其他國家作出的管控死刑的要求。換句話說，儘管中國拒絕把死刑列為例外情況寫進條約內，但中國亦願意在較為非正式的層面上作出保證，在引渡後不會施行死刑。只要死刑不被正式列為禁止引渡，中國便同意作出實質讓步。條約可對死刑的例外情況隻字不提，但同時仍可訂明，若有關引渡觸犯被要求引渡的國家的法律，則引渡要求將被拒絕。與俄羅斯達成的條約，便是以此為模式。另一做法是，雙方可另行作出聲明，規定若要求引渡犯人所犯的罪行根據作出要求國家的法律可令犯人被判死刑，作出要求的一方將尊重被要求的一方的法律，而雙方將商議一個他們均能接受的解決方法。中國與白俄羅斯及羅馬尼亞簽訂的條約，便是以此為模式。

當有關方面在沒有條約的情況下透過商議達成引渡安排的話，被引渡的疑犯能否被判死刑，就視乎被要求的國家的立場及隨後的商議。以往曾有疑犯在沒有條約的協助下由一些東亞及東南亞國家被引渡至中國大陸，他們當中有一些曾被判死刑。一個惹人矚目的特殊個案，是一名於 1989 年被引渡離開日本的劫機者。這名疑犯亦是在沒有條約的協助下被引渡。但他只被判以八年監禁，這以中國的標準來說是相當寬鬆的判刑。據說，這判刑是由日本當局施加，以作為引渡該名疑犯的交換條件。

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案疑犯的事宜上達成協議。基於明顯的原因，中國沒有與台灣簽訂條約，但有關協議所處理的問題，與中國曾經簽訂的引渡條約所處理的並沒有大分別。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。

在過去，台灣海峽兩岸的紅十字會組織，經常代表兩岸政府進行非正式接觸。於 1990 年，兩個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。它是一份簡短的移交犯人協議，當中規定了移交犯人的原則（該協議指明，兩項指引性原則是「人道精神」及「安全和合宜」）、地點及程序，並規定該協議適用於刑事案疑犯、被定罪的罪犯和非法入境者。

引渡協議本身並不存在著固有的內容。協議的實質內容，是由雙方因應實際需要及本身的政治理念及智慧一起商議從而產生出來的

金門協議實施首兩年相當成功。在該段期間，數批非法入境者被遣返中國大陸，而數名高姿態的刑事案疑犯也被引渡回中國大陸受審。可是，到了協議雙方處理由中國至台灣的騎劫客機事項時，問題便出現了。關鍵的問題在於金門協議的範圍 — 它適用於劫機罪行嗎？

於 1993 年 4 月，中國大陸與台灣在新加坡展開了直接對話。由兩個新近組成的非政府機構分別代表兩岸政府進行磋商：代表中國大陸的是海峽兩岸關係協會，而代表台灣的是財團法人海峽交流基金會。在劫機及移交劫機者的問題上，台灣堅持在劫機罪行上行使其司法管轄權，理由是該些罪行同時在中國與台灣兩地發生，因此根據國際法，台灣有權對劫機者提出檢控。台灣方面指出，金門協議沒有明確規定包括何種罪行，而鑒於劫機罪行的政治含義以及台灣對於其司法管轄權表關注，故此移交劫機者的問題需要特別處理。有人指出，在移交犯人前，應該有著正式的協議。簡而言之，台灣要求中國大陸承認其刑事司法管轄權。台灣更堅持，以後任何移交罪犯的協議均須規定疑犯在下列情況下不能被移交：有關罪行乃政治罪行、觸犯有關罪行可被判死刑、案件的司法程序正在進行、或罪犯是台灣「公民」。

雙方經過激烈的商議，於 1994 年 8 月達成了初步協議，而該協議仍有待兩岸政府正式確認批准。但清楚的是，中國大陸在上述問題上作出了很大的讓步。新協議的原意是作為金門協議的補充，並只集中處理劫機罪行。但在台灣極力堅持下，補充協議的範圍被擴展至適用於所有其他罪行，因此實際上取代了金門協議。補充協議不會訂明「政治罪行例外情況」，但在「特別情況」下，若有關罪行與被要求一方有「密切關係」或「嚴重影響〔被要求一方的〕利益」的話，被要求一方可拒絕移交罪犯的要求。除了這些情況外，經過適當的調查後，持有疑犯的一方將把疑犯移交。雖然新協議未被確認批准，但實際情況顯示它正在生效，管轄著海峽兩岸之間的移交疑犯事宜。

中國大陸作出的另一主要讓步，就是把一方的「公民」「引渡」至另一方受審。雙方曾經同意不把「公民」例外情況寫進協議內。但他們亦同意，被要求一方有權決定其「公民」應否被「引渡」至另一方境內。

一國為名，兩國為實

兩個法制間互相合作的關鍵，不在於國家主權，而是在於每個法制的獨立性，即是說法制的法律主權。香港是在「一國」之內，這點已不容置疑。現時的主要問題是「兩制」如何並存及互相合作。不論是整體上的法律互助，抑或特別針對引渡或移交罪犯而言，這些問題的實質內容在國內範疇與在國際層面上不一定有分別。互助的問題，是要由兩個有關的司法管轄區經過磋商及達成協議而落實進行。事實上，不論在國際層面上與否，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一起商議從而產生出來的。任何一方不應把自己的理念強加於另一方身上。中國大陸與台灣達成的移交罪犯協議，在實質上與中國跟其他國家簽訂的引渡條約並沒有分別。現在唯一的問題是，香港與中國大陸之間的移交罪犯協議，應該包括什麼條款？

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