司法文书和司法外文书的公约》(即1965年《海牙公约》)和《关于承认和执行外国仲裁裁决的公约》(即1958年《纽约公约》)的缔约国，而此两公约都由英国适用于香港，所以1997年7月以前香港和内地的民商事司法文书的相互送达和仲裁裁决的相互承认和执行，可根据此两公约进行。虽然在1997年7月后，此两公约仍适用于香港与有关外国之间，但却不能再适用于香港特别行政区与中国内地之间，因为两地已属同一国家。在这种情况下，两地有需要通过磋商，达成具有类似此公约内容的、关于有关司法协助安排的协议，然后各自立法或补充现行法规，以实施有关安排。

三（甲）

根据普通法的原则，[53] 香港法院的刑事管辖权，只限于发生在香港区域以内的犯罪行为；但某些个别成文法例的条文，对法院作出了额外的授权，使它可以审理某些指定的、在香港区域以外发生的犯罪行为，如破坏飞行中的飞机。[54] 换句话说，除了例外的个别规定，一般来说，香港的刑法只适用于香港区域内的犯罪行为。[55]

虽然香港法院的刑事管辖权范围不算宽阔，但由于世界各国

(53) *Halsbury's Laws of England*, 4th ed., vol. 11, pp. 53, 60, 63.

(54) 《航空保安条例》(香港法例第494章)，第9条。

(55) 刑法的适用范围与法院的刑事管辖范围是相关的：如果一个国家的刑法适用于某犯罪行为，一个必然的结果便是该国法院对该行为享有管辖权。参见M. C. Bassiouni and V. P. Nanda (eds.), *A Treatise on International Criminal Law* (Springfield: Thomas, 1973), vol. 2, p. 9.

法院刑事管辖权的界限有不少重叠之处，所以有可能出现这种情况：即一个人涉嫌作出了香港法院本来有权管辖的犯罪行为，但他在香港被检控之前已经在外国法院接受审讯，并由该外国法院作出判决。对于这种情况，适用于香港的普通法原则规定，只要有关外国法院是对被告行使着有效的管辖权，则无论被告被该法院判定有罪或无罪，都不可以在香港就同一罪行进行审判。[56]

正如在民事方面的司法豁免权一样，外国的外交代表在刑事方面也享有外交特权和豁免权。[57] 另一点值得注意的是驻港英军在1997年前在刑事方面的地位。[58] 这些驻军不但受香港一般法律约束，而且需要遵守特别适用于军队的军事法。[59] 军事法的内容主要是关于军队的行政和纪律的规范。负责执行军事法的法院是军事法院，军事法院不但可审判违反军事法的行为，也可审判军人触犯一般（非军事法的）刑法的行为。但关于后者，香港的法院同时享有管辖权，下列情况除外：[60] 犯罪行为是在军人执行其职责时发生的；军人对于军队的其他成员犯罪；或军人对于军

(56) *Halsbury's Laws of England*, 4th ed., vol. 11, p. 63; W. S. Clarke, "Double Jeopardy, Overlapping Jurisdiction and the Attorney-General of Hong Kong" (1986) 16 *Hong Kong Law Journal*, p. 90 at p. 92; M. L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969), ch. 12.

(57) 《国际组织及外交特权条例》(香港法例第190章)，第6章。在1997年7月后，根据《基本法》第18条适用于香港特别行政区的中华人民共和国全国性法律，包括《外交特权与豁免条例》和《领事特权与豁免条例》。

(58) 关于英军在英国的宪法地位，可参阅S. de Smith and R. Brazier, *Constitutional and Administrative Law* (Penguin Books, 6th ed. 1990), ch. 11; *Halsbury's Laws of England*, 4th ed., vol. 41。关于一个国家驻别国军队的刑事法律地位，可参阅Bassiouni and Nanda，同注(55)，vol. 2, pp. 119, 124。

(59) 例如关于陆军的英国《陆军法》(Army Act 1955)（其中部分适用于所有殖民地）、关于空军的《空军法》(Air Force Act 1955)（其中部分适用于所有殖民地）。

(60) UK Forces (Jurisdiction of Colonial Courts) Order 1965 (1965 S. I. No. 1203).

队或其成员的财产犯罪。

正如在民事方面，香港与其他国家或地区在刑事上也有司法互助的关系。[61] 例如关于罪犯的引渡[62] 方面，大部分英国与其他地方的引渡关系都在1997年前适用于香港，[63] 并将在1997年后继续适用。[64] 一般的做法是，由一国（或地区）就被其指控为犯罪（或已判刑）的、而身在另一国（或地区）的人，向这第二国提出引渡请求，第二国的司法或其他有关机关审查这个要求，决定是否批准引渡有关人士。关于引渡问题的国际条约，[65] 通常明文规定对那些罪行可请求引渡，[66] 及其他引渡条件，例如：(1) 有关罪行必须是发生于请求引渡国家；(2) 有关罪行不但是请求引渡国家的法律下的犯罪行为，而且根据被请求引渡国家的法律，它

(61) 刑事司法协助的范围包括刑事诉讼程序中的各项步骤，如案情的侦查、案犯的缉捕、诉讼文书的送达、证据的收集以至判决的执行。可参阅 Bassiouni and Nanda，同注 (55)，vol. 2，pp. 189—203。

(62) 引渡的意义是，"一国应他国的请求，将在其境内被该外国指控为犯罪的或已判刑的人移交给该外国审判或处罚"。参见《中国大百科全书·法学》，北京：中国大百科全书出版社，1984年，第705页；M. C. Bassiouni, *Criminal Law and Its Processes* (Springfield: Thomas, 1969), p. 542. 关于引渡问题，可参阅 Bassiouni and Nanda，同注 (55)，vol. 1，p. 58；Bassiouni，同本注，pp. 545—554。

(63) *Survey of Extradition and Fugitive Offenders Legislation in Commonwealth Jurisdictions* (London: Commonwealth Secretariat, 1977), p. 23; Bassiouni and Nanda，同注 (55)，vol. 2，p. 328.

(64) 实施这些移交逃犯安排的香港本地立法是在1997年3月通过的《逃犯条例》(1997年第23号条例)。另外两部关于刑事司法协助的立法是《刑事事宜相互法律协助条例》(1997年第87号条例)和《移交被判刑人士条例》(1997年第45号条例)。

(65) Bassiouni，同注 (62)，pp. 547—554。

(66) 例如列出有关罪名，或规定引渡适用于可判刑若干时间（如一年或以上监禁）的罪行。参见 Bassiouni and Nanda，同注 (55)，vol. 2，p. 312；《逃犯条例》(同注 (64))，第4、2 (2) 条及附表1。

也是犯罪行为；(3) 如有关罪犯正就有关（即引渡请求所涉及的）罪行受被请求引渡国家检控或已就该罪行被审判，则可拒绝引渡，以避免双重检控；[67] (4) 政治犯一般不引渡；(5) 罪犯被移交请求引渡国后，该国只能就引渡请求中提出的罪名对该罪犯进行审判或处罚。

三（乙）

对于涉外刑事案件，《中华人民共和国刑法》的第一章中关于刑法的适用范围的条文，提供了一套比较完整的原则。总的来说，这些原则的精神，是以属地管辖原则为基础，并以属人管辖、保护管辖及普遍管辖等原则为补充，[68] 现可综合简述如下：

第一，如有人在中华人民共和国领域内犯罪，[69] 则不论他是中国公民或外国人（享有外交特权和豁免权的外国人除外），都适用《中华人民共和国刑法》，受中华人民共和国人民法院审判。[70]

第二，《中华人民共和国刑法》在中国领域外的适用性，要视

(67) Friedland，同注 (56)，pp. 390—6；Bassiouni and Nanda，同注 (55)，vol. 2，p. 320。

(68) 属地管辖原则反映于1997年3月修订后的《刑法》第6条，属人管辖、保护管辖和普遍管辖等原则分别反映于第7、8及9条。参见陈兴良主编：《刑法疏议》，北京：中国人民公安大学出版社，1997年，第35～36页，第78～83页。

(69) 根据《刑法》第6条，"犯罪的行为或者结果有一项发生在中华人民共和国领域内的，就认为是在中华人民共和国领域内犯罪。"

(70) 《刑法》第6条。根据《刑事诉讼法》第16条，该法也适用于外国人犯罪应当追究刑事责任的情况。

乎犯罪人是否中国公民。中国公民如在国外犯了中国《刑法》规定的罪，则无论有关行为按照当地法律是否可受处罚，这个公民仍可受到中国《刑法》和中国法院的管辖，除非有关罪行按中国《刑法》规定的最高刑为3年以下有期徒刑，则“可以不予追究”。[71]

第三，“外国人在中华人民共和国领域外对中华人民共和国国家或者公民犯罪，而按本法规定的最低刑为三年以上有期徒刑的，可以适用本法，但是按照犯罪地的法律不受处罚的除外。”[72]这便是“保护管辖”的原则。关于这点和上述的第二点，值得留意的是，在中国与外国法院享有双重管辖权的情况下，《中华人民共和国刑法》规定，即使有关罪犯的犯罪行为在国外发生并已经接受外国法院的审判，仍可在中国依照中国的刑法追究；但是在外国已经受过刑罚处罚的，可以免除或者减轻处罚。[73]

第四，针对国际犯罪问题，有些国际条约订有刑事条文；如果有关条约是中国已经缔结或参加的，则中国法院可就有关罪行使刑事管辖权及适用中国《刑法》。[74]这便是“普遍管辖”的原则，主要针对的是在中国以外犯了国际公约所规定的罪行后进入了中国的外国人。[75]

最后，关于中国与外国的刑事司法协助方面，《刑事诉讼法》作出了明文的规定。[76]

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〔71〕《刑法》第7条；关于对较轻罪行不予追究的规定，并不适用于中国国家工作人员和军人。

〔72〕《刑法》第8条。

〔73〕《刑法》第10条。

〔74〕《刑法》第9条。

〔75〕参见全国人大常委会法制工作委员会刑法室编著：《中华人民共和国刑法释义》，北京：法律出版社，1997年，第12页。

〔76〕《刑事诉讼法》第17条，这是该法在1996年3月修订时新增的条文。

三（丙）

关于香港特别行政区成立后内地与香港的刑事法律冲突，其中一个问题是中央驻港官员及军队在香港的刑事法律地位。根据上面关于民事上的外交特权和豁免权的讨论的同样原理，香港特别行政区内的中央派港官员不是外国外交使节，应不能享有刑事方面的特权或豁免权；至于驻港人民解放军的法律地位，则已详列于在1996年12月通过、并在1997年7月1日起根据《基本法》第18条适用于香港的《中华人民共和国香港特别行政区驻军法》。《驻军法》中关于香港特别行政法院和中国国家军事司法机关对驻军人员的司法管辖权的规定，在起草时参照和大致采纳了香港原有的关于驻港英军的司法管辖权的规定。举例来说，如果中国人民解放军驻港部队成员作出“非执行职务的行为，侵犯香港居民、香港驻军以外的其他人的人身权、财产权以及其他违反香港特别行政区法律构成犯罪的案件，由香港特别行政区法院以及有关的执法机关管辖”。[77]

一个比较复杂的问题就是关于同时涉及香港及内地的刑事案件两地的法院的管辖权和两地的刑法的适用性如何协调。由于近年来两地的关系日趋密切，这类案件的数目逐渐增加，这个问题

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〔77〕《驻军法》第20条。

已经引起了较多人的关注。[78] 根据《基本法》,[79] 香港特别行政区的法律渊源是《基本法》、香港原有法律（主要是普通法和香港立法机关制定的成文法）、香港特别行政区立法机关制定的法律和根据《基本法》第18条列于《基本法》附件三的"全国性法律"。《中华人民共和国刑法》并没有列于附件三，所以不适用于香港特别行政区。这部《刑法》本身也订明，[80]"除法律有特别规定的以外"，凡在中国领域内犯罪的，都适用此《刑法》。香港《基本法》中有关全国性法律在香港特别行政区的适用的条文，可理解为这些例外性的特别规定之一。[81]

更具体来说，香港特别行政区与中国内地的刑事法律冲突，可分为以下五种情况：

（1）有人在香港特别行政区作出行为，按特别行政区法律，该行为是一种罪行，按中国内地刑法也是罪行；

（2）有人在香港特别行政区作出行为，按特别行政区法律，该行为是一种罪行，按中国内地刑法，却不是罪行；

（3）有人在香港特别行政区作出行为，按特别行政区法律，该行为不是一种罪行，按中国内地刑法，该行为是一种罪行；

（4）有人在中国内地作出违反中国内地刑法的犯罪行为后，潜逃到香港；

（5）有人作出的犯罪行为，既可视为发生于香港及违反香港法律，也可视为发生于内地及违反内地的刑法。

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〔78〕 内地学者已经开始研究这个问题，可参见赵秉志、孙力："香港特别行政区与内地间互涉刑事法律问题研究"，《中国法学》，1993年第2期，第79页；赵秉志、赫兴旺，"中国内地与港澳特别行政区的刑事司法协助问题研究"，《法学家》，1995年第2期，第47页。

〔79〕 参见《基本法》第8、11、17、18、84条。

〔80〕 《刑法》第6条。

〔81〕 见《中华人民共和国刑法释义》，同注〔75〕，第8页；《基本法》第18条。

关于上述各种问题的处理，我认为基本原则应是：在香港特别行政区的人，不论是中国公民、外国人、香港居民、非香港居民，只有义务遵守香港特别行政区法律（包括其中的刑法），没有义务遵守中国内地刑法。因为正如上面所述，中国内地的刑法并不适用于香港特别行政区。从这个观点出发，《中华人民共和国刑法》对涉港案件的适用范围，可分以下三方面说明：

第一，这部刑法适用于所有在中华人民共和国领域内、除香港特别行政区以外的犯罪行为（但如一犯罪行为在特别行政区内发生，而它的结果在中国内地发生，这可视为中国内地的犯罪行为[82]）。

第二，这部刑法不适用于所有在中华人民共和国香港特别行政区内的犯罪行为（除非犯罪行为的结果在中国内地发生）。

第三，这部刑法中关于对中国境外行为的适用性的条文，[83] 在应用于香港居民（尤其是香港永久性居民）身份的中国公民时，是否应作出变通，值得进一步研究。

关于第二点，这似乎表示中国内地刑法在特别行政区的适用性还低于其在国外的适用性（即第三点），这是否有违主权原则？我认为不是的。香港特别行政区是中华人民共和国不可分割的一部分，但由于香港与中国内地是一个国家内的不同法律区域，所以两地有各自的刑法。因此，如果香港原有刑法中未有足够的规定去体现中国的主权原则和保障国家的利益，便应由特别行政区立法机关作出适当的修改和补充，以符合一国两制中"一国"的要求。在这方面，值得留意的是，《基本法》本身也明文要求香港特别行政区"自行立法禁止任何叛国、分裂国家、煽动叛乱、颠

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〔82〕 这是因为就跨地区性的"隔地犯"问题来说，《中华人民共和国刑法》第6条采用了行为地主义兼结果地主义的原则；参见《刑法疏议》，同注〔68〕，第79页。

〔83〕 主要是第7条。

覆中央人民政府”等等行为。[84]

根据这套观点，前述的第（1）和（2）类案件，应交由特别行政区法院根据香港法律全权审理，《中华人民共和国刑法》不适用于有关行为，中国内地的人民法院也不对这些案件行使管辖权。至于（3）类情况，则应完全不算是犯罪行为，无论香港法院或内地人民法院都无权予以管辖。

但对第（4）类情况如何处理？这种情况是有人在内地犯罪后逃至香港，另一个对称的情况是有人在香港犯罪后逃往内地（即1）或（2）类案件的一种可能发展模式）。关于前者，根据香港的法律，一般来说香港法院对有关罪犯不行使管辖权；关于后者，根据上面的观点，案件仍应适用香港法律及由香港法院处理，而非适用内地法律及由内地法院处理。所以在这两种情况下，便有必要在香港特别行政区及内地之间建立一种引渡或移交制度，确保在内地犯案后逃到香港的人得以移交内地有关人民法院审判，而在香港犯案后逃往内地的人得以移交香港特别行政区法院审判。我们不应因香港特别行政区是中国的一部分而否认引渡制度的需要。根据世界各地的法律实践，引渡不单存在于国与国之间，也存在于一个国家之内的不同法律区域之间，[85]虽然国际引渡与区际引渡的条件和程序，由于基于不同的政治和法律考虑，未必相同。[86]引渡是不同法域间刑事司法协助的其中一种形式，至于其他方面的刑事司法协助，香港特别行政区与中国内地之间当然也应加以发展。[87]

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(84) 《基本法》第23条。

(85) 可参考美国各州之间的引渡，这称为“rendition”，以别于“extradition”——主权国家之间的引渡。见 Bassiouni，同注（62），第565～573页。美国的州际引渡请求由被请求州的州长处理，而非主要由法院办理。

(86) 例如国际间不引渡政治犯的原则，未必适用于州际引渡。

(87) 参见《基本法》第95条。

关于前述的第（5）类案件，即一件刑事案件同时牵涉中国内地和香港特别行政区，例如犯罪行为在香港，但犯罪结果在内地发生，在这种情况下，中国内地人民法院可以根据《中华人民共和国刑法》审判当事人，香港法院也可以根据香港特别行政区法律审判当事人。这是所谓双重管辖权的问题。正如上面所指出，如有人已经就一犯罪行为在中国内地接受审判，按照现行香港法律，香港法院是不可以就同一行为再次审判当事人的，这是个相当合理的、保障个人自由和权利的原则。在对称的情况，即如果当事人先在香港受审，然后返至内地，内地法院是否可再次对他进行审讯呢？在这方面，可以在两种处理方法之间作出选择：一是参考《中华人民共和国刑法》第10条关于已在外国受审的人的原则来处理，[88]二是规定在这情况下不再依照中国内地的刑法追究。[89]我认为后者是比较合理的，因为香港特别行政区法院是中国法律体制的一部分，它的判决不应被等同于《中华人民共和国刑法》第10条所述的外国法院的判决；相反，香港特别行政区法院的判决应得到中华人民共和国内地法院的承认和信任。

四

最后，作为本文的一个总结，可以把上面提到的主要的、较具体的建议和观点，综合列述如下：

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(88) 即是说虽然当事人已经由香港法院审判，仍然可以由内地法院依照内地法律追究；但是在香港已经受过刑罚处罚的，可以免除或者减轻处罚。

(89) 关于双重管辖权或双重审讯问题，可参阅 Friedland，同注（56），pp. 357，387，423，427。例如在美国，很多州都立法规定，如两州对同一犯罪行为享有双重管辖权，则当事人在其中一州受判罪后，不可在另一州被检控。

1. 香港特别行政区法院在处理同时涉及香港特别行政区及中国内地的民事案件时，可沿用香港原有的普通法的冲突规范。但这只是个基本的、一般性的原则，并不排除在个别情况中，由香港法院或立法机关对原有冲突规范作出变通性的修改，以符合某些具体需要——例如关于税务要求的执行问题及关于中国的国家财产和行为在香港的民事法律地位。

2. 由于香港特别行政区的成立，中国内地法律体系中有必要发展一套新的冲突规范，以处理中国内地和香港特别行政区的民事法律冲突问题。在制定这套区际冲突法时，可参考及大致采用关于涉外案件的冲突法。

3. 中国内地和香港特别行政区应逐步发展民事司法协助关系，内容可参考香港与其他国家或地区现有的司法协助关系；中国中央机关与香港有关机关达成有关协议后，中央及香港立法机关可各自立法，对有关程序和措施，作出相应的规定。

4. 与1997年前的情况不同，中央驻香港特别行政区的官员不能享有刑事方面的特权或豁免权；至于中国人民解放军驻港部队的刑事法律地位，已由《中华人民共和国香港特别行政区驻军法》确定。

5.《中华人民共和国刑法》并不适用于香港特别行政区内的犯罪行为（除非犯罪行为的结果在中国内地发生）；在特别行政区的人，只有义务遵守特别行政区法律（包括其中的刑法），没有义务遵守中国内地刑法。对于所有在香港特别行政区实施的犯罪行为，特别行政区法院可根据香港法律全权处理，中国内地法院不应对这些案件行使管辖权。至于《中华人民共和国刑法》在中国以外的地方对于具香港居民（特别是香港永久性居民）身份的中国公民的适用性，需作进一步的研究。

6. 有必要在香港特别行政区及内地之间建立一种引渡或移交制度，确保在内地犯案后逃到香港的人得以移交内地有关法院审判，在香港犯案后逃往内地的人得以移交香港特别行政区法院审判。香港与内地也应发展其他方面的刑事司法协助关系。

7. 关于同时牵涉中国内地和香港特别行政区的刑事案件，如当事人就有关犯罪行为已在香港接受审判，然后返至内地，在此情况下，本文建议规定被告不应在内地再依照内地的刑法被检控和审判，即避免双重审讯。

New Gazette of the Law Society of Hong Kong,
May 1993
(based on the pre-1997 version of the PRC Criminal Code)
LAW BULLETIN

Criminal

Post-1997 extradition and criminal law

Albert HY Chen

There are issues that need to be resolved concerning extradition and other aspects of criminal conflict of laws between Hong Kong and the PRC before 1997

The subject of conflict of laws is usually regarded as covering issues arising from civil cases with elements involving more that one jurisdiction. However, criminal cases with multi-jurisdictional elements also raise structurally similar issues, such as the jurisdiction of a criminal court of a particular legal system to deal with such a case, or the question of juridical assistance (particularly extradition of suspects from one jurisdiction to another). This article considers these criminal conflict of laws issues relating to Hong Kong and mainland China in the light of the approach of 1997.

According to common law principles, Hong Kong's criminal law and the jurisdiction of its courts are generally applicable only to offences committed in Hong Kong. However, in relation to certain offences, there are statutory provisions extending such applicability and jurisdiction to acts committed outside the territory.

Under common law principles regarding double jeopardy, an offender may not be tried in Hong Kong if he has already been tried (and found either guilty or not guilty) by a foreign court of competent jurisdiction. This principle also applies in relation to an offence committed in Hong Kong.

Currently, extradition of offenders, or suspects, between Hong Kong and other jurisdictions is mainly conducted pursuant to treaties between the United Kingdom and other countries which have been extended to Hong Kong. New extradition agreements between Hong Kong and foreign jurisdictions are in the process of being negotiated under the auspices of the Joint Liaison Group. The first of these agreements, with the Netherlands, has already been signed. The new regime will have to be supported by a new extradition ordinance. However, there is no formal extradition agreement between Hong Kong and mainland China.

New extradition agreements between Hong Kong and foreign jurisdictions are in the process of being negotiated under the auspices of the Joint Liaison Group.

Relevant Chinese law

Chapter I of the Criminal Code of the PRC (the "Code") deals with the applicability of PRC criminal law (and also the jurisdiction of PRC courts) to criminal cases with foreign elements. There is an anomaly regarding the application of these principles to Hong Kong. This arises because Hong Kong is not regarded by the PRC as a foreign territory, but neither is Hong Kong within the domestic jurisdiction of the PRC in a complete sense. Four main aspects are covered in the Code:

1. As regards offences committed within PRC territory (whether by PRC citizens or foreign nationals), the PRC criminal law is fully applicable and the PRC courts have full jurisdiction to try them (Article 6).

2. The applicability of PRC criminal law outside the country depends on whether the offender is a PRC citizen. PRC criminal law is applicable to a Chinese citizen committing any offence mentioned in Article 4 of the Code outside China, irrespective of whether the relevant act amounts to an offence under the law of the place where the act is committed.

Where a Chinese citizen commits any *other* act outside the PRC which constitutes an offence under PRC criminal law attracting a minimum punishment of three years' imprisonment, then the PRC criminal law may apply: if it is an offence under the local law, then the PRC criminal law is applicable (Article 5).

3. For cases where both a foreign court and a PRC court have jurisdiction, PRC criminal law may be applied to deal with the offender even if he has already been tried by a foreign court. However, where the offender has already been punished in the foreign country, the PRC court may take this into account and award a lesser punishment or exempt the offender from punishment (Article 7).

4. Article 6 should also be noted. This provides for the applicability of PRC criminal law:

> *... to foreigners who, outside the territory of the PRC, commit crimes against the state of the PRC or against its citizens, provided that this Law stipulates a minimum sentence of not less than a three-year fixed term of imprisonment for such crimes; but an exception is to be made if a crime is not punishable according to*

the law of the place where it was committed.

Issues raised by 1997

The re-incorporation of Hong Kong into the PRC in 1997 raises new criminal conflict of laws problems which have not yet been resolved in the Basic Law. To tackle these issues, the PRC Criminal Code will have to be amended, and formal extradition or rendition arrangements will have to be made between Hong Kong and mainland China. These will have to be followed by the introduction of new legislation in both jurisdictions to implement the arrangements.

Article 18 of the Basic Law (together with Annex III thereof) suggests that mainland Chinese criminal law will not be applicable to the Hong Kong Special Administrative Region ("HKSAR"). To ensure that this principle will be observed by the courts of mainland China, corresponding amendments need to be made to Chapter I of the PRC Criminal Code. It should be clearly provided that:

- The criminal law applicable in mainland China will not be applicable to persons in Hong Kong and acts committed in Hong Kong, regardless of whether such persons are Chinese citizens or whether they are Hong Kong permanent residents.
- The courts of mainland China have no jurisdiction to try criminal cases involving acts committed in Hong Kong (subject possibly to the rule reflected in Article 5 of the Code that an act may be deemed to have been committed in a particular jurisdiction if its consequence occurs in that jurisdiction).

In other words, as far as the operation of the criminal law is concerned, persons in Hong Kong should be exclusively governed by Hong Kong law, and have no duty to observe the criminal law applicable in mainland China.

Separate jurisdictions

Such an approach would be based on the recognition that for legal purposes, Hong Kong and mainland China are two separate jurisdictions within the same country. Thus, the criminal law of the HKSAR is an integral part of the criminal law system of the PRC. Mainland Chinese criminal law applies to, and mainland courts have criminal jurisdiction over, acts committed in mainland China (and certain acts committed outside the PRC as mentioned above). Hong Kong criminal law applies to, and Hong Kong courts have criminal jurisdiction over, acts committed in Hong Kong (subject to special statutory provisions extending the jurisdiction of Hong Kong courts to acts committed outside Hong Kong as mentioned above).

Another important issue concerns the extent to which the present Articles 4 and 5 (regarding the applicability of PRC criminal law to Chinese citizens committing relevant acts outside the PRC) should be applicable to Hong Kong permanent residents who are Chinese citizens under the PRC Nationality Law. The PRC Nationality Law is applicable to the HKSAR under Article 18 and Annex III of the Basic Law. These permanent residents include most of the British Dependent Territories Citizens in Hong Kong.

> ***... persons in Hong Kong should be exclusively governed by Hong Kong law, and have no duty to observe the criminal law applicable in mainland China.***

It is arguable that Articles 4 and 5 should not apply to such Hong Kong residents. If it is necessary to subject them to criminal law obligations outside Hong Kong and mainland China in respect of particular kinds of acts, the criminal law of the HKSAR is probably the appropriate vehicle to achieve this. Such cases will then be tried by the courts of the HKSAR and not mainland courts.

If the general principle is adopted that courts of mainland China and the HKSAR exercise criminal jurisdiction over acts committed in mainland China and the HKSAR respectively, extradition or rendition arrangements need to be established whereby an offender escaping from mainland China to the HKSAR, or vice versa, may be sent back to the territory where the offence was committed for trial. "Rendition" is the term used to describe transfers of offenders between different states of a federal state such as the USA, while "extradition" is usually used in the context of transfer of offenders between sovereign states.

Finally, the situation where both a mainland Chinese court and an HKSAR court have jurisdiction to try a particular case needs to be addressed. This arises, for example, where the relevant act is committed in Hong Kong but has consequences occurring in mainland China, or the crime involves a series of acts partly in mainland China and partly in Hong Kong. Hong Kong follows the common law principle that the offender in such a situation will not be tried again in Hong Kong if he has already been tried in mainland China by a court of competent jurisdiction. In the converse situation, where the offender is tried in the HKSAR first, does a mainland Chinese court have jurisdiction to try him again? This issue needs to be dealt with by an amendment to the PRC Criminal Code. At present, Article 7 of the Code only addresses the situation where the offender has been tried outside the PRC (which includes the HKSAR) and is tried again for the same act in the PRC.

Co-existence

In conclusion, the co-existence of two criminal law systems in the PRC after 1997 generates a number of problems which have to be resolved. Even before 1997, the fact that Hong Kong is regarded by China neither as a foreign territory nor fully within the jurisdiction of Chinese courts and subject to the applicability of Chinese law, gives rise to problems which have hitherto been tackled on an informal basis. The solutions formulated have produced results that are not completely satisfactory as regards, for example, "extradition" of suspected offenders from Hong Kong to mainland China. Occasional reports of Chinese courts trying persons for alleged offences committed in Hong Kong or Macau also illustrate the anomalous legal position at present. These matters need to be resolved as 1997 approaches.

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應盡快制定引渡協議

★陳弘毅 香港大學法律學院院長

張子強集團案件之所以複雜，是因爲它同時涉及三個特殊情況：一是說不但犯罪跨越兩地，而且涉及香港居民和內地居民的結夥共同犯罪，北京中國人民大學法律系教授趙秉志教授早時的文章（《香港特別行政區與內地間互涉刑事法律問題研究》（《中國法學》，1998年創刊期）曾引用「實際控制」和「先理爲優」的原則，即在某些情況下，應由率先接獲案件並進行審理的一方的司法機關行使管轄權。

張子強案所引起的兩地司法權爭議甚大。

「先理爲優」爲原則

這個原則可能幫助我們理解爲什麼廣州中級人民法院就張子強集團案行使了全面的管轄權，亦可能爲香港特別行政區政府這次控有向內地當局提出引渡或移送被告人的要求，提供一個層面的理據。

另一方面，根據趙秉志教授的文章中的整體構想和具體建議，如果香港繼福花園命案的疑犯李育輝的涉嫌犯罪並沒有任何內地的成分，便證由香港法院對他行使審判權，即使他不是香港居民。我以前發表的一篇關於兩地法律衝突問題的文章，有一樣的意見。我不認爲中國刑法第七條可以解釋爲內地法院對這類案件行使管轄權的法律依據，根據《基本法》，中國內地刑法不能適用於有關犯罪行爲，而單憑刑事訴訟法第二十四條相信是不足以授權內地法院對有關行爲進行審判的。

李育輝應由香港審理

特區政府在未有與內地達成正式的逃犯移交協議之前，對於像李育輝這類情況的人不提出引渡要求，其用心良苦是可以理解的。因爲特區政府無論在政治意願上或法理基礎上都未有足夠準備，去應付內地當局就涉嫌在內地犯法的香港居民從香港引渡到內地受審的要求。如果在繼福花園這類案件中，內地當局願意應香港當局的要求，移交內地居民來香港受審，此先例一開，以後香港當局將難以推辭內地當局提出的移交港人疑犯的要求。所以繼福花園案涉及的不單是法理的問題，更包括政策性的權衡重輕的考慮。

亡羊補牢 訂立規範

我對這個問題的結論是有矛盾性的。一方面，純粹從《基本法》和中國刑法的法理分析來看，內地居民在港犯案，應該由香港法院行使獨有的管轄權。但在小心制定足以保障港人人權的兩地刑事司法互助和移送疑犯的協議和相應法規之前，港府不就涉嫌在港犯案的內地居民向內地提出移交要求，不失爲一個穩慎和明智的政策世取向。在這種矛盾的心情下，我覺得我們一方面應該促兩地當局盡快制定一套合理和符合「一國兩制」和《基本法》的刑事司法互助和逃犯移交安排，另一方面，希望中國內地當局能堅持法治原則，正視在《基本法》生效後中國內地刑法就中國內地居民在港犯罪的適用的法律級點，亡羊補牢，盡快訂立補充性的法律規範。

（前緣自十一月十四日港台師目「香港家書」。）

訓府討低在學
教政學都府家
治成際國
政產國
峻

李育輝

The Form and Substance of Legal Interaction between Hong Kong and Mainland China:
Towards Hong Kong's New Legal Sovereignty

*HL Fu**

'... it is a pity that such an (arbitral) award cannot be enforced directly. What is equally important is that there may be difficulties in seeking to enforce a Hong Kong award in mainland China. There seems to be no obvious reason why there should not be a simple mechanism put in place for the mutual enforcement of arbitral awards between mainland China and Hong Kong, and I hope we will see such a system before too long.' [1]

The Hon Mr Justice Findlay's frustration has been shared by many who are interested in the issue of mutual legal assistance between Hong Kong and mainland China. Well before the transition of sovereignty on 1 July 1997, academics and practitioners on both sides of the border proposed possible mutual assistance schemes and issued warnings for the resulting legal vacuum if no agreement was reached. [2] Unfortunately, no such agreement was reached before the transition and no major progress has been made on the matter since reunification which not surprisingly, has led to serious concern in legal and business circles.

The purpose of this chapter is to review mutual legal assistance between Hong Kong

* The author wishes to thank Pinky Choi, Richard Cullen, Yash Ghai, Robert Morgan, Raymond Wacks, and Wang Chengguang for commenting on earlier drafts of this paper.

1 *Ng Fung Hong Ltd v* ABC [1998] 1 HKC 213.

2 Albert Chen, *The Rule of Law in Hong Kong and the Basic Law* (Hong Kong: Wide Angle Press, 1986); Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997); Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997); Robert J M Morgan, 'The Transition of Sovereignty to the People's Republic of China and the Arbitration Regime in Hong Kong; The Issues and their Management' (1997) 12 International Arbitration Report 1; and *Report of the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters* (Hong Kong, October 1992) (the Edwards Report). On the mainland side, see for example, Huang Jin and Huang Feng (eds), *Collections of Essays on International Judicial Assistance and Regional Conflict of Laws* (Wuhan: Wuhan University Press, 1989); and *Studies on Regional Judicial Assistance* (Beijing; China University of Political Science and Law, 1993); Han Depei (ed), *Studies of Chinese Conflict of Laws* (Wuhan: Wuhan University Press, 1993); Huang Jin (ed), *The Theories and Practice of Regional Judicial Assistance* (Wuhan: Wuhan University Press, 1994); Judicial Assistance Bureau, Ministry of Justice, *Studies of Judicial Assistance* (Beijing; Law Press, 1996); and Zhang Xianchu, 'How to Serve Your Writ Extra-territorially From Hong Kong'

(1998) 28 HKLJ 356.

and the mainland before and after reunification. The first part will discuss the politico-legal foundation of this issue, and argue that, within the framework of the Basic Law, the independence of Hong Kong's legal system must be a pre-condition for the operation of mutual legal assistance with the mainland. The second part will examine the existing mutual legal assistance arrangements Hong Kong already has with the mainland. Where such agreements are absent, examples concerning Taiwan will be referred to. The final part will explore the relevance of the 'one country, two systems' doctrine in the context of cross- border mutual legal assistance.

Hong Kong's new legal sovereign

It is now well settled that under the Basic Law, Hong Kong has a separate body of laws and an autonomous legal system, equivalent in status to those of the mainland, Macau, and Taiwan. Mainland laws do not apply to Hong Kong unless they are listed in Annex III of the Basic Law according to the procedure prescribed by BL 18. No branch of Hong Kong's legal system shall be subordinate to its counterpart in the mainland. In essence, the Basic Law is a 'bi-polar' [3] or 'mini-constitution' [4] that serves as the fountain of power in Hong Kong. [5] It is also an important national law on the mainland 'that is binding on the Central People's Government, provincial and regional government, and the proverbial man on the mainland street-in short, throughout China.' [6]

As Fung argued: 'Quarantining Hong Kong's legal and judicial systems from those of the Chinese mainland does not mean that no interface may exist at all between the two systems.' [7] There are a variety of socio-economic reasons which will inevitably lead to increased cross-border legal interaction. Indeed, mutual legal assistance has become a matter of necessity. However, the foundation of such assistance is the co-existence of two different bodies of law and two autonomous legal systems; thus, the important factor is jurisdiction

3 John Newson, 'Hong Kong's Ironic Constitution' (Interview with Professor Yash Ghai) (September 1988) Hong Kong Lawyer 28.

4 Daniel R Fung, 'Hong Kong's Unique Constitutional Odyssey and its Implications for China' (1997) 24 Asian Affairs: An American Review 199.

5 *Cheung Lai Wah & Ors v Director of Immigration* [1998] 1 HKC 617.

6 Fung (note 4 above), p 206.

7 Ibid.

and not state sovereignty because each legal system is a legal sovereign in its own right. As such, there is no reason why Hong Kong cannot look towards other models and seek guidance from other countries for inspiration in negotiating mutual legal assistance matters with the mainland.

Of course, the degree to which two legal systems can assist each other varies. There is a wide spectrum of legal interaction between any two systems which depends on a variety of reasons: the most important of which are the nature of their political systems; the type of law and legal systems in use; the confidence and trust put into each other's systems; and above all, the practical necessity of dealing with each other. The more diverse their political and legal systems, and the less confidence one system has in its counterpart, the greater difficulty both parties will have in finding further grounds for co-operation. Given the fundamental disparity of the political and legal systems in China and Hong Kong, the conclusion and operation of mutual legal assistance between them is bound to be a difficult and tortuous process.

Heymann classified international mutual legal assistance, in the context of criminal matters, into two models. [8] The first is the prosecutorial model, in which the two systems co- operate freely, fully, and informally. Each party appreciates the benefits of reciprocal co- operation and has full confidence in the fairness and effectiveness of the other's system. This model, for example, would not insist on a 'political offence' exception in extradition agreements and would allow limited law enforcement activities within the other's borders. Thus, this level of co-operation depends on the similarity of political and legal systems, and formal treaties are not a prerequisite of their co-operation. [9]

The second is the international law model in which co-operation is partial and formal. Co-operation in this model depends on 'lawyerly interpretations of carefully negotiated agreements which specified precisely what types of cases called for assistance.' [10] Co- operation is based upon necessity and not trust. In all probability, the parties will reach agreement with the suspicion in mind that the other party may be 'unfriendly, repressive or erratic.' The international law model emphasises national sovereignty, distrusts the other's justice system, and depends clearly on a delineated scope of rights and obligations which

8 Philip B Heymann, 'Two Models of National Attitudes toward International Co-operation in Law Enforcement' (1990) 31 Harvard International Law Journal 99.

[9] Ibid, p 102.

[10] Ibid, p 104.

must work in co-operation with each other. [11]

This distinction of mutual legal assistance at the international and domestic levels may not be clearly defined and the extent to which two sovereign states co-operate with each other in legal matters may vary greatly. On the one hand, mutually hostile states may go to extreme lengths to even block the possibility of assistance to each other. The conflict Britain and the US have had with Libya over the extradition of suspects involved in the bombing of Pan Am Flight 103 over Lockerbie in Scotland illustrates this frustration. [12] On the other hand, the level of law enforcement co-operation among member states of the European Union, [13] and between the US and some of its allies demonstrate the willingness of states, [14] either because of trust or necessity, to limit governmental authority in order to satisfy certain common interests. In a bilateral relationship, the legislature and to a lesser degree, the judiciary, will take into consideration overwhelming political circumstances to adjust their relationships with one another. The gradual exclusion of 'terrorism' from the political offence exception in extradition law illustrates this evolving relation among friendly states. [15] In this age of globalisation, governmental authority is often relinquished in exchange for international co-operation and assistance. [16]

Mutual legal assistance within a federal state is relatively easy to effect, There are federal laws, and normally a constitution, which govern, co-ordinate or promote inter- regional interaction in legal matters. [17] Such mutual assistance is based upon the same or similar political and legal traditions among different regions, and is necessitated by common good within a federal state. Nevertheless, such assistance is still based upon the co-existence of two mutually exclusive legal systems, subject to federal jurisdiction.

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11 Ibid, p 104.

12 John P Grant and Rupert Dickinson, 'The Lockerbie Stalemate: Is an International Criminal Court the Answer?' (1996) 4 Juridical Review 250.

13 See for example, Francis R Monaco, 'Europol: The Culmination of the European Union's International Police Co-operation Efforts' (1995) 19 Fordham International Law Journal 247.

14 Ethan A Nademann, 'The Role of the United States in the International Enforcement of Criminal Law' (1990) 31 Harvard International Law Journal 37.

15 Geoff Gilbert, *Aspects of Extradition Law* (Dordrecht: Martinus Nijoff Publishers, 1991).

16 The Commission on Global Governance, *Our Global Neighborhood* (Oxford: Oxford University Press, 1996).

17 For instance, s 1 of Article IV of the US Constitution states: 'Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.'

The Basic Law and the Chinese constitution

The Basic Law is not an ordinary Chinese law. Its political significance is unprecedented as it gives legitimacy to a political system fundamentally contradictory to the mainland's Communist regime. It also has a special legal status within the Chinese legislative hierarchy. First, the Basic Law, enacted by the National People's Committee (NPC), is a 'basic law.' Under the Chinese constitution, the NPC has the power to enact 'basic laws' and the Standing Committee to pass other laws. While the difference in the legislative competency of the NPC and the NPC Standing Committee is unclear, and this ambiguity may provide ample scope for the NPC Standing Committee to expand its powers, [18] it is certain, in theory at least, that 'basic laws' passed by the NPC are superior to those passed by its Standing Committee. [19]

Second, the Basic Law cannot be amended unless the clearly prescribed legal procedures in BL 159 are followed. Apart from the constitution itself, the Basic Law is the only national law which contains built-in amendment procedures. Unlike the constitution, the power to amend the Basic Law does not totally lie with the NPC. Finally, the Basic Law, in China's growing constitutional jurisprudence, is regarded as a constitutional document. Like the law on elections, it affects the constitutional structure. As such , other 'basic laws' enacted by the NPC may be inconsistent with it.

The relationship between the Chinese constitution and the Basic Law is less clear or certain. Article 1 of the constitution states that China 'is a socialist state under the people's democratic dictatorship led by the working class ...' Although art 31 authorises the state to set up special administrative regions (SARs) where necessary, it is not clear to what extent the SAR may deviate from this socialist system. The Basic Law states that 'The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.' The essence of the Chinese constitution, according to Professor Ghai, lies in its preamble which 'provides more effective guidelines for state and other institutions than the actual provisions

18 This is especially true given the broad power of interpretation in the Constitution. See Ghai (note 2 above), p 104. The expected Law Making Law does not address the potential conflict between basic laws enacted by the NPC and other laws enacted by its Standing Committee.

[19] See Michael W. Dowdle, The Constitutional Development and Operations of the National People's Congress' (1997) 11 (1) Columbia Journal of Asia Law 1. Article 62 (11) of the Constitution empowers the NPC 'to alter or annul inappropriate decisions of the Standing Committee of the National People's Congress.' It is worth noticing that the NPC Standing Committee under previous constitutions was less powerful.

of the constitution.' [20] Given the express statement of the nature of the state as a dictatorship of the proletariat and the dominant role of the communist vanguard in Chinese society, the constitutionality of the Basic Law itself may be doubtful. That is, if one reads art 1 of the preamble and many other articles as prescribing fundamental limits on which governance and economic structures are permitted in the PRC, then art 31 has to be read as subject to those limitations too and the question arises whether the Basic Law is in conflict with them. [21] Some scholars have tried to explain away this contradiction, [22] but mainstream constitutional scholarship generally ignores the issue. However, at least some scholars have argued that the 1982 constitution needs to be amended to accommodate the 'one country, two systems' doctrine as it has been applied to Hong Kong (and Macau). [23]

One country, two systems' and mutual legal assistance

Does the Basic Law provide sufficient guidance on issues relating to cross-border mutual legal assistance? Several frameworks have been suggested to govern this issue between Hong Kong and China which may further differ according to context, such as the servicing of judicial documents [24] and the recognition and enforcement of arbitral awards. [25]

The first option is for the Central Government to enact national legislation to govern mutual legal assistance matters. The legal basis of this option is never clearly stated by the people who advocate it, but might be (remotely) possible due to the uncertain position of the Chinese constitution in Hong Kong. For example, art 31 of the 1982 constitution aside, it is ambiguous which other articles are applicable to Hong Kong and how far their application extends. While the constitution as a whole and certain constitutional provisions definitely do not apply in Hong Kong, other articles, in addition to art 31 do and have been applied here. [26]

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20 Ghai (note 2 above), p 89.

21 Fan Zhongxin, *One Country, Two Systems and China in a Cross Century* Era (Hong Kong: Hong Kong Culture & Education Publishing Limited, 1998).

22 See Edward Epstein, 'China and Hong Kong: Law, Ideology, and the Future Interaction of the Legal Systems' in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989).

23 Wen Zhengbang, *The Constitutional History of the People's Republic* (Zhengzhou: Henan People's Press, 1994), pp 310-12. Fan (note 21 above).

24 Zhang (note 2 above).

25 Morgan (note 2 above).

26 For example, art 57 which states that the National People's Congress is the highest organ of state

It is conceivable that in the future, this uncertainty may be invoked by the Central Government to 'federalise' the jurisdiction of mutual legal assistance between Hong Kong and the mainland - that is, to impose a solution from the centre.

The danger of this option lies in the gradual erosion of Hong Kong's autonomous legal system which it clearly foreshadows, thus undermining the Basic Law. There may also be technical difficulties created by the differences in legal concepts between the civil law tradition in mainland China and the common law tradition in Hong Kong. In servicing documents, for example, civil law and common law continue to disagree on what constitutes judicial documents, extra-judicial documents, and the distinction between civil and commercial matters. It is unlikely that a unilateral central law could satisfactorily address these difficulties. [27]

The second option is for Hong Kong to voluntarily enter into mutual legal assistance arrangements with the mainland. The legal basis for this option already exists and derives from BL 95 which authorises Hong Kong to arrange 'juridical relations' with the mainland independently. However, neither 'juridical relations' nor 'judicial organs' in BL 95 have a precise meaning, and the terms are used very loosely. It is submitted that BL 95 covers all mutual legal assistance, including extradition. [28] Clearly, Hong Kong is free to enter into any such agreement with either other regions in the mainland or a particular ministry of the Central Government, or with the Supreme People's Court (SPC), and the Supreme People's Procuratorate (SPP) as representatives of the courts and procuratorate on the mainland.

The third option is to enact 'sympathetic' reciprocal legislation in Hong Kong and other regions of the mainland. [29] This would allow Hong Kong and the mainland to develop their own rules of 'regional conflict of laws' on the basis of reciprocity. The advantage of this option is that it would allow the differences of the two systems to continue, and both sides would retain maximum autonomy in determining mutual legal assistance matters. The danger lies in the uncertainty it creates, for each side may repeal or amend its legislation without

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power; and art 85 which declares that the State Council is the executive body of the highest organ of state power. For more detailed discussion of this issue, see Epstein (note 22 above).

27 Zhang (note 2 above).

28 For a discussion of this issue, see Ghai (note 2 above), p 327; and Janice Brabyn,

'Extradition and the Hong Kong Special Administrative Region' (1988) 20 Case Western Reserve Journal of International Law 169.

29 Morgan (note 2 above), p 21.

reference to the other side. [30]

From hostility, through indifference, to understanding

With the transition looming and socio-economic interactions on the rise, the need to understand each other and to normalise working relationships was strongly felt on both sides of the border. This was particularly true of Hong Kong after the Sino-British Joint Declaration was signed in 1984, As a result, efforts were redoubled to promote a mutual understanding. [31]

Given the serious concern about the maintenance of a rule of law in Hong Kong after reunification, it is not surprising that the mainland's legal system and its laws were carefully scrutinised in Hong Kong. Chinese law first became a subject of study in Hong Kong in the mid 1980s, when the Faculty of Law in the University of Hong Kong set up a diploma course on Chinese law and, later, when the Faculty of Law in Beijing University offered its LLB (external) through Shue Yan College, also in Hong Kong. Quickly the industry grew and became profitable. Universities in Hong Kong now offer a variety of Chinese law programmes, ranging from short courses leading to certificates, to years of full-time study leading to a doctoral degree. [32]

Outside the universities, the Department of Justice (formerly the Legal Department) also played an instrumental role in the run-up to 1997. For example, the Legal Department retained the service of Michael Palmer as its China law consultant in 1988. In 1994, under the leadership of the Solicitor General and with the blessings of the Legislative Council (Legco),

30 Ibid. See also Zhang (note 2 above).

31 It is not a coincidence that cross-straits relations between Taiwan and the mainland were also improved immediately after the signing of the Joint Declaration. By 1987, Taiwan authorities had sanctioned non-governmental contact with the mainland, such as visits and investments in mainland China by the Taiwanese.

32 The City University of Hong Kong has offered a full time LLM programme in English since last year. The University of Hong Kong introduces its own LLM in Chinese Commercial Law in 1998, also in English. The People's University of China has offered a LLM course through the City University of Hong Kong since 1995. There are also other sub-degree courses on Chinese law. The Southwest University of Political Science and Law teaches a diploma courses on Chinese law for Hong Kong students in Shenzhen. And finally, the China University of Political Science and Law has also started its own diploma on Chinese law through the Chinese University of Hong Kong.
On the other hand, Chinese law teaching has not been popular in the LLB syllabus in the two law faculties in Hong Kong. Given the current struoture of legal education in Hong Kong, it is unlikely that the LLB programmes will increase their focus on Chinese law. However, Chinese law remains an important subject for post-graduate studies.

a China law Unit was set up to advise the government on China law and to monitor legal developments on the mainland. Other bodies, including the Judiciary, the legal profession, and private publishing companies (Asia Law and Practice in particular) have also made valuable contributions in promoting the understanding of Chinese law in Hong Kong.

In short, Hong Kong is becoming a centre for the 'overseas' study of Chinese law. Many full time academics, supported by generous research grants, have made Chinese law their principal area of research, and pressurised by their respective universities to publish have produced numerous (some undoubtedly unwanted) publications on the topic. As a result of the intense interest, not surprisingly Chinese law has also become attractive to a growing band of legal publishers; notably China Law and Practice, Sweet & Maxwell, and Butterworths Asia, all of whom publish their texts in English.

The interest is not purely one-sided however, and Hong Kong law has received a corresponding amount of academic attention on the mainland. For example, Professor Zhao Bingzhi, a leading criminal law professor in the People's University of China, has taught the criminal law of Hong Kong, Macau, and Taiwan in Beijing for over ten years. In addition, a number of other mainland law faculties now offer introductory courses on Hong Kong law. Furthermore, not only have research centres on Hong Kong and Taiwan law sprung up in China itself but law professors in Hong Kong have also had their works published on the mainland. Works written in Chinese by Hong Kong academics, noticeably Betty Ho and Albert Chen, both from the University of Hong Kong, are widely read and highly recommended on the mainland.

Cross-border visits have been utilised to promote mutual understanding as well. Hundreds of legal academics, lawyers, and government legal officials have, upon the invitation and sponsorship of the Hong Kong government, universities, professional institutions and private foundations, come to Hong Kong to study its laws or observe the operations of its legal system. Many of these persons have spent extended periods of time in Hong Kong. The Legal Education Trust Fund, under the leadership of Cecilia Chen, has, among other things, sponsored nearly a hundred scholars or government law officials from the mainland to visit Hong Kong. The Hong Kong and British governments, jointly with other institutions in the United Kingdom, continue to sponsor twelve young lawyers in private practice each year from the mainland to receive legal training in both the United Kingdom and Hong Kong. The Hong Kong government has been keen to promote Hong Kong's common law and to play an active role in contributing to China's reform of its civil

and criminal procedure laws, [33] and this has led to a growing number of visits to the mainland by local legal professionals and law students.

Increased communications and mutual visits between members of disciplinary forces have also been instrumental in facilitating mutual legal assistance. Some of the exchanges have been unofficial. For example, regular conferences have been held between the Academic Research Committee of Law on Reform through Labour of the China Law Society and the Society for the Rehabilitation of Offenders of Hong Kong. This academic exchange which began in 1986, remains unofficial, but has had strong official backing from both sides. Indeed, two exchange agreements have been signed, mainly covering the exchange of information and mutual visits. [34] Other arrangements have been more direct. For instance, the Customs and Excise Department and the Independent Commission Against Corruption (ICAC) have offered training courses for mainland officials, and officials from China's procuratorate, and supervision organs have served brief attachments with the ICAC. [35] Fortunately, the political deadlock between the two governments before the transition did not hinder this sort of cross-border legal liaison.

However, cross border police co-operation has been more problematic; partially because of the power mainland police enjoy and partially because of the role previously played by the Hong Kong police in suppressing Communist activities. Despite this, China has repeatedly assured the Hong Kong police that there will be no interference from mainland public security forces after the transition, [36] that Hong Kong's existing police co-operation with overseas forces will remain unchanged, [37] that expatriate police officers will not be forced to resign their positions, [38] and, in particular, that those officers previously involved in

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33 Daniel R Fung, 'Hong Kong: China's Guide to the 21st Century: The Sherpa Paradigm' (paper presented at the Conference on Hong Kong and China on its Way into the Pacific Century at Rostock, Germany, 24 April 1997. According to the Secretary for Justice in 1998, the government will spend more than $12.9 million for this purpose. See also, May Sin-mi Hon, 'Justice Chief briefs Qian on Aw case' South China Morning Post, 26 March 1998.

34 'Introduction to the Seminar on the Correction of Offenders and their Reintegration into Society' from *Proceedings of the Conference on the Correction of Offenders and their Reintegration into Society* (21- 25 September 1992, Beijing).

35 Beryl Cook, 'Mainlanders set to train with ICAC' South China Morning Post, 10 May 1993.

36 Thomas Larkin, 'Police will "be free from PSB"' Hong Kong Standard, 25 November 1995.

37 'Eddie Hui: Hong Kong Police co-operation with Interpol will remain unchanged' Ming

Pao, 7 May 1997.

[38] 'Representatives of Police Superintendent Association visit Beijing' Ta Kung Pao, 24 October 1995.

the suppression of communist activities will not be hounded after reunification for merely carrying out their duties. [39]

Official exchanges between the forces became very frequent from the early 1990s. Various associations in the Hong Kong police, including the Expatriate Inspectors Association, visited Beijing and were warmly received. Concerted efforts at very senior levels on both sides have improved relations between the two forces. By 1996, the Hong Kong marine police had developed a good working relationship with their mainland counterparts and were on 'a first-name basis.' [40] Extra-duty exchanges, such as sports exchanges, also evolved and gained a certain popularity.

Police co-operation intensified with this increased understanding. Regular meetings were held between the two forces, and co-operation became more institutionalised. For instance, towards the end of 1994, forty requests a month were made by Hong Kong police to their mainland colleagues for assistance, and about thirteen a month were offered in return. [41] Hong Kong police have shared information and technology on the gathering of finger prints and criminal intelligence (especially those related to narcotics and commercial crimes), and the technology of ballistics. As the mainland has been eager to obtain further information on advanced technology from Hong Kong and to exchange criminal intelligence, so has Hong Kong relied upon the mainland to retrieve stolen goods and to help control the flow of illegal immigrants, guns, and ammunition. The return of stolen goods from the mainland has been a problem since 1991, and is now a regular component of cross-border police interaction. [42]

In 1993, two mainland Interpol officers arrived in Hong Kong to take up one year terms as China's first police liaison officers. They were stationed in the New China News Agency and were expected to work with their Hong Kong counterparts. [43] These positions have since been made perpetual. Interpol's China National Central Bureau is in Beijing, with a liaison office in Guangdong and a sub-office in Shenzhen. In 1995, a sub-office was set up in Zhuhai to strengthen its communications with Hong Kong after an incident in which

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39 Zhong Huilan, 'Beijing will not pursue after the transition' Sing Tao Jih Pao, 12 April 1996.

40 James Kelly, 'Marine forces united in border "war" Hong Kong Standard, 13 February 1996.

41 Connie Law, 'Mainland contacts show big increase' South China Morning Post, 12

September 1994.

[42] Andy Clark, 'Police to share data, expertise' South China Morning Post, 3 September 1994.

[43] Tommy Lewis, 'Hong Kong posts for China police' South China Morning Post, 12 February 1993.

mainland police detained two seamen in Hong Kong waters for smuggling cars to China. [44] Acknowledging this problem, Hong Kong set up the Liaison Bureau (formerly the Interpol Bureau) to facilitate easier communication with China's police force.

The promotion of mutual understanding is still the priority of post reunification police co-operation. Following the first bilateral meeting with senior officials of the Ministry of Public Security after 1 July 1997, the Hong Kong Commissioner of Police was able to reach a new agreement on bilateral co-operation which concluded that:

- co-operation between the two police forces should be 'closer, more comprehensive, and effective';

- bilateral meetings should be held twice a year;

- co-operation in boundary security, traffic, VIP protection, and education should receive particular attention; and

- communications and the exchange of intelligence and visits should also beenhanced. [45]

From understanding to co-operation

Notarisation of Documents
A basic element of legal interaction concerns the use of notarised documents from other jurisdictions. The growing number of social and commercial interactions between Hong Kong and the mainland have necessitated the mutual recognition of certain documents. Notarisation is often mandatory and frequently required in China as prima facie evidence of the validity of documents in most civil, economic, and family law matters. [46]

Notarisation is regarded in China as an exercise of sovereign power and is under the direct control of the government through the Ministry of Justice, Chinese embassies and consulates take responsibility for notarising documents in foreign countries. Prior to 1981, notarisation by Hong Kong solicitors, if recognised, would have amoundted to acknowledging British sovereignty over Hong Kong in Chinese eyes. As a result, notarisation by Hong Kong

44 Laura Beck, 'Interpol office to be opened in Zhuhai' Hong Kong Standard, 22 April 1995.

45 Police Report No 8, issued by the Police Public Relations Bureau, 14 May 1998.

46 Vivien Chan, 'Notarisation of Documents' (June 1997) Hong Kong Lawyer 20.

solicitors were not acceptable for use in China. [47] To solve this problem, in 1981, the Chinese Ministry of Justice themselves appointed certain Hong Kong lawyers to notarise documents for use in the mainland. [48]

Several directives and guidelines have been issued by the Ministry of Justice to regulate the service. In 1995, the Ministry of Justice issued new measures to regulate the scope of notary work in Hong Kong, the appointment of notaries and their qualifications, and notarising procedures. [49] According to these measures, the scope of the work was extended to 'any legal act taking place in the Hong Kong region' and 'any fact or document with legal implications.' [50] The qualifications to become a China appointed notary are fairly clear. An applicant must be a qualified Hong Kong lawyer:

- who supports the PRC government and its economic reform policies;

- who supports the Basic Law and has made a contribution to Hong Kong's stability and prosperity;

- who has been in practice for ten years;

- who has good ethical standards and abides by mainland laws, regulations, and rules; and

- who has the ability to prepare documents in Chinese and conduct business in Putonghua. [51]

An important development of the 1995 Measures is that a notary can no longer send a notarised document directly to the mainland. Instead the document has to be sent via the China Legal Services Company (Hong Kong) Limited, a business run by the Ministry of Justice, after verification by the company. [52] Violation of this rule may result in the suspension or revocation of authorisation. [53]

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47 Ghai (note 2 above), pp 328-30.

48 Ibid.

49 Ministry of Justice, Measures on the Regulations of China Appointed Public Notaries (Hong Kong) (No 34 of 1995).

50 Ibid, s 3.

51 Ibid, s 8.

52 Ibid, s 4.

The Hong Kong experience with appointed notaries was regarded as so successful that the Ministry of Justice decided, in 1990, to replicate the scheme in Taiwan. The plan was rejected by Taiwan, however. [54] But this lack of a formal arrangement has not prevented either authority from using documents notarised by the other side. In 1989, Taiwan authorities used 1,100 documents notarised on the mainland and this number increased to 8,900 in 1990. [55] Since 1988, authorities on the mainland have repeatedly stated that any documents notarised in Taiwan can be used as evidence in court and for other uses, as long as the title 'Republic of China' does not appear within it.

In 1993 Taiwan and the mainland signed an agreement, entitled 'Agreement on the Use and Verification of Certificates of Authentication Across the Taiwan Straits.' Clearly both sides have now realised that co-operation on the verification of notarised documents where validity is doubted would be advantageous. The Agreement covers documents concerning inheritance, adoption, marriage, birth, death, agency, educational background, residence, dependants, and evidence of property rights. The parties also agreed to add or subtract the numbers of certificates of authentication according to need. [56] Actual verification is seen to by the Straits Exchange Foundation (SEF) of Taiwan and the Association of Public Notaries on the mainland. [57]

Following reunification, the Ministry of Justice has continued to appoint public notaries in Hong Kong as it did before. The Director of the Public Notary Department of the Ministry said, at the end of 1997, that the Ministry had appointed 200 notaries in Hong Kong, and that since establishment of the system, notaries in Hong Kong have notarised 480,000 agreements. [58] The appointment process is said to be 'complicated and rigorous,' and only 'prestigious lawyers' may be so commissioned. [59] In fact, patronage may be a better term

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53 Ibid, ss 15-17.

54 Fan (note 21 above), pp 282-8.

55 Ibid, p 283.

56 The full agreement can be found in Hungdah Chiu, 'Koo-Wang Talks and the Prospect of Building Constructive and Stable Relations Across the Taiwan Straits' (Occasional Papers/Reprints Series (University of Maryland School of Law) in (Number 6, 1993) 119 Contemporary Asian Studies 43-8).

57 Section 1(1), the Agreement.

58 INFOCHINA, 'China to continue practice of public notaries in Hong Kong' 14 August 1998 at <http://www.chinainfobank.com>.

[59] Ibid.

to describe the process. [60] Professor Ghai argues that as Hong Kong is under the same sovereign as the mainland, and as the Basic Law recognises Hong Kong's legal profession, notarial work in Hong Kong should be accepted on the mainland without discrimination. [61] China, while agreeing in principle, argued that a notary in Hong Kong should first demonstrate an understanding of Chinese law and practice before he or she should be allowed to qualify for mainland related work. The solution, to offer training to interested Hong Kong lawyers, was obvious and the Ministry of Justice thus organised its first training course for Hong Kong lawyers applying to be China appointed notaries on 21 March 1995 of which there were 151 participants. [62]

The service of documents

In 1988, after a lengthy period of negotiation, and the approval of the Supreme People's Court, the Higher People's Court of Guangdong province entered into an informal agreement regarding the service of documents with the Supreme Court of Hong Kong. [63] The two courts agreed to assist in the service of a wide range of court documents in civil and commercial matters, such as writs, court notifications, decisions, and court rulings. [64] According to the Edwards Report, some 126 documents were received from Guangdong and 11 were sent from Hong Kong under this agreement. [65] Unfortunately, the Guangdong-Hong Kong agreement is restricted to one province in the mainland with close ties to Hong Kong, and the limited application of this agreement has thus rendered its operation ineffective. [66]

Another channel opened in 1991 when China joined the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the

60 Ghai (note 2 above), p 330.

61 Ibid.

62 'Database' (1995) 2 China Law 102. No such training is required for notaries on the mainland who certify documents to be used in Hong Kong.

63 Supreme People's Court, 'Reply and Approval of the Supreme People's Court Concerning the Tentative Service Assistance Agreement in Civil and Commercial Matters between Guangdong and Hong Kong' Research Office of the Supreme People's Court, *Collection of Judicial Interpretations of the Supreme People's Court* (Beijing: People's Court Press, 1994), vol. 1, p 1900.

64 For a study of this agreement, see Zhang (note 2 above); and Zhou Yang and Zhao Xudong, 'The Conflicts and Co-ordination of Laws under One Country, Two Systems' (1997) 7 Zhongguo Lushi (Chinese Lawyer) 18.

65 Edwards Report (note 2 above), p 16.

Hague Convention). The Hague Convention has been applicable in Hong Kong since 1970 by virtue of the United Kingdom's participation and covers the service of documents between Hong Kong and the mainland as a whole. For the purposes of the Convention, the Ministry of Justice was designated as the central authority for the receipt of relevant documents in the PRC. Following reunification, the Hague Convention continues to apply to Hong Kong but only by virtue of China's ratification of it; however, it no longer covers the servicing of documents inside China. [67]

Investigation and the gathering of evidence
The cross-border taking of evidence for civil and commercial matters has not generally been a problem for mainland courts. This is largely due to the fact that the rules of evidence in the mainland have only just begun to develop and remain rudimentary, and that that China appointed notaries can notarise a wide range of documents which are accepted by mainland courts.

However, the taking of such evidence on the mainland has also caused difficulties. Before reunification, hearsay statements were admissible in Hong Kong courts where the maker of the statement was in a foreign country under the Evidence Ordinance. Under order 41, rule 12 of the Rules of the Supreme Court, affidavits sworn before a mainland judicial officer, a public notary, or a British Consul on the mainland were admissible in Hong Kong civil proceedings. According to the Edwards Report, affidavits were frequently taken in this way on the mainland. [68] Although this procedure came to an end after reunification, the Edwards Report has recommended an amendment to Hong Kong law to ensure the continuity of the practice.

Mutual assistance in the cross-border taking of evidence in criminal law matters has had a more interesting history. Co-operation between the ICAC in Hong Kong and the procuratorate, China's corruption buster, in Guangdong, has been a success. The Guangdong procuratorate has been the de facto representative of the Supreme People's Procuratorate in in matters relating to mutual legal assistance with Hong Kong. In 1987, the ICAC and its Guangdong counterpart established a Mutual Assistance Scheme which permitted one side,

66 Zhou and Zhao (note 64 above).

67 Zhang (note 2 above). See also Edwards Report (note 2 above), pp 16-18.

68 Before reunification, depositions could be taken on the mainland under order 39, rule 2 of the Rules of the Supreme Court. This form of evidence taking did not take place according to the

knowledge of the authors of the Edwards Report (note 2 above), p 21.

through diplomatic channels, to send its officers to the other side to interview witnesses under three conditions:

(1) the interview had to be supervised;

(2) the participation of the interviewees was voluntary; and

(3) investigating officials could only interview witnesses, not suspects.

At the time the scheme was established, there were concerns that this investigative power might be abused if procurators were allowed to conduct interviews in Hong Kong. The ICAC went to great lengths to explain the voluntary nature of interviews and the need for the presence of ICAC officers during interviews. In addition, no person from one jurisdiction under the scheme, according to Mr de Speville, a former ICAC Commissioner, could be compelled to give evidence in the other. [69] By the end of 1995, about 100 exchange visits had been carried out, 50 visits for each side. Mainland officials interviewed more than 100 witnesses in Hong Kong, while ICAC officers interviewed several dozen on the mainland. [70] However, the system was regarded as cumbersome because of the need to secure approval through diplomatic channels. [71]

The police have gone even further in cross-border co-operation with the mainland. After his high profile first trip to Beijing in August 1994, the Commissioner of Police, Eddie Hui, reached an agreement with his opposite number to strengthen co-operation in areas such as the exchange of information, direct contact between related police departments, training, and research. [72] Mainland police were also granted the power to interview suspects in Hong Kong with the approval, and under the supervision of the Hong Kong police. [73] There was even speculation at the time that both parties might agree to the cross border investigation of

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69 Darren Goodsir, 'ICAC eager for China evidence' South China Morning Post, 28 September 1995.

70 Jonathan Hill, 'ICAC chief cautious over China' South China Morning Post, 16 January 1996.

71 For example, an application of mainland officials to come to Hong Kong to interview witnesses requires the approval of the Xinhua, the Political Adviser's Office of the Hong Kong government, and the ICAC, (ibid). See also, Goodsir (note 69 above).

72 'Eddie Hui's agreement with Beijing facilitates further cross-border co-operation' Sing Tao Jih Pao, 18 August 1994.

[73] Darren Goodsir, 'Tight rein on Hong Kong interviews by China police' South China Morning Post, 22 August 1994.

selected offences, [74] but when the question was actually raised in Hong Kong, the Commissioner categorically ruled out the possibility of mainland officers coming to Hong Kong to conduct their own investigations. [75]

Despite restrictions, it appears that Hong Kong police officers have been allowed to conduct investigations and interview suspects on the mainland. In 1995 for example, a team of police and ICAC officers went to Beijing to arrange the extradition of an alleged member of the Wo On Lok triad society. This person, a British national overseas passport holder from Hong Kong, was suspected of having murdered (in Singapore) a key witness to a cigarette smuggling case being investigated in Hong Kong. The suspect had been detained in Beijing. [76]

Mainland witnesses have also been invited to testify in Hong Kong courts. [77] In a case concerning (former) senior officials from China, prosecution witnesses from the mainland testified in Hong Kong and appeared to receive special treatment, including special ICAC arrangements with respect to transportation and protection. [78] However, mainland authorities have not allowed certain classes of people, the police in particular, to testify in Hong Kong's courts in their official capacity. For example, one murder trial collapsed in Hong Kong when the key witnesses, two investigating police officers on the mainland, failed to come to Hong Kong to testify. The suspect had escaped to China after committing murder, and evidence of his crime had eventually been collected by police officers in Fujian province. But the Chinese authorities refused to permit the two officers to testify in Hong Kong. This case led to further debate of the proposal that Hong Kong police officers should be permitted to go to the mainland to collect evidence themselves, [79] which would in all likelihood presuppose reciprocal arrangements for mainland police officers to visit Hong Kong. Despite the collapse of the murder trial, Hong Kong still pledged to send detectives to testify in mainland courts.

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74 Lin Shebing, 'Hong Kong and mainland police agree to cross-border investigation' Ming Pao, 18 August 1994.

75 Laura Beck, Francis Moriarty, and M Y Sung, 'No China police office, says Hui', Hong Kong Standard, 18 August 1994.

76 Laura Beck, 'Police expect to arrest local triad members in Chui case' Hong Kong Standard, 4 May 1995.

77 By the end of 1995, mainland Chinese citizens had testified in Hong Kong on more than 20 occasions. according to the ICAC. Yonden Lhatoo, 'Border pact to boost crime fight' Hong Kong Standard, 17 February 1996.

78 'ICAC's special arrangement for witnesses from China' Ming Pao, 23 December 1995.

79 Han Qianmei, 'Hong Kong police do not rely on mainland police to collect evidence' Sing Tao Jih Pao, 30 January 1996.

In the meantime, Hong Kong police expressed the intention to offer mainland officers training on court protocol. [80]

Hong Kong has provided invaluable assistance to China's war against corruption. The successful prosecution on the mainland in 1996 of Zhou Beifang, a former chairman of the Hong Kong listed affiliates of the state run Capital Iron and Steel Corporation [81] for corruption, was hailed as the most successful example of co-operation between the ICAC and its mainland counterpart to date. Important evidence in that case was obtained in Hong Kong by mainland officers with the assistance of the ICAC. [82]

After the International Anti-corruption Conference held in Beijing in October 1995, co-operation between Hong Kong and the mainland gained even further momentum. In October 1995, a landmark ICAC surveillance operation was carried out in Shenzhen without supervision or interference. It was the first time an ICAC officer had conducted an investigation independently in China with the consent of the Chinese authorities. While the breakthrough was hailed, there was also concern that Hong Kong might have to reciprocate. The ICAC admitted reciprocity would be a sensitive issue which would need careful handling. [83] Legco also voiced its concerns saying that, where necessary, it preferred Hong Kong officers to carry out surveillance in Hong Kong on the mainland's behalf. [84]

In 1995, a referral system was set up on the initiative of the ICAC, to enable corruption complaints to be referred to their competent jurisdictions. This system was created in response to the increase in complaints received by the ICAC in Hong Kong concerning corruption on the mainland. With the consent of the complainant, a complaint can be referred from Hong Kong to the mainland and vice versa. [85] At the beginning of 1996, cross-border corruption was perceived as a growing problem in Hong Kong; so much so that the ICAC

80 Darren Goodsir, 'Police pledge to mainland courts' South China Morning Post, 10 November 1995.

81 'The Case of Zhou Beifang Committing the Offences of Accepting Briberies and Offering Briberies' (1997) 1 Supreme People's Procuratorate Gazette 28. See also, Jasper Becker, 'Shougang steels for more pains. Wage defaults and firings raise threat of unrest' South China Morning Post, 2 December 1997.

82 Chen Peimin, 'Shougang Steels case is the most successful operation in Hong Kong-mainland anti-graft co-operation's Sing Tao Jih Pao, 20 June 1995.

83 Darren Goodsir, 'China may bring graft fight to Hong Kong' South China Morning Post, 20 December 1995.

84 Jonathan Hill, 'ICAC chief cautious over China' South China Morning Post, 16 January 1996.

85 'Call for international graft police' Hong Kong Standard, 9 October 1995.

publicly declared it wished to make extra efforts to advance co-operation. In February 1996, it announced two potentially important decisions: that it might hand over completed ICAC investigation files to the mainland for their intelligence value; [86] and that they were considering allowing mainland graft-busters to carry out under cover work in Hong Kong. [87]

In February 1996, the ICAC and the Guangdong Provincial Procuratorate reviewed the 1987 Mutual Assistance Scheme and replaced it with a new pact. Both sides agreed to streamline their operational procedures to create a new, much simpler inquiry scheme. Designated officers on each side would carry out inquiries, such as the verification of evidence, without wading through the previously required approval procedure. It was also reconfirmed that witnesses who crossed the border to testify would only do so voluntarily and that the requesting party should bear the expenses. [88] With reunification approaching, both sides stressed the importance of strengthening co-operation to stamp out corruption. To this end the ICAC has lobbied the Central Government for a formal arrangement to cover all regions in the mainland, and has also asked for more control over the investigation of corruption involving mainland-funded companies in Hong Kong. [89]

The boundaries agreement

Hong Kong redrew its boundaries with Guangdong immediately before the reunification following nearly ten years of negotiation; primarily to protect Hong Kong's autonomy in law enforcement issues. Prior to the agreement, Zhuhai police had frequently entered Hong Kong's waters to carry out anti-smuggling operations. In 1990, this happened dozens of time a year, according to Martin Lee, a Legislative Councillor. [90] The most serious incursion took place in May 1990 when, allegedly, Chinese police entered Hong Kong, after temporarily detaining two Hong Kong policemen who tried to intervene, and took away a boat with three Mercedes Benz cars and the five crewmen who were on board. Both sides were quick to point the finger and deny responsibility for the incident. Eventually, the crewmen were released

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86 Jonathan Hill, 'ICAC may pass case files to China' South China Morning Post, 7 February 1996.

87 Niall Fraser, 'Investigating by mainland is "imminent" Eastern Express, 16 February 1996. But the retiring Deputy Commissioner of the ICAC, Jim Buckle, stated that a more likely scenario would be to have the ICAC do the work on China's behalf.

[88] Yonden Lhatoo, 'Border pact to boost crime fight' Hong Kong Standard, 17 February 1996. This arrangement is consistent with China's mutual judicial assistance treaties with other countries.

[89] Linda Choy, 'Beijing should aid ICAC' South China Morning Post, 12 March 1998.

after four weeks detention. The Secretary of Security said cross-liaison had brought the incident to a happy ending, and that in future both sides would work more closely with each other so that 'such an incident does not happen again.' [91]

In March 1995, Zhuhai police again sailed into Hong Kong waters to seize a barge and a tugboat suspected of smuggling cars to China. They arrested two seamen from Hong Kong and also pointed a machine gun at the Hong Kong marine police who tried to intervene. [92] Not surprisingly, the incident renewed boundary concerns in Hong Kong. As a result, a series of high level meetings took place between the United Kingdom and Chinese governments. The Zhuhai police insisted that the arrest and seizures had been made within mainland waters, and they blamed unexpected conditions at sea for drifting into Hong Kong waters, and a breakdown in communications for the stand-off. While the Zhuhai police did apologise for the incursion, they insisted that they would continue to prosecute the suspects under Chinese law, and criticised the Hong Kong government for 'making a big fuss about nothing.' [93] As it happened, both suspects were later released. [94]

The new boundary is now defined in relation to clearly recognisable natural features rather than arbitrary lines on maps, which, it is claimed, will make Hong Kong's job of running the border a lot easier, while also reducing the risk of incursion by mainland security vessels into Hong Kong. [95]

The Double Taxation Arrangement

The Double Tax Arrangement (DTA) reached in 1998 between the State Administration of Taxation of the Central Government and Hong Kong's Inland Revenue Department is another important formal agreement reached after reunification. It attests to the fact that Beijing does treat Hong Kong's tax regime as a separate and independent entity, and may also produce a model of cross-border co-operation in other areas. The content of the DTA is quite similar to

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90 Hong Kong Legislative Council, Hansard, 6 June 1990, p 1713.

91 Ibid, p 1725.

92 'Beijing apologises over marine police incursion' Hong Kong Standard, 31 March 1995.

93 'Issues of Marine Police Operation After 97 to be Discussed in Joint Liaison Group' Hong Kong Economic Journal, 4 April 1995.

94 China denied that the release was the result of British protest, insisting that they were set free according to the law. The Zhuhai police didn't notify the Hong Kong police about the release. Staff Reporters, 'Freed "smuggler" gives Hong Kong police the slip' South China Morning Post, 16 April 1995.

95 Government Information Centre News Update, 'Hong Kong-Guangdong Boundary of Administration

other double tax treaties China has entered into, although it is more limited in scope. The international element is apparent as the DTA is based on the OECD model.

The DTA is of course not a real treaty. Under China's civil law tradition, a treaty entered into by the government and ratified by the NPC overrides domestic laws which are inconsistent with the treaty. As the DTA is a domestic agreement between two legal systems within the same country, it does not, in theory, have the same binding effect. This lack of legal force does not affect its binding effect in China's legal regime though where administrative decisions often hold sway. However, it seems the DTA will override the Inland Revenue Ordinance in Hong Kong. [96] A more symbolically distinctive feature lies in the fact that the instrument is called an arrangement instead of a treaty or an agreement, terms normally used for international instruments of this sort. This distinction is also maintained in the Chinese version of the document.

Rendition of criminal suspects
No formal rendition agreement between Hong Kong and the mainland exists. While the mainland has returned many criminal suspects wanted in Hong Kong, Hong Kong has not been able to reciprocate. Under the existing administrative arrangement, the mainland authorities would return a fugitive offender to Hong Kong if the following three conditions are satisfied:

- he is a Hong Kong resident,
- the offence was committed entirely in Hong Kong and
- he is not accused of having committed any offence in the mainland. [97]

Since 1990, 128 fugitive offenders have been returned by mainland authorities to Hong Kong under this administrative arrangement. But from the mainland's perspective, Hong Kong is fast becoming a safe haven for people who have committed crimes in China. [98]

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formally signed' (19 June 1997) at <http://www.info.gov.hk>.

96 Specification of Arrangements (Arrangements with the Mainland of China for the Avoidance of Double Taxation on Income) Order LN 126 of 1998.

97 Speech by the Secretary for Justice, Elsie Leung, in the motion debate on 'The HKSAR's judicial jurisdiction' in the Legislative Council, 9 December 1998 <http://www.info.gov.hk.>.

[98] H L Fu, 'The Relevance of Chinese Criminal Law to Hong Kong and its Residents' (1997) 27 HKLJ 229. Ren Keqin and Chen Xiuyun, 'Studies on the Problem of Cross-border Crimes in Guangdong'

Again, this lack of a mutual agreement has not totally prevented the informal rendition of illegal immigrants from the mainland and wanted suspects from Hong Kong. Most illegal immigrants, for example, have been 'extradited' and accepted by mainland authorities.

However, China has been able to reach a rendition agreement with Taiwan for the transfer of illegal immigrants and criminal suspects. In terms of nature and scope, the Taiwan experience could provide a working example for Hong Kong to refer to at a later date when hammering out a similar rendition agreement with the mainland.

Prior to 1979, mainland China and Taiwan were in a state of mutual hostility. Since the beginning of 1979, China has taken several measures to engage Taiwan in dialogue on the issue of political reunification. One of these involved amending the Chinese constitution to facilitate such a step. As a result, Taiwan made its first move to normalise relations in 1987 by lifting the ban on its residents visiting the mainland. In 1991, Taiwan formally ended hostilities by terminating the 'period of mobilisation for the suppression of Communist rebellion.' [99]

In the following years, while economic interaction increased between the two regions, government contact was still prohibited. For example, in one notorious incident, Taiwan asked Interpol to arrest a murder suspect in China but refused direct acceptance of the person from the mainland. Instead, Singapore had to be used as a go-between. The suspect was delivered to Singapore by the mainland authorities and later picked up by Taiwanese police. [100] It is hardly surprising that by the late 1980s, both sides felt it necessary to reach a rendition agreement. The Taiwan authorities were eager to return a number of illegal immigrants to the mainland, and the mainland was eager to have its criminal suspects, mainly those who had escaped to Taiwan with large amounts of stolen money, extradited to face trial.

In 1990, the Red Cross associations from both sides, which had been used as informal representatives of the two governments to make contact, reached a landmark agreement in the Island of Quemoy, referred to as the Quemoy Agreement. It is a short rendition agreement, providing the principles, locations, and procedures of rendition, and the offenders to whom the agreement applies. The agreement has a 'humanitarian spirit' and 'safety and convenience' appear to be its leading principles. It is applicable to criminal suspects,

(1997) 5 The University of Public Security Journal 61.

99 Chiu (note 56 above).

100 Zhao Bingzhi, The Punishment and Prevention of Transnational and Trans-regional Crimes (Beijing:

convicted offenders, and illegal immigrants.
For two years, the agreement operated successfully; several groups of illegal immigrants were sent back to the mainland and a few high profile criminal suspects were extradited back to the mainland to face trial. Problems surfaced when both sides had to deal with the issue of hijacking of aircraft from mainland China to Taiwan. Central to the contention was the issue of the agreement's scope, and particularly whether it applied to the offence of hijacking.
The hijacking of aircraft, military or civilian, between Taiwan and the mainland, has had an interesting history. [101] From May 1993 to June 1994, 12 aircraft were hijacked to Taiwan and in every one of these cases, Taiwan's courts exercised jurisdiction. All the hijackers were prosecuted and sentenced from 6 to 12 years imprisonment. One even received 13 years for displaying a bad attitude during the trial. Although Taiwan returned all the crew members, other passengers, and aircraft to China, it consistently rejected the mainland's rendition requests. [102]
Direct dialogue between Taiwan and the mainland took place in Singapore in April 1993. The negotiations were conducted by two newly established non-governmental

China Gangzheng Press, 1996).

101 Before the ending of hostilities, the hijacking of aircrafts from the other side was encouraged and heavily rewarded. In 1983, six persons from the mainland hijacked an airliner, intending to fly to Taiwan, but ended up in South Korea instead. South Korea had no diplomatic relations with China at the time and rejected China's extradition request on the ground that hijacking, as a counter- revolutionary offence in China, was a political offence and therefore not extraditable. The South Korean authorities instituted criminal prosecutions, and expelled the hijackers to Taiwan, upon its strong request, after sentencing them from 4 to 6 years imprisonment. The hijackers were given a hero's welcome and given generous financial awards. The plane, the crew, and other passengers were sent back to China by the South Korean authorities.
In 1986 when a Taiwan cargo plane was hijacked to Guangzhou, the hijacker was warmly received in both Guangzhou and later in Beijing. This was the first time both sides were able to deal with each other officially. Negotiations took place in Taiwan, with the result that the hijacker was allowed to stay on the mainland while the cargo plane was sent back to Taiwan.
When another aircraft was hijacked to Taiwan by two mainland hijackers in 1988, the attitude of the Taiwan authorities had changed. While they were still called anti-communist heroes, they were at the same time subject to criminal prosecution. However, they were prosecuted for the offence of endangering civil aviation instead of the more serious offence of hijacking. The hijackers were sentenced to three and half years imprisonment and were released after serving less than one year. They were allowed to reside in Taiwan.
In 1989, a family hijacked an aircraft to Japan. Taiwan kept a low profile in this case. The matter was settled between Japan and China. The husband was extradited to China and was sentenced to 8 years imprisonment by a Chinese court.
For studies on cross-strait hijacking, see Fan (note 54 above); Erica Strecker, 'Cross-Strait Air Piracy: Its Impact on ROC-PRC Relations' (1994) 21 Asian Affairs: An American Review 148; Wang Taiquan and Chen Jianyu, 'Double Jeopardy and Mainland Hijackers in International Law and the Issue of Human Rights' (1998) 4 Yuedan Law Journal (Yuedan Faxue Zazhi) 85; and Zhao (ibid).

102 Ibid.

organisations. Representing the mainland was the Association for Relations Across the Taiwan Straits (ARATS), chaired by Wang Tao-han; representing Taiwan was the Straits Exchange Foundation (SEF) chaired by Koo Chen-fu. 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 were deemed to take place in both places, and under international law, Taiwan would be entitled to prosecute. The Quemoy Agreement, according to Taiwan, was not specific on the crimes it covered. Because of the political significance of hijacking and Taiwan's concern over its jurisdiction, the rendition of hijackers had to be treated differently. There must be a formal agreement before rendition. In essence, Taiwan demanded that the mainland recognise its lawful jurisdiction in criminal matters. [103] It also insisted that in any future rendition agreements, suspects would not be extraditable if the offence concerned was political, 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. Clearly, the mainland has made major concessions. The new agreement was originally intended merely to supplement the Quemoy Agreement, while focusing narrowly on the offence of hijacking, but upon Taiwan's insistence, the supplementary agreement was made applicable to all the other offences too, effectively replacing the Quemoy Agreement. [104] According to the new agreement, there will be no express 'political offence exception' but the requested party will be permitted 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.

Another major concession is the extradition of 'citizens' from one side to the other to face criminal trial. The mainland insisted that the agreement between Taiwan and itself was purely a domestic one and international principles of extradition should not be applicable in a cross-straits context. While both sides agreed that the citizen exception should not be referred to in the agreement, they nevertheless decided that the requested party should have the right to determine whether its 'citizens' be extradited to the other side.

An important breakthrough occurred in 1997, when another Taiwanese cargo plane was hijacked to the mainland. The mainland seized this opportunity and surrendered the hijacker, Liu Shan-chung, to face trial on 14 May 1998, putting the pressure firmly on

103 Strecker (ibid).

Taiwan. Two months later, Taiwan reciprocated by sending two hijackers in its custody to the mainland. [105]

One major concession made by Taiwan in the rendition agreement relates to the exclusion of the death penalty. China's criminal law contains a wide range of capital offences and, from the Chinese perspective, a death penalty exception would, in practice, defeat the purpose of an extradition, and indeed the death penalty has not constituted an automatic exception in other bilateral extradition treaties that China has agreed to. However, China has nonetheless been flexible in accepting other less formal mechanisms to facilitate the demand 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. [106]

Where extradition is achieved through negotiation without a treaty, and whether the extradited suspect can be sentenced to death depends upon the position of the requested country and subsequent negotiations. Many suspects have been extradited from various East Asian and South-eastern Asian countries and several of them have been sentenced to death. [107] One notable exception was the hijacker extradited from Japan in 1989. The suspect was extradited without the assistance of a treaty and was sentenced to 8 years imprisonment - a very lenient punishment by Chinese standards, [108] which could indicate that extradition had been conditional on the lenient sentence.

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104 Ibid.

105 Both hijackers, Huang Shugang and Han Fengying, were on parole after serving half of their sentences. Han's husband was still in prison serving a sentence for the same offence. Their child, who went to Taiwan in the same hijacked airplane, was studying at a Taipei primary school. It was reported that the child would be sent back to the mainland after his father had served his term.

1106 Huang Feng, *Studies on the Extradition System in China* (Beijing: University of Politics and Law of China, 1997).

107 Taiwan police stated in 1995 that the citizenship of fugitives from Hong Kong naturalised in Taiwan would be revoked if they had committed crimes in Hong Kong before naturalisation. Taiwan used to be a safe heaven for corrupt public servants from Hong Kong. In 1994 alone, 12 suspects were returned to Hong Kong. See Renato Reyes, 'ICAC to pursue fugitives in Taipei' Hong Kong Standard, 6 January, 1995.

108 In 1993, Sun Xianlu who attempted to hijack an airplane to Taiwan was sentenced to life imprisonment. This case was published by the Supreme People's Court as a model case. 'The Case

of Sun Xianlu' (1994) I Supreme Peoples Court Gazette 43.

Mutual recognition and the enforcement of judgements or arbitral awards
A Hong Kong judgment, like any other foreign judgment, has no direct operation on the mainland, unless it is first recognised by a mainland court. The PRC Civil Procedure Law 1991 allows for a foreign judgment to be recognised and enforced on the basis of treaties or reciprocity. [109] In the other bilateral mutual judicial assistance agreements China has entered into, mainland courts have recognised and enforced foreign judgments except in special circumstances specified in the treaties. As no arrangement exists between Hong Kong and the mainland for the mutual enforcement of judgments and as the reciprocity principle in the Chinese Civil Procedure Law is ambiguous, the only viable mechanism to enforce a Hong Kong judgment is to start a fresh action on the mainland. [110]

Arbitral awards were mutually enforceable in Hong Kong and the mainland before the transition of sovereignty because the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) applied. The New York Convention was ratified by the United Kingdom in 1975 and extended to Hong Kong in 1977. China acceded to it in 1987. [111] According to one commentator, awards made on the mainland constituted between one-half to two-thirds of the total convention awards made in Hong Kong between 1990 and 1994 indicating that the mutual enforcement of convention awards had worked reasonably well before the transition. [112]

Since the PRC resumed sovereignty over Hong Kong on 1 July 1997, Hong Kong and the PRC ceased to be separate parties to the New York Convention. Courts in Hong Kong have thus held that an arbitral award made by a mainland arbitration tribunal is not directly enforceable, unless a specific mutual recognition and enforcement agreement states to the contrary; otherwise, the award would no longer be enforceable under Hong Kong's Arbitration Ordinance. [113] The Hong Kong Government is negotiating with mainland authorities on arrangement of mutual enforcement of arbitral awards between Hong Kong and the mainland.

Once again Taiwan's experience points to a possible resolution in this matter.

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109 PRC Civil Procedure Law 1991, art 262.

110 Edwards Report (note 2 above), p 25.

111 For a thoughtful study on this issue, see Morgan (note 2 above).

112 Ibid, p 27.

113 *Ng Fung Hong Limited v ABC* [1998] 1 HKC 213.

Judgments and arbitral awards are mutually recognised and enforceable in Taiwan and the mainland because of legislative and judicial enactments in Taiwan and the mainland respectively. As early as 1990, the Supreme People's Court officially announced that mainland courts would recognise and enforce judgments rendered by courts in Taiwan. In 1992, Taiwan reciprocated by passing a law to recognise civil judgments or arbitral awards made on the mainland. [114] However, following international practice, mainland judgments or awards will not be recognised if they violate public order or public morality in Taiwan. However, recognised judgments or awards will be enforced if they order the payment of money. [115]

It was not until 1998 that the Supreme People's Court issued rules to set down the procedures and criteria to govern the recognition and enforcement of judgments rendered by Taiwanese courts. [116] The Measures are also applicable to the recognition and enforcement of arbitral awards made in Taiwan. While they were carefully worded to ensure that Taiwanese judgments would not be regarded as foreign judgments, in substance they are treated as such. There are several exceptional circumstances in which a mainland court may refuse to recognise a judgment made in Taiwan. Most of the exceptions are similar to those stated in China's bilateral mutual judicial assistance treaties. According to s 9 of the Measures, a civil judgment rendered by a court in Taiwan shall not be recognised if one of the following circumstances applies:

- the effectiveness of the civil judgment is not certain;

- the civil judgment was made in circumstances where the defendant was absent from the trial and was not duly served with the document that had originally instituted the proceedings, or the defendant had no capacity to participate in the litigation and was not properly represented;

- the case belonged to the exclusive jurisdiction of a people's court in the mainland;

- both parties had agreed to submit the dispute to arbitration;

- a people's court had already made a decision on the same subject matter, or the

114 Taiwan Legislative Council, Regulations on Relations between People in the Taiwan Region and People in the Mainland Region.

115 Ibid, art 74.

116 SPC, Measures of the Supreme People's Court on the Recognition by People's Courts of Civil Judgments Made by Courts in the Taiwan Region (Judicial Interpretation, No 11 of 1998) (hereafter,

people's court had recognised a judgment of a foreign or overseas court or an arbitral award made by a foreign or overseas arbitration institution on the same subject matter; or

- the civil judgment violated the basic principle of national laws or harmed social and public interests.

An applicant can apply for recognition of a Taiwanese judgment in a competent mainland court within one year of the relevant judgment. [117] Once a judgment is recognised upon application, the same matter cannot be tried again by a mainland court and the judgment will be enforced according to the Chinese Civil Procedure Law. [118] There are two sections in the Measures conferring jurisdiction on mainland courts, which are not expressly stated in China's bilateral agreements. Under s 13, if a matter has been decided by a Taiwan court, but no corresponding application has been made to a people's court for recognition, the latter will have jurisdiction to retry the case upon application. Under s 15, where a people's court declines to recognise a Taiwan judgment for the reasons listed in s 9, the concerned parties may have the matter tried in a competent mainland court afresh.

In China's bilateral treaties, it is often specified that a competent mainland court will not re-examine a foreign judgment on its merits when recognition and enforcement are being sought in China. As regards Taiwanese judgments, this principle is not stated in the Measures. On the other hand, there is no clear authorisation for a mainland court to re- examine the merits of judgments either. The only distinctive circumstance which may lead to refusal is s 9(6) which states that Taiwanese judgments will not be recognised if they violate the spirit of a national law. The precise meaning of this clause is uncertain but it does not imply any re-examination on merit. Since the meaning of the 'spirit of national law' is vague and incapable of certain definition, its significance may be more symbolic and could merely have been used to demonstrate the domestic nature of the Measures.

This subsection can and does make a strong symbolic statement at China's current stage of relations with Taiwan especially considering that Taiwan has yet to be reunified with the mainland. In the Hong Kong context, the clause 'not violating the spirit of national laws' would certainly be inapplicable. Indeed, such a statement would violate the Basic Law,

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the Measures).

[117] Ibid, s 17.

[118] Ibid, s 18.

because, given the difference in our two legal systems, it follows that Hong Kong law will violate the spirit of China's national laws in many ways.

Mutual legal assistance and regional conflict of law

What are the implications of the 'one country, two systems' policy in the context of mutual legal assistance between the mainland and the current and future SARs? It is reiterated repeatedly that any legal assistance agreements must be confined within the permissible scope of the one country, one sovereignty ideal. This has been stated as the first guiding principle governing cross-border mutual legal assistance. But what does it mean? It has been suggested, for example, that public order or policy may not be invoked as a ground to refuse acceptance of documents for services. But both Taiwan's legislation and the mainland SPC Measures accept these as legitimate grounds for refusal.

It has also been suggested that, under the 'one country, one sovereignty' doctrine, Hong Kong courts (for that matter, any SAR court), cannot negotiate directly with the SPC, because the latter is the supreme judicial authority within the PRC of which the SAR is merely a component. Could the solution be to open up negotiations between a department within the SPC and SAR courts? However, this argument is difficult to sustain because it ignores the fact that Hong Kong courts, applying Hong Kong laws, cannot, by definition, be subordinate to the SPC, the supreme judicial body applying mainland law (or national law). Recent practice has indeed indicated this to be the case. Thus, China's State Administration of Taxation entered into an arrangement with the Inland Revenue Department of Hong Kong; and the Ministry of Public Security, China's national authority for police, declared long ago that it considered the Hong Kong police force as an equal partner. These organisations support and co-operate with each other but there is no question of one being subordinate to the other. [119]

The substance of mutual legal assistance in a domestic Chinese context is not necessarily different from those in international contexts. Such assistance is usually the subject of an agreement between two legal systems arrived at through a process of negotiation. This is not to suggest that the 'one country, two systems' doctrine has become

[119] Fu (note 98 above).

meaningless. On the contrary, ties between Hong Kong and China have obviously strengthened since reunification, but Hong Kong's relationship to the mainland is unique and differs from other federal arrangements. Given the fact that Hong Kong's legal system has more independence as a SAR than it ever had as a dependent territory under British rule, and that there is no concurrent 'federal jurisdiction' in Hong Kong, the one country ideal is significant mainly in a symbolic sense. It is important in determining the form agreements take, the names used, and the expressions adopted, but the contents of agreements still have to be negotiated and agreed upon by the two mutually exclusive jurisdictions involved.

It is true that China has proved sensitive on the issue of sovereignty. But part of the reason for China's occasional hypersensitivity is historical. Once China has been integrated into the international community, its traditional position on sovereign power may change. See, for example, China's shifting position when dealing with international pressure on the issue of human rights, and its recent signing of the International Covenant on Civil and Political Rights (ICCPR). China has become more pragmatic. It could be argued that once face has been given and certain rituals have been performed, the mainland will be able to accept the binding effect of the Basic Law and treat the SAR as an equal partner.

This hope may not be as far fetched as it seems. The ICAC-Guangdong Procuratorate mutual assistance scheme and the Hong Kong-Guangdong agreement on mutual assistance on the service of documents both survived the transition of state sovereignty; the Ministry of Justice continues to appoint notaries in Hong Kong; and the Hong Kong Police Force remains a part of Interpol as a sub-bureau of China just as it was a sub-bureau of the United Kingdom. In the current negotiation on reciprocal enforcement of arbitral awards between Hong Kong and the mainland and the service of documents, continuity is the key consideration. It is expected that the possible future arrangements should be the same as those in place before reunification. [120]

This continuity demonstrates that the key to interaction between the two legal systems is not state sovereignty, but the independence of each system. That is, the 'legal' sovereignty of each system. Special circumstances call for special arrangements. And the fact that Hong Kong residents have been treated as foreign nationals in many of China's commercial laws does not diminish China's national integrity or dignity. Having a Vice-Minister of the Foreign Ministry as a Basic Law Committee member does not change the fact that the Basic Law is a domestic law of China. Making the 'one country, two systems' doctrine a restricting

[120] May Sin-mi Hon, "Deal struck on cross-border cases" South China Morning Post, 16 December 1998.

framework will not facilitate smooth co-operation between the mainland and the SARs. Hong Kong is clearly within the one country ideal and this is simply no longer an issue. How the two systems can survive and how they should interact is the real question. Given the two fundamentally different legal systems, legal co-operation must be guided by legal needs, the bargaining power of both parties, and practical and political necessities rather than by abstract doctrines.

It is tempting perhaps to argue for the creation of some sort of federal jurisdiction, especially in criminal law matters. The US experience has shown that federal law enforcement and federal courts are in a better position to exercise jurisdiction over sensitive crimes such as civil rights violations, and inter-state offences. [121] They can provide a framework for a system of standardised law. One strain which may lead to the failure of a federation is the absence of 'a united framework' which can manage and accommodate regional identity and differences. [122] The Basic Law recognises and preserves internal differences, but lacks an institutional structure to generate positive consensus between the mainland and Hong Kong. [123]

But without a strong institutional structure, any 'federalisation' or standardisation of even limited jurisdiction is dangerous. While cross-border legal interaction is strongly encouraged, the creation of any federal jurisdiction should be rejected with equal force. Hong Kong's legal system is markedly different and marginal within China's political-legal regime, and it could easily be overwhelmed if not insulated and vigorously protected. As the weaker party, it should insist on formality and regularity when hammering out agreements on mutual legal assistance with China, the stronger party. [124]

Whether or not Hong Kong can uphold its legal sovereignty depends not only on the Central Government making possibly excessive demands, but also, perhaps more importantly, on whether the SAR has the capacity to maintain its high degree of autonomy. So far, the Central Government has kept its promise to allow Hong Kong to govern itself.

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121 Jamie S Gorelick and Harry Litman, 'Prosecutorial Discretion and the Federalization Debate' (1995) 46 Hastings Law Journal 967.

122 Ronald Watts, *Comparing Federal Systems in the 1990s* (Canada: Institute of Inter-governmental Relations, Queen's University, 1996), pp 102-3.

123 The Basic Law Committee is the only institution bridging the two legal systems on constitutional matters, but it is likely to play a passive and limited role. See 'China law expert

discusses the Basic Law Committee and law in the PRC' (interview with Professor Albert Chen) (November 1997) China Law & Practice 40.

Hong Kong's deputies to the NPC and the Political Consultative Conference are cautioned not to comment on Hong Kong's government administration on the mainland. And despite being dragged into the public spotlight, the Xinhua News Agency has tried to maintain a low profile. Also, the People's Liberation Army (PLA), despite maintaining a garrison in Hong Kong, have managed to remain almost invisible especially in comparison with the former British military presence. However, the fact remains that the 'one country' doctrine can be invoked by the Central Government in special circumstances to override the 'two systems' aspect of the policy.

Macau offers an excellent negative example. Faced with increasing violent crimes committed by triad societies in the enclave, the colonial government found itself unable to make sufficient remedial measures. Indeed, so dire was the situation, it had to invite China to intervene to intensify crime control during the transition period. In response, the Guangdong police have re-enforced the level of control in Zhuhai, a Chinese city adjacent to Macau, and also sent a team of liaison officers into Macau, declaring that, 'We want to make it very clear that there is no place for triads in Macau.' [125] In a dramatic move, the Chinese government have decided to station PLA troops in Macau after the reunification in 1999 without consulting the Portuguese government, reversing a tacit Sino-Portuguese deal that ruled out deployment. While stationing PLA troops in Macau is obviously an exercise of China's sovereignty, the Vice-Premier, Qian Qichen, who announced the decision also stated that the troops would boost social stability and economic prosperity in Macau. [126] It is clear that the PLA, whose function is to secure national defence, will intervene in the Macau SAR to secure law enforcement if local security forces fail to manage the task. [127]

The overwhelming acceptance of the decision to station a PLA garrison in Macau can be partially attributed to the successful Hong Kong experience, where the PLA has been gradually accepted. The Macau story has other implications for Hong Kong, however. What is most alarming is that the gangs who have terrorised Macau are only branches of triad

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124 Heymann (note 8 above); and Fu (note 98 above).

125 Ng Kang-chung, 'Guangdong vows help against Macau triads' South China Morning Post, 18 September 1998, p 5.

126 Niall Fraser, 'Beijing U-turn puts troops in Macau after handover' South China Morning Post, 19 September 1998, p 1.

127 Following the statement made by the Chinese government, Macau governor, Rocha Vieira responded that both sides would have to discuss the matter. 'PLA plan triggers new talks' South

China Morning Post, 23 September 1998, p 5.

societies headquartered in Hong Kong. [128] It is highly likely that the exercise of criminal jurisdiction over the case of Big Spender, a crime boss in Hong Kong, who committed his crimes principally in Hong Kong, [129] is intended to send a strong message to both Hong Kong and the mainland. The bottom line is that, where a SAR fails to maintain social and economic stability, the Central Government will intervene.

Embracing the mainland: Hong Kong's irony

It appears that Hong Kong is embracing China's new sovereignty with open arms. Albert Chen has argued that the change of sovereignty on 1 July 1997 was a shift in the Grundnorm as theorised by Kelsen. A Grundnorm is the foundation of any legal order. Because of the reunification, 'Hong Kong will be absorbed into the legal order of the PRC, and will adopt as its own the grundnorm of the PRC legal system.' [130] As the Grundnorm supplies the foundation of any given legal order and 'provides a unity for all its legal norms existing at various levels of its hierarchy of norm,' it is logical to expect that the influence of the transition on Hong Kong's legal system would be fundamental and widely felt in Hong Kong. [131] Chan reviewed the legal development in Hong Kong one year after reunification and concluded that Hong Kong's legal system is indeed developing a new identity as an SAR within the PRC. [132]

The effect of the shifting Grundnorm was most striking when the NPC Standing Committee decided to set up a Provisional Legislative Council in Hong Kong to replace the more popularly elected legislature. One year later, the Court of Appeal appreciated this shift in grundnorm in HKSAR v Ma Wai-kwa. [133] The court held that HKSAR courts had no

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128 Harold Bruning, 'Macau seeks Beijing help to bust crime' Hong Kong Standard, 17 September 1998, p 2.

129 H L Fu, 'The battle of criminal jurisdictions' (1998) 28 HKLJ 273.

130 Albert Chen, 'The Provisional Legislative Council of the SAR' (1997) 27 HKLJ 1,9-10. For a different application of Kelsen's theory in Hong Kong, see Raymond Wacks, 'One Country, Two Grundnormen? The Basic Law and the Basic Norm' in his (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993).

131 Ibid, p 10.

132 Johannes Chan, 'A Search for Identity: Legal Development in the Hong Kong Special Administrative Region since 1 July 1997' A paper presented at the conference on 'Hong Kong in China: A Year Later' 29-31 October 1998 in Singapore.

133 [1997] 2 HKC 315.

jurisdiction to challenge the validity of any legislation or act of the NPC when it exercised the sovereign power of the state. 134 While the case was decided in the context of the legality of the Provisional Legislative Council under the Basic Law, it clearly has far reaching implications. 135 The ruling of the Ma case was upheld by the Court of Appeal in *Cheung Lai Wah & Ors v The Director of Immigration.* 136

Legislation has been passed in Hong Kong to protect its national interest, such as the ordinances passed to protect the national flag [137] and national security. [138] While the Provincial Legislative Council was free to amend the Public Order Ordinance and the Societies Ordinance after certain sections were repealed by the NPC Standing Committee, [139] the amendments were widely seen as being strongly influenced by the Central Government. BL 23 obliges the HKSAR government to enact laws to control certain political activities. It is likely that future legislation based on BL 23 will not only retain the old offences of treason and sedition, but will also introduce new criminal offences with strong mainland characteristics, such as subversion and secession. [140] A more contentious issue involves the passage of the Adaptation of Laws Ordinance which transferred the privileges of the British Crown to the Chinese state, [141] including Xinhua in Hong Kong. The ordinance confers a wide

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134 *HKSAR v David Ma Wai-kwan* [1997] 2 HKC 315. For comments on the case, see Johannes Chan, 'The Jurisdiction and Legality of the Provisional Legislative Council' (1997) 27 HKLJ 374; and Albert Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts' (1997) 27 HKLJ 387.

135 Chan (ibid). Albert Chen argues that the Ma case 'should not be so broadly interpreted as to mean that any act, decision, or resolution of the NPC that is relevant to or touches upon Hong Kong has the force of law in Hong Kong. 'He insists since the Basic Law has come into operation,' ... Hong Kong courts are under no obligation to recognise the legal force of any NPC acts that have not been made applicable to Hong Kong in accordance with Article 18 of the Basic Law ... (emphasis original).' See Chen (ibid), p 390.

136 [1998] 1 HKC 617.

137 National Flag and National Emblem Ordinance. Two defendants were convicted under this ordinance on 19 May 1998. They were fined HK$4,000 and were bound over for one year. 'Two men who damaged national flags found guilty' Wen Wei Po, 19 May 1998.

138 Societies Ordinance and the Public Order Ordinance. See Johannes Chan, 'Human Rights: From One Era to Another' in Joseph Cheng (ed), *The Other Hong Kong Report 1997* (Hong Kong: Chinese University of Hong Kong Press, 1997), pp 137-67; and Albert H Y Chen, 'Questions of Law and Order' South China Morning Post, 30 January 1997.

139 Chen, ibid.

140 H L Fu, 'National Security in a Free Society: Understanding Article 23 of the Basic Law' (paper presented at the conference on Judicial Independence in Hong Kong, at St Anthony's College, Oxford, 12-13 June 1997).

immunity from the application of Hong Kong laws on state institutions. [142]

The executive has also been seen, at least according to the perception of the general public, as embracing the mainland. Xinhua was not prosecuted for violating the Personal Data (Privacy) Ordinance when it failed to reply in time to Emily Lau's enquiry as to whether it held any information on her. [143] The Secretary for Justice refused to explain her decision and there was wide speculation (justifiably) that her reasons were connected to the status of Xinhua. [144] In another case, the Secretary for Justice exercised her discretion not to prosecute Sally Aw, Chairman of Sing Tao Holdings which owns the Hong Kong Standard, one of the principal English newspapers in Hong Kong. Three executives from the newspaper were charged with conspiring with Aw to inflate the newspaper's circulation figures. However, Sally Aw is also a Hong Kong member of the China's National Political Consultative Conference and a personal friend of the Chief Executive. The Secretary for Justice's explanation to Legco's members that political connections or favouritism played no part has been largely regarded as unsatisfactory. The explanation she offered was unable to dispel public pessimism that in this case the rule of law had been sacrificed. [145] The Department of Justice has placed the PRC constitution, which is, as a whole, not applicable to Hong Kong, in the Laws of Hong Kong and before all other laws. [146] Hong Kong fought several hard battles with the mainland before reunification over the issue of criminal jurisdiction, but now appears eager to allow mainland courts to try its criminals. [147]

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141 The central authorities and their subordinates which are conferred immunity include: (i) the president of the People's Republic of China; (ii) the Central People's Government; (iii) the government of the Hong Kong Special Administrative Region; (iv) the Central Authorities of the People's Republic of China that exercise functions for which the Central People's Government has responsibility under the Basic Law; and (v) subordinate organs of the Central People's Government or other Central Authorities that perform the functions of the CPG under the Basic Law and do not exercise commercial functions.

142 For comments and criticism on the wide immunity, see, Hong Kong Voice of Democracy, 'Adaptation of Laws (Interpretative Provisions) Bill: the Application of Ordinances to the "State"' (6 April 1998) at <http://www.democracy.org.hk>. See also, Johannes M M Chan, 'Due Process in Hong Kong: The Prospect under Chinese Sovereignty' (paper presented at the Conference on Judicial Independence at St Anthony's College, Oxford, 12-13 June 1997).

143 Colm Cronin, 'What's Really Worrying Hong Kong?' (1998) 10 Asialaw 12.

144 Chan (note 129 above). The protection of Xinhua affected by the Adaptation of Law Ordinance did not extend to cover the period which Emily Lau's inquiry related.

145 Jimmy Cheung and May Sin-Mi Hon, 'End to Sally Aw row doubted' South China Morning Post, 20 March 1998.

146 See Margaret Ng, 'PRC Constitution Made Part of Laws of Hong Kong?' (October 1998) Hong Kong Lawyer 21.

147 Fu (note 129 above).

The Hong Kong police have also taken extraordinary measures to maintain public order in relation to mainland leaders. While it is true that peaceful demonstrations continue to remain a way of life in Hong Kong, and no applications for public meetings and processions have been disallowed or prohibited, it is also true that the police have begun to adopt different tactics in Hong Kong to protect Chinese senior leaders. The use of Beethoven's Fifth Symphony to drown out reunification protesters was held by the Independent Police Complaints Council (IPCC), the civilian watchdog of the Complaints Against the Police Office (CAPO), to be an 'unnecessary use of authority.' The police refused to accept the ruling and have determined to protect the safety as well as the dignity of Internationally Protected Persons (IPPs), [148] and Lee Ming-kwai, a Senior Assistant Commissioner, who ordered the Fifth Symphony to be played was afterwards awarded a 'Commendation for Government Service.' [149]

On the other hand, although we are right to be concerned about Hong Kong's ready acceptance of the PRC grundnorm and its new identity, we often overlook Hong Kong's current and potential impact on the mainland's legal system and the fact that Hong Kong is an important component in the array of factors which drive law reform on the mainland. While the mainland's legal system may 'imperceptibly but inexorably' influence Hong Kong, it is also possible that Hong Kong's legal system may shape socio-legal change on the mainland. [150]

It is now commonly accepted that Hong Kong is an ideal place for China to draw on to build a legal framework for its market economy. Hong Kong law, with its available Chinese version, provides easily accessible reference materials for Chinese legislative drafting, especially in the area of commercial law. [151] Moreover, the new articles on organised crime in the PRC's amended criminal law drew much from regulations in Guangdong province, which, in turn, benefited greatly from Hong Kong's experiences in controlling triad societies. [152] Fung may have exaggerated Hong Kong's influence when he said, 'We play the role of interpreter-cum-mentor. What this means in the legal sphere is that China looks to

148 Gren Manuel, 'New order on freedom of speech' South China Morning Post, 1 October 1998.

149 Glenn Schloss, 'Symphony of protest over officers' award' South China Morning Post, 14 October 1998.

150 Epstein (note 22 above).

[151] Fung (note 33 above).

Hong Kong for guidance and for advice,' [153] but Hong Kong's fingerprints are clearly evident in China's commercial laws - among those of many other jurisdictions. [154]

It is trite law that legal transplants have only limited effect in developing legal systems. Even though mainland law has been influenced by Hong Kong, the direction in which it will eventually develop will depend on other factors apart from the actual content of its law. Shenzhen borrowed extensively from Hong Kong when drafting its municipal regulations (principally in the areas of commercial law), [155] but this has not distinguished the operation of law in Shenzhen from the rest of the mainland in any meaningful way. [156] As Fung admitted: 'The common law partakes of a certain spirit, a certain philosophy, a certain approach...'

However, a certain 'philosophy' and 'spirit' do seem to be gradually developing in the mainland's legal system. Again, Hong Kong's fingerprints are evident in this cultural transformation. Timothy Fok, a Legislative Councillor from Hong Kong, has observed that Hong Kong provides a model that many Chinese cities are eager to follow. Hong Kong is perhaps idealised in the mainland and its charm is probably more appreciated by mainlanders than by Hong Kong's own residents. [157] Fok's observation referred to city planning, but it may readily be applied to other contexts. Western popular culture, as processed or interpreted by Hong Kong has heavily influenced the younger Chinese populations. They follow Hong Kong fashions, listen to Hong Kong music, and watch Hong Kong television or films. The uptake of these cultural experiences is, in one sense, more fundamental than abstract concepts could ever be. The progress from disco to democracy illustrates the importance of the social and economic foundations of political change, [158] and Hong Kong is one key to this transition in China. The repeated attempts to control spiritual pollution from Hong Kong and other

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152 Apple Daily, 30 September 1997.

153 Fung (note 33 above).

154 Ibid, p 34. For the influences civil law traditions have had on current Chinese law, see Albert Chen, 'The Developing Chinese Law and the Civil Law Tradition' in M Brosseau, S Pepper, and S K Tsang (eds), *China Review 1996* (Hong Kong: Chinese University Press, 1996).

155 Epstein (note 22 above).

156 Court rooms may have been better decorated and judges paid higher salaries, but the judiciary is not more efficient, nor less corrupt.

157 Timothy Fok, 'At a loss for identity' South China Morning Post, 22 September 1998.

[158] Orville Schell, *Discos and Democracy: China in the Throes of Reform* (New York: Pantheon Books, 1988).

potential SARs and their dismal failure illustrate both the weariness and vigilance of the Chinese Communist Party (CCP) against cultural erosion of the Communist rule and the power of new popular cultures.

This changing cultural influence is also observable in the legal system. Visiting judges from the mainland are genuinely struck by the solemnity of the judiciary. Lawyers and laypersons alike from the mainland are impressed by the rule of law in Hong Kong. Hong Kong's freedom of the press, as observed in Hong Kong and practised in the mainland when Hong Kong journalists frequently test the forbidden zones, are the envy of their mainland counterparts. The ICAC has a much higher reputation in the mainland than its mainland counterpart because of its independence and effectiveness. The Chinese capacity for pragmatic judgment when presented with concrete examples probably helps explain this phenomenon. Ideology, including the CCP ideology, is hard pressed to counter these sorts of evaluations.

Overseas investment by Hong Kong or via Hong Kong has also been instrumental in promoting the rule of law. Foreign investors often require that the binding law should be published and made publicly available, making it difficult to reply upon internal documents as sources of law. The process of engaging in lengthy contract negotiations has also taught numbers of Chinese managers many important lessons about the value of the rule of law. The anti-kick-back clauses in such agreements send a reminder to Chinese partners that corruption, in the end, harms business. As many law makers and regulators admit, overseas investors and their lawyers (mainly stationed in Hong Kong) are exerting a strong influence on the making, application, enforcement, and practice of law. [159]

To say that the mainland and Hong Kong are more or less embracing each other is not to suggest that the legal systems in Hong Kong and the mainland will soon converge or that they are even set on a converging course. They are not. The two legal systems are based upon two different political economies with fundamentally antagonistic interests. Hong Kong's legal system is unlikely to be affected directly or fundamentally by the mainland in any meaningful way in the foreseeable future. Hong Kong law continues to model itself after western common law, and is free to chart its own course. On the other hand, mainland law, despite reform and some real progress, is still 'socialist' in the sense that at the ideological

159 Of course, this is not to deny that investors from Hong Kong and other places have been

associated with corruption and the abuse of workers' rights, and have also bad an adverse impact on China's legal system and legal practice. See Stanley Lubman, 'Introduction: The Future of Chinese Law' in his (ed), *China's Legal Reform* (Oxford: Oxford University Press, 1996), p 86.

level, it remains as the instrument of the state under the leadership of the CCP.

Both sides now clearly recognise their differences but are prepared to tolerate these differences whilst, at the same time, making positive efforts to co-exist. These growing social and economic ties necessitate enhanced liaison and increasing co-operation with or without formal agreements. The importance of a good working relationship is widely appreciated. Albert Chen observed that a strong will exists on both sides to make 'one country, two systems' work. [160] Legal reform in China demonstrates China's inclination to develop a rule of law, and its commitment to piecemeal reform on judicial independence and slow paced democratic reform. In a limited sense, the mainland aspires to embrace Hong Kong's legal system and legal values. While the domestic political economy remains the driving force for the direction and pace of political-legal reform in China, external pressures and growing co- operation with a range of different legal systems also helps it to bridge the gap between the two legal systems.

The ICCPR may render additional help in this bridging process. When China ratifies the ICCPR, both the mainland and Hong Kong will be obliged to abide by the same covenant. It is not beyond the bounds of reasonable speculation to note the possibility that the ICCPR may have a converging impact on the two governments, perhaps in the way that the European Convention of Human Rights has had a standardising impact on legal systems in European countries?

We are still at the beginning of an era of assimilation. Are we bound to dig each other's graves as Marx once questioned or will we eventually find a common ground for co- existence? Optimists and their critics have different versions of the future. Johannes Chan reasoned that the 'one country, two systems' doctrine as understood in the mainland may be better described as 'one country, two economic systems.' For the mainland, Hong Kong's civil liberties are based upon its economic success and are tolerated by the mainland because of Hong Kong's economic success. Once this economic basis is weakened Hong Kong's legal system may follow the same fate. [161]

There is another possibility, however, as Chan has clearly seen. If Hong Kong maintains its economic strength and China continues its course of reform, Hong Kong's liberal legal values, if not its legal system, may impact the mainland rather as its popular

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160 Albert Chen, 'The Concept of Justiciability and the Jurisdiction of the Hong Kong Courts' (1997) 27 HKLJ 387.

[161] Chan (note 132 above), p 167.

culture has impacted its people. Yash Ghai argues that economic development in general and foreign investment in particular necessitate legal assimilation between the mainland and Hong Kong. Hong Kong's liberal legal values will increasingly become acceptable and even necessary. [162] Albert Chen, from a more humanistic perspective, sees values, such as respect for human rights, as the common heritage and aspiration of humankind; a common goal that people in both Hong Kong and the mainland strive for. [163] In this sense, justice and fairness are the substance; legal systems are merely the different forms used to express and achieve them. 'One country, two systems' may, in the end, become 'one set of values shared by two systems.'

Conclusion

Mutual legal assistance between Hong Kong and the mainland gradually improved in the years towards reunification. Co-operation worked reasonably well through the application of international treaties (the New York and Hague Conventions), through informal understandings, or limited mutual assistance pacts. Reunification so far has not brought the two sides closer. While the international treaties lapsed after reunification, no major progress has since been made on mutual legal assistance between Hong Kong and the mainland.

From Hong Kong's perspective, the transition of sovereignty has not changed the nature of mutual legal assistance between itself and the mainland. Hong Kong as a SAR in the PRC enjoys more legal autonomy than it did as a dependent territory. Under the framework of the Basic Law, Hong Kong's legal independence and its relative insulation from China's legal system is protected. While Hong Kong's new legal sovereignty does not mean it should quarantine itself, because legal interaction is a matter of necessity, the basis for such legal interaction must be the co-existence of two equally autonomous legal regimes. One is only different from the other, neither is superior to the another. At an earlier stage of interaction and assimilation, 'two systems' was the key to the survival of the 'one country, two systems' doctrine. Until the creation of any 'federal' jurisdiction, the legal systems of Hong Kong and the mainland are foreign to each other, and should be treated as such.

162 Newson (note 3 above), p 27.

[163] Albert H Y Chen, 'Justice after 1997' in Harold Traver and Jon Vagg (eds.) *Crime and Justice in Hong Kong* (Hong Kong: Oxford University Press, 1991). See also Albert Chen, *Rule of Law, Enlightenment,*

and the Spirit of Modern Law (Beijing: China University of Political Science and Law, 1998).

COMMENT

The Battle of Criminal Jurisdictions

The decisions of the mainland authorities to prosecute 'the Big Spender' and the 'Fung Shui Master' in Guangdong have caused serious concern about PRC criminal law in relation to Hong Kong. To what extent is PRC criminal law relevant to Hong Kong and its residents? Are the decisions justifiable under PRC criminal law? Do they contravene the principle of 'one country, two systems'? What are the implications of the decisions? This comment tries to answer these questions.

The facts

Li Yuhui, a fung shui master from the mainland, was alleged to have administered cyanide to five persons in Telford Gardens in July 1998, causing their death, while he was performing a ceremony for them. The Fung Shui Master fled to the mainland and was later detained by the mainland authorities. After he confessed to his crime, Guangzhou authorities decided to prosecute him in the mainland for the multiple homicide. After he confessed to his crime, the mainland authorities decided to prosecute him in the mainland for the multiple homicide.

Cheung Tze-keung, nicknamed Big Spender, is a Hong Kong resident. He and his gang members, including another seventeen Hong Kong residents and eighteen mainland residents, have been tried in Guangzhou for a series of offences committed in both Hong Kong and the mainland. The Big Spender was detained by the mainland police on 24 January 1998, and was arrested on 20 July 1998. The Guangzhou procuratorate instituted prosecutions against him and other gang members in the Guangzhou Intermediate People's Court on 29 September 1998. The offences they were charged with included smuggling explosives and firearms, which took place principally in the mainland, and kidnappings and armed robberies which took place principally in Hong Kong. The court found all the defendants guilty as charged and sentenced five of them, including the Big Spender, to death on 30 October 1998.

Hong Kong authorities have shown no intention to try and repatriate the Big Spender to Hong Kong to face trial. The Security Bureau and the Police stated, after his arrest, that the Hong Kong government would not request his repatriation because the crimes involved were wholly or partially committed within the mainland, and the Guangzhou courts would have jurisdiction.[1]

[1] Stella Lee, 'Return Cheung Gang to SAR, Say Rights Groups,' South China Morning Post, 6 August 1998.

When, after the trial started, the Big Spender made his request, through his Hong Kong lawyer, to the Department of Justice for his repatriation, the response from the SAR government was swift and firm. The Secretary for Security, Regina Ip, stated that, as the crimes were not reported in Hong Kong, there was no evidence sufficient to request his repatriation to Hong Kong. Similar statements were subsequently made by the Secretary for Justice,[2] the Chief Secretary for Administration,[3] and the Chief Executive.[4]

While many people in Hong Kong have hailed the trial of the Big Spender in the mainland as a victory for cross-border liaison against organised crime, others are concerned about the implications of this case and the potential remit of PRC criminal law in Hong Kong. The argument has turned on the impact of the Basic Law and the independence of Hong Kong's legal system. It was commonly argued that, since some offences that were charged were committed in Hong Kong, they should be tried in Hong Kong to comply with the one country, two systems doctrine and to respect judicial independence in Hong Kong.[5] Several leading legal figures shared similar views. Audrey Eu SC, Chairman of the Hong Kong Bar Association, said the case aroused intense discussions among Hong Kong lawyers and urged the Department of Justice to press for holding the trial in Hong Kong.[6] Gladys Li SC, in a letter written to the South China Morning Post, argued that trial of the offence of kidnapping in the mainland 'undermines several provisions of the Basic Law and the concept of "one country, two systems."' She also said it would have a chilling effect on the protection of rights and freedoms in Hong Kong.[7] Mr Martin Lee SC, Chairman of the Democratic Party, maintained that the one country, two systems cannot be administered until Hong Kong and the mainland have reached an acceptable rendition agreement.[8] Benny Tai from the Department of Law, University of Hong Kong argued that, based upon Art 19 of the Basic Law, whenever a Hong Kong court has jurisdiction over a case (civil, criminal, or otherwise), mainland courts would automatically be deprived of jurisdiction over the same case.[9]

Despite the mounting pressure, the SAR government stood firm. In a reply to Mr Martin Lee the government maintained that it was not proper for Hong Kong to seek the repatriation of the Big Spender while court proceedings were

2 'The Mainland has Jurisdiction over the Trial of Cheung Tse-keung,' Wen Wei Po, 26 October 1998.
3 'Anson Hits Out at Silent Victims of Kidnappers,' South China Morning Post, 28 October 1998.
4 'No Reason to Hold Trial in HK, Says Tung,' South China Morning Post, 29 October 1998.
5 Hong Kong Voice of Democracy, 'Human Rights Group Petition for "Big Spender,"' <http://www/democracy.org.hk> 7 August 1998.
6 Hong Kong Voice of Democracy, 'HK Lawyers Voice Concern over the Big Spender Trial,' <http://www.democracy.org.hk> 23 October 1998; Lucia Tangi, 'Different Systems Hold Back Beijing Judicial Arrangement,' Hong Kong Standard, 30 October 1998.
7 Gladys Li, 'Alarmed by Top Officials' Lame Excuse,' South China Morning Post, 28 October 1998.
8 Martin Wong, 'HK Police Start Own Probe on Big Boss' Activities,' Hong Kong Standard, 2 November 1998.
9 Benny Tai, 'The Unshakable Responsibility to Protect the Autonomy of Hong Kong,' Ming Pao Daily, 2 November 1998.

underway in the mainland. But it also stated that the police in Hong Kong had been investigating the case and a police officer had been sent to attend the trial to gather information that might help in the bringing of charges in Hong Kong.[10] On 3 November 1998, both former Chief Justice Yang Ti-liang and Executive Councillor Chung Sze-yuen made public statements, supporting the decision to try the Big Spender and his gang members in the mainland.[11] Mr Grenville Cross SC, Director of Public Prosecutions, in a written reply to Gladys Li's criticism, stated that even if the Big Spender were repatriated to Hong Kong, there would be no evidence to support a criminal prosecution. The mainland legal process thus had to be respected.[12]

The application of PRC criminal law

The Basic Law protects the autonomy of Hong Kong's legal system. Under Art 18, no PRC national laws will be applied in Hong Kong unless they are listed in Annex III. The Criminal Law of the PRC is not a listed law and thus has no application in Hong Kong. It is clear that Hong Kong courts exercise exclusive jurisdiction over crimes occurring within its borders, and Hong Kong residents have no duty to abide by PRC criminal law.[13] As Li nicely puts it: 'If the Criminal Law of the PRC has no force in the HKSAR, then as a matter of law, the Hong Kong residents cannot have broken that law.'[14] But, as cases such as those of the Big Spender and the Fung Shui Master have shown, cross-border crimes may still lead to conflict between the two jurisdictions. The problem is that, in some cases, both Hong Kong and the mainland may have jurisdiction over the *same* crime. It is necessary to clarify how and to what extent PRC criminal law becomes relevant to Hong Kong and its residents in a case of dual jurisdiction.

Personality-based jurisdiction

The personality principle allows a state to punish its own citizens for violating criminal law abroad. The Criminal Law of the PRC (as amended in 1997), like such laws in many other civil law jurisdictions, confers wide personality jurisdiction over PRC citizens. Under Art 7 of the code, the law 'shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and

10 Government Information Centre, Daily Information Bulletin, 'Government Response to Cheung Tse-keung Case,' <http://www.info.gov.hk>.
11 May Tam and Lucia Tangi, 'Yang Dismisses Interference Claim,' Hong Kong Standard, 3 November 1998.
12 J Grenville Cross SC, 'Criticism over the Big Spender Case Unfair,' South China Morning Post, 4 November 1998.
13 See H L Fu, 'The Relevance of Chinese Criminal Law to Hong Kong and its Residents' (1997) 27 Hong Kong Law Journal 229; Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997).
14 Li (note 7 above).

space of the People's Republic of China.' This rigid personality principle is softened by a possible exemption of one's criminal liability if the maximum punishment to be imposed is not more than three years imprisonment.

Who is a PRC citizen under PRC criminal law? The creation of the Special Administrative Region has fundamentally changed the division of jurisdictions in the PRC unitary state. There are now different jurisdictions with separate laws and autonomous legal systems to govern their respective PRC citizens. These jurisdictions are autonomous and mutually exclusive. Moreover, there is no truly concurrent central jurisdiction of the sort one finds in federal systems. The Criminal Law of the PRC, from the Hong Kong perspective, is a mainland law, and the scope of its application has to be reinterpreted within the new constitutional context of the one country, two systems doctrine.

Fundamental to the understanding of the personality-based jurisdiction of PRC criminal law is the quasi-nationality regime of an SAR. The PRC citizenry are composed of residents from the mainland and the SARs, but, 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 primarily an SAR resident. He or she, in principle, has 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 limited to the mainland and its residents, 'PRC citizen' within the meaning of PRC criminal law means mainland residents only.

The next issue which arises is, is Hong Kong outside the PRC territory within the meaning of Art 7 of the PRC criminal code? A literal reading would answer the question in the negative because of the reunification; consequently, Art 7 would not be applicable to a mainland resident in Hong Kong. But this literal interpretation would defeat the purpose of PRC criminal law, which aims to follow a mainland resident wherever he goes. There is no ground for holding that PRC criminal law follows a mainlander wherever he or she goes except within an SAR. A proper interpretation is that 'PRC territory' within the meaning of criminal law refers to the mainland of the PRC. This term relates to criminal jurisdiction rather than to state sovereignty. In this limited sense, Hong Kong should be regarded as outside PRC territory. Consequently, PRC criminal law can follow the Fung Shui Master into Hong Kong just as it could into a foreign jurisdiction. But it will not apply to a Hong Kong resident who did not commit a crime within the mainland.

Territory-based jurisdiction

PRC criminal law, like the criminal law of many countries, also has an expansive territorial application. Under Art 6, the criminal code is applicable to all offences committed within the territory of the PRC. A crime is deemed to have taken place in PRC territory when 'either the conduct or consequence

of a crime takes place within the territory.' There is no interpretation as to what is meant by conduct or consequence, and no case has been decided on this point. The mainland authorities in both cases asserted criminal jurisdiction without explaining the legal basis.

One possible interpretation is that, based upon the wording of Art 6 of the Criminal Law, conduct or consequence means that an element of the crime has to take place within the mainland for a mainland court to have jurisdiction. Therefore, in a case where A, on the mainland side of the Lo Wu border, shot and killed B, who was on the Hong Kong side of the border, or vice versa, a mainland court would have jurisdiction.[15] But the remit of PRC criminal law is much wider than that. Under Art 22 of the Criminal Law, it is a crime to prepare the commission of a crime, in the sense of preparing the instrument of the crime and creating the conditions for a crime. Therefore, conduct within the meaning of Art 6 means more than the element of the offence actually committed. The meaning of Art 6 may involve more than the element of the offence actually.[16]

It is clear that an independent state has the absolute right to exercise criminal jurisdiction over a crime all the elements of which take place within its territory. But there is no universally accepted principle to determine jurisdiction if certain elements of a crime take place beyond the borders of the prosecuting jurisdiction, or all the elements constituting the offence are committed beyond those borders.[17] Still, recent developments in the common law tend to provide support for the expansive territorial application of PRC criminal law.

The common law has been relatively conservative in claiming extraterritorial criminal jurisdiction, influenced by the traditional English adherence to a rigid territoriality principle. But common law courts have developed different interpretative techniques in order to punish cross-border crimes which would otherwise have escaped punishment. 'Judicial acrobatics' have been deployed to hold that offences occurring abroad have occurred within the jurisdiction.[18] Historically, courts have exercised jurisdiction in reliance on the location where the criminal intent was formed, the location where victims felt the

[15] This provision is similar to s 1 of the Criminal Justice Act 1993 (UK) which gives English courts jurisdiction over certain property offences if a 'relevant event' takes place in the UK, a relevant event being 'any act or omission or other event (including any result of one or more acts or omission) proof of which is required for conviction of the offence.'

[16] Mainland criminal law has expansive territorial jurisdiction, but it does not stand alone. The New Zealand Crimes Act 1961 is illustrative of this practice; s 7 states: 'For the purpose of jurisdiction, where any act or omission forming part of an offence, or any event necessary to the completion of an offence in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission or event.'

[17] Geoff Gilbert, 'Crimes Sans Frontieres: Jurisdictional Problems in English Law' (1992) 63 British Yearbook of International Law 415.

[18] P W Ferguson, 'Jurisdiction and Criminal Law in Scotland and England' [1987] Juridical Review 179, 187.

impact of the crime, the location where the fruits of the crime were enjoyed, and so forth.[19]

The increase in cross-border crime has compelled nation states, including their judiciaries, to rethink the traditional territoriality principle. In *DPP v Doot*[20] the House of Lords enunciated an expansive territorial jurisdiction on the basis of international comity and the practical need to aid in the punishment of cross-border crime. Lord Salmon, in his majority opinion, categorically states: 'it hardly seems to be in accordance with the rules of international comity that our courts should treat the defendants with special leniency because their crimes were likely to ruin young lives in the United States of America than in this country.'[21]

The doctrine of international comity was further developed in the Canadian case *Libman v The Queen*.[22] The Supreme Court of Canada allowed prosecution in Canada for a fraud the act of which occurred in the US and the consequence occurred in Panama and Costa Rica. Libman made certain phone calls in Canada to certain residents in the US inducing them to purchase worthless shares in some Costa Rican gold mines. The money was then sent to Panama and Costa Rica (as directed) to Libman's associates. The money eventually came to Canada.

Justice La Forest, after surveying cases on the territoriality principle, held that a Canadian court has jurisdiction over the offence of fraud on the ground that 'the fruits of the transaction were obtained in Canada as contemplated by the scheme. Their delivery here was not accidental or irrelevant. It was an integral part of the scheme. *While it may not in strictness constitute part of the offence, it is ... relevant in considering whether a transaction falls outside Canadian territory.*'[23] What is 'relevant' includes 'all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence.'[24] The ultimate test is whether 'a significant proportion of the activities constituting the offence took place in Canada' and whether a 'real and substantial link' existed between the crime and Canada.[25] Most importantly, '[t]he outer limits of the test may, however, well be coterminous with the requirements of international comity.'[26]

Based on these principles, there do not seem to be any serious difficulties in establishing a 'real and substantial link,' broadly construed, between the crimes committed by the Big Spender, including the kidnappings, and the jurisdiction

[19] See *Libman v The Queen* (1986) 21 DLR (4th) 174 for a review of these cases granting expansive territorial jurisdiction.
[20] [1973] AC 807.
[21] Ibid, p 831.
[22] (1986) 21 DLR (4th) 174.
[23] Ibid, p 198 (emphasis added).
[24] Ibid.
[25] Ibid, p 200.
[26] Ibid.

of the mainland, given the serious and organised crimes committed by him in both Hong Kong and the mainland.

The Basic Law and the autonomy of Hong Kong's criminal justice system

The Basic Law establishes and protects the high degree of autonomy of the Hong Kong criminal justice system, subject to the requirements of the Basic Law. However, Hong Kong's autonomy, as argued by Mr Yang Ti-liang, is not meant to deny the mainland's right to try the cases just because Hong Kong is also entitled to.[27] The Basic Law protects the Hong Kong criminal justice system from any possible mainland intrusion by conferring upon it a status equal to that in 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 two systems, while allowing them to negotiate on how they should interact. This arrangement does not create any positive or affirmative powers on one system over another. It just recognises their equal status. When a crime crosses the border, both Hong Kong and the mainland should have jurisdiction over the same offence. The Basic Law does not deprive either system of its jurisdiction according to its own law.

The alleged kidnappings were investigated by Hong Kong police under the direct instruction of Governor Patten in 1996, but the investigation revealed no evidence sufficient to support any further action.[28] Legally, those criminal offences did not take place in Hong Kong. The Big Spender was not wanted by the police in Hong Kong when he left Hong Kong for the mainland through the legal channel at the beginning of 1998.[29] After he was detained in the mainland, the mainland police found evidence sufficient to institute a prosecution in the mainland. The victims of the crime may have been willing to provide evidence to the mainland authorities, while they were reluctant to do so in Hong Kong.[30] The mainland authorities may have forced or induced the accused to confess his crimes. More importantly, the mainland has a different criminal law regime, with different rules of evidence and procedure, which are much more prosecution-friendly, to say the least.

One may blame the victims for not reporting the case to Hong Kong police and for paying ransom to the kidnappers. But ultimately it is the victim who decides which jurisdiction he has faith in. It is the victim's right to choose a jurisdiction with a simple procedure, less protection of the rights of the accused,

[27] Quoted in Tam and Tangi (note 11 above).
[28] Chris Yeung, '1996 Kidnap Rumour led to Police Inquiry: Patten,' South China Morning Post, 29 October 1998.
[29] Government Information Centre, Daily Information Bulletin, 'Cheung Tze-keung Case Explained' <http://www.info.gov.hk>.
[30] It was reported that written witness statements were filed with the trial court by victims of the kidnappings: Ng Kang-chung, Ceri Williams, and Stella Lee, 'Mainland Law Doesn't Apply, Lawyers Argue,' South China Morning Post, 3 November 1998.

and severe punishment. One may criticise criminal justice in the mainland, its arbitrariness, abusiveness, secretiveness, etc. But these criticisms do not pose any challenge to the right of a mainland court to exercise jurisdiction over the case and to the ultimate legitimacy of a court judgment. The Big Spender and other gang members apparently planned a series of serious criminal offences in the mainland to be carried out in Hong Kong; he and his gang, it seems, smuggled into Hong Kong firearms and ammunition from the mainland for the purpose of committing those crimes; and they returned to the mainland, with the fruits of the crimes, after they committed the crimes as planned.[31] The link between those crimes and the mainland is substantial. Regardless of what motivated the mainland authorities to prosecute the Big Spender in the mainland, there is no legal barrier created by the Basic Law or otherwise to prevent the Guangzhou courts from trying him for his cross-border crimes.

It is a loss to Hong Kong that the case was not tried in Hong Kong. For many, including the victims, Hong Kong appears to be a weak prosecutor and its criminal justice is not tough enough to handle the Big Spender case. In this case, Hong Kong has had to rely upon the mainland criminal justice system to punish the Big Spender and his associates. This system is often seen by many people in Hong Kong as inferior, uncivilised, and even barbarous. But this concern has little, if anything, to do with the one country, two systems doctrine, nor with the Basic Law. It is purely a matter of legal interactions between two systems (as divided by the Basic Law). It highlights the urgency for co-operation between the two systems, but does not endanger Hong Kong's autonomous legal system. Even if the mainland treated Hong Kong as an independent sovereign state, it would still be justified in prosecuting the Big Spender as it did. It is unthinkable that the mainland should tolerate a group of gangsters planning and preparing crimes in its jurisdiction and then enjoying fruits of the crime in its jurisdiction after they have committed the crimes in an SAR, especially when that SAR has not been able to investigate and prosecute these crimes.

Hong Kong and the mainland fought many battles over criminal jurisdiction before reunification. Now the two legal systems are ready to co-operate more closely to combat cross-border crime. Cross-border crime necessitates organised cross-border co-ordination and co-operation on the part of governments. Since criminals choose a particular country or region to commit crimes according to how they see their best interests, arguably, law enforcement authorities should be given the same leverage and allowed to choose a jurisdiction for prosecution strategically. The issue in the two cases is not whether the mainland has jurisdiction to prosecute the Big Spender and the Fung Shui Master — clearly it does according to the broad personality and

[31] Stella Lee, 'HK's Most Wanted Man Arrested,' South China Morning Post, 23 July 1998.

territorial principles incorporated in PRC criminal law. The real issue to be addressed is, in a clear case of dual jurisdictions, how and according to what criteria should the primary right to prosecute be assigned to one jurisdiction instead of the other.

In view of the questionable procedures applying with respect to PRC criminal law and the drastic punishments meted out, Hong Kong people are right to be concerned about the current state of legal interaction in cases of dual jurisdiction. But it is misplaced to look to the Basic Law for answers to this difficult problem. Rather these cases highlight the need for Hong Kong and the mainland to negotiate agreements in these contentious areas with renewed vigour.

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