

FINAL REPORT ON
CONFLICT OF LAWS, EXTRADITION,
AND OTHER RELATED ISSUES

(passed by the Executive Committee on 12 June 1987)

Special Group on Law

Introduction

Hong Kong will become a special administrative region of the People's Republic of China after 1997 and its system will be different from that of other parts of the PRC. This is the so-called "one-country, two systems" concept. In terms of the judicial system, HKSAR and mainland China are two different jurisdictions. Mainland China practises a socialist legal system and its laws are mainly enacted by the National People's Congress and its Standing Committee. The legal system adopted by the HKSAR is a capitalist one which took the common law (of British origin) as the basis. The laws which are applicable to the HKSAR are the Basic Law, the laws which are previously in force in Hong Kong and in accordance with the Basic Law, and the laws enacted by the future legislature.

Conflict of laws is that part of the private law of a country that deals with cases having a contact with some other systems of law. That may mean that persons or corporations of two sovereign states are involved. But equally (for many purposes) conflict rules are needed where two distinct jurisdictions within a state are concerned. Thus in the U.K. conflict rules exist on between English, Scottish and North Irish jurisdictions. After June 1997, as Hong Kong and the mainland have two distinct jurisdictions the legal basis of conflicts resolution must be addressed.

Major Issues

- 1 With the establishment of the Hong Kong Special Administrative Region in 1997, the HKSAR and the mainland will be two different jurisdictions. Will the conflict of laws for dealing with civil cases involving Hong Kong and other countries/jurisdictions, which is previously in force, be applicable to the cases involving Hong Kong and mainland China after 1997?

Proposal:

In dealing with problems concerning conflict of laws between Hong Kong and mainland China after 1997, principles of the common law which are applicable to solving such conflict should continue to be used in Hong Kong courts.

- 2 What coordinating arrangements should be made concerning the criminal jurisdictions of the courts of the HKSAR and mainland China in order to safeguard against double jeopardy in cases where both Hong Kong and a mainland Chinese court might claim jurisdiction?

Proposal:

In dealing with criminal cases involving both Hong Kong and mainland China, the principle taken should be based on the place of offence. This means when a person, whether a Hong Kong inhabitant or an inhabitant of mainland China, who has committed an offence in Hong Kong should be prosecuted and tried according to the law of Hong Kong; whereas a person, whether a Hong Kong inhabitant or an inhabitant of mainland China, who has committed an offence in mainland should be prosecuted and tried according to the law of mainland.

- 3 According to the Joint Declaration, the laws enforced in the HKSAR shall be the Basic Law, the laws which are presently in force in Hong Kong and in accordance with the Basic Law, and the laws enacted by the legislature of the HKSAR. However, the national laws (other than the Constitution of China[1]), e.g. National Security law, Anti-Subversion Law etc. which are enforced in mainland China should be applicable to the whole of China. As Hong Kong is a part of China, will these laws be applicable to the HKSAR? If the laws apply, in what ways can the application be in accordance with the Basic Law? And what authority should enforce such laws[2]?

Proposal:

As mainland China and Hong Kong adopt different judicial systems, laws of the mainland should not be applied to Hong Kong. In respect of foreign affairs, Hong Kong has to observe the administrative instructions from the mainland and make them valid in Hong Kong by going through the legislative procedure. In order to avoid any confusion between the legal systems of mainland China and Hong Kong, all existing laws of mainland China which are applicable to Hong Kong, e.g. the Nationality Law, should be clearly spelt out in the Basic Law. In the future, any new laws of mainland China which are applicable to Hong Kong should first go through the legislative procedure of Hong Kong before they take effect in Hong Kong. No Chinese laws should be applicable to Hong Kong unless they have been incorporated by reference in the Basic Law or gone through the legislative process of the HKSAR.

[1] See the final report on "the Basic Law and the Constitution" for the applicability of the Chinese Constitution to Hong Kong.

[2] See also the report on "Jurisdiction of the HKSAR courts and Applicability of National Laws to Hong Kong" for the discussion on this issue.

It is suggested by a member as an alternative that any new laws of mainland China which are applicable to Hong Kong should first go through the process of discussion and proposal by a committee under the National People's Congress, comprising members from Hong Kong and mainland, before it is applied to Hong Kong. The NPC will make its decision according to the proposal of the committee. After the announcement of the decision, the applicable laws will automatically take effect in Hong Kong and those which are not applicable will be invalid.

As Hong Kong and mainland China are two different jurisdictions, what will the reciprocal juridical assistance between Hong Kong and mainland China be like after 1997?

Proposal:

The problem can be solved by bilateral agreement.

On the issue of extradition, the present arrangements between Hong Kong and other countries or regions, and between Hong Kong and other parts of mainland China are:

Extradition

- 1) In Hong Kong, the law as regards extradition is entirely dependent upon U.K. legislation. By the Extradition Act 1870, U.K. may by Order in Council direct that the Act shall apply in the case of a foreign state with which an arrangement has been made for the surrender to that state of fugitive criminals, and the Order in Council can declare that the Act be extended to Hong Kong (Section 17 of the Act). The Extradition (Hong Kong) Ordinance, Cap. 236 merely provides for the application of the Extradition Acts to Hong Kong.
- 2) Certain principal conditions or safeguards must be satisfied before a fugitive is extradited from Hong Kong to the requesting country. These include --
 - a) double criminality - what the fugitive has done in the requesting country must constitute an offence in that country and also an offence listed in the First Schedule to the Act (extradition crime);
 - b) prima facie rule - the evidence required is such as would justify the committal for trial of the fugitive criminal if the crime of which he is accused has been committed in Hong Kong (Section 10 of the Act), and depositions and their authenticated copies are admissible (Sections 14 and 15 of the Act);

- c) political crimes not extraditable - a fugitive criminal will not be surrendered if the offence for which he is demanded is of a political nature (Section 3) or the requisition for his surrender is in fact made with a view to try or punish him on account of his race, religion, nationality or political opinion (Section 2 of Suppression of Terrorism Act 1978); and
- d) previous crime - a fugitive criminal must not be surrendered unless the law of the requesting country state has provisions that he will not be tried for an offence committed before his surrender other than the extradition crime proved by the facts on which the surrender is grounded (Section 19).

Rendition

- 3) The return or rendition of fugitive offender as between Hong Kong and the U.K. or other Commonwealth Countries is governed by the Fugitive Offenders (Hong Kong) Order 1967, which extends most provisions of the Fugitive Offenders Act 1967 to Hong Kong.
- 4) The principal conditions or safeguards set out in paragraph 2 above also apply in rendition, except that the requesting country must be a designated country (Section 2 of the 1967 Act) and that the offence must be a "relevant" offence set out in Schedule I to the Order.

Extradition to China

- 5) The return of Chinese fugitives from Hong Kong to China is governed by the Chinese Extradition Ordinance, Cap.235, which contain the same principal conditions or safeguards for extraditing a fugitive criminal to China. The list of extradition crimes set out in the First Schedule to Cap.235 contain most but not all of the offences in the other lists.

Additional undertaking

- 6) If the crime for which a fugitive is wanted is punishable by death in the requesting country but not in Hong Kong, Hong Kong normally will not extradit or render that fugitive to the requesting country unless an undertaking is given to the effect that he would not be sentenced to death.

Question: In respect of extradition, what will be the arrangements between Hong Kong and other countries or regions? What would be the arrangements for the surrender of wanted persons as between Hong Kong and other parts of mainland China after 1997?

Proposals:

- 1) After considering the points mentioned above, it is submitted that the principal conditions as set out in paragraph 2 above should apply. In particular, the evidence required for the return of an offender from Hong Kong to mainland China should at least be the evidence that would justify committal for trial (i.e. prima facie evidence). As regards the list of offences that are relevant for the purpose of returning fugitives, the lists attached to the Chinese Extradition Ordinance, the Fugitive Offenders (Hong Kong) Order or the Extradition Act may serve as useful guidelines. It should be considered that the provisions of the Fugitive Offenders (Hong Kong) Order and of the Extradition Act be "localised" into the domestic legislation of the HKSAR.
- 2) The same should also apply in the case of surrender of fugitive offenders from mainland China to Hong Kong.
- 6 Will officials from mainland China stationed in Hong Kong have the privileges or exemptions enjoyed by diplomats in respect of civil and criminal prosecution after 1997?

Proposal:

Such privileges are only applicable to diplomats in foreign countries. As Hong Kong is a part of mainland China and not a foreign country, normally officials from mainland China would not be given such privileges or exemptions. However, if Hong Kong officials are given certain privileges or exemptions in the mainland, officials from mainland should be subject to reciprocal arrangements in Hong Kong.

- 7 At present British soldiers stationed in Hong Kong who have committed any offence in places directly under the jurisdiction of the British army are dealt with as follows:

- 1) Criminal offences committed by soldiers against soldiers

The following offences committed by soldiers will not be tried in the courts of the Hong Kong:

- i. if the offence was committed when the soldier was carrying out his duties;
- ii. offences of personal assaults (e.g. battery); or
- iii. the offence involves the British Government or property of an "individual" who is related the British army in one way or another (i.e. a British soldier or his family member).

2) Criminal offences committed by soldiers against civilians

The courts of Hong Kong have judicial power over the offences committed by soldiers against civilians unless the offence arises in the execution of duties by the soldier.

3) Criminal offences committed by civilians against soldiers

The courts of Hong Kong have judicial power over criminal offences committed by civilians against soldiers under any circumstances.

Members of the British Armed Services are liable to civil litigation for claims of damages if they have committed a civil wrong against civilians (regardless of whether it was caused by executing his duties). These cases will be tried by the courts of Hong Kong. The prosecuted party will be the soldier and his employer (i.e. the U. K. Government). In actual practice, if the offence arises in the soldier's execution of his duties, the Ministry of Defence will provide legal aid and compensation for the soldier concerned.

Question: What laws should be observed by the People's Liberation Army (PLA) stationed in Hong Kong after 1997?

Proposal:

- 1) The PLA stationed in Hong Kong should observe the laws of the HKSAR when outside the the military camps.
- 2) The PLA will be ruled by the military code within the camps. However, if a criminal offence committed in the camp involves a civilian (i.e. person other than the PLA members) as the offender or victim, it will be dealt with according to the laws of the HKSAR. On the other hand, if a PLA member commits a criminal offence in execution of his duties, the laws of the HKSAR will not apply: the offender should be sanctioned by the military code even though the victim is a civilian.

Note: The phrase "carrying out his duties" or "in execution of his duties" has a restricted meaning. The criminal offence mentioned above must be related to the execution of duty. For instance, the offence committed by a soldier who raped a woman when he was on duty is clearly not related to the execution of his duty. Thus the offence should be tried by the courts of Hong Kong. On the other hand, when a soldier on duty resorted to violence in the arrest of a trespasser on the camp and caused the death of the trespasser, the soldier would be tried according to the military code.

* If there is any discrepancy between the Chinese and the English versions, the Chinese version shall prevail.

法律衝突、引渡及其他有關問題

最後報告

(1987年6月12日經執行委員會通過)

中華人民共和國香港特別行政區基本法諮詢委員會

法律專責小組

引言

香港在一九九七年後成為中華人民共和國的一個特別行政區，將實行與中國其他地區不同的制度。這就是所謂的“一國兩制”。在法律制度來說，香港特別行政區與中國內地，將是兩個不同的法律區域。在中國內地實行社會主義法制，適用的法律主要由全國人大及其常委會制定；在香港特別行政區，實行以源於英國的普通法為基礎的資本主義式的法制，適用的法律是香港特別行政區的基本法，與基本法沒有抵觸的九七年前香港原有法律，及香港特別行政區立法機關制定的法律。

衝突法是國家私法的一部分，專門處理涉及其他法律制度的案件。該案件可能涉及兩個主權國家的人士或機構；但（為了多個目的），涉及一國之內兩個不同的司法管轄區的案件，也同樣需要應用衝突法規。因此，以英國為例，在英格蘭、蘇格蘭、北愛爾蘭各司法管轄區之間就有衝突法規。一九九七年六月以後，香港和內地既是兩個不同的司法管轄區，必須制定解決兩者法律衝突的法律根據。

主要問題

1. 當香港特別行政區在一九九七年成立後，香港和內地便成為兩個不同的法律區域。九七年後，原適用於涉及香港與任何其他國家或法律區域的民事案件的衝突法，是否仍適用於涉及香港與內地的案件？

建議：

九七年後，在處理涉及香港與內地的法律衝突問題，將來香港法院應沿用在港適用解決法律衝突的普通法制原則。

2. 對香港及內地法院均可爭取管轄權的案件，為保障當事人不會因同一罪名而受兩次審理（Double jeopardy——指英、美、法上禁止法院對同一罪行進行一次以上公訴的一個普通法和憲法原則。大陸法上稱一事不再理原則），兩地的法院的管轄權和兩地的刑法的適用性應如何協調？

建議：

應以犯罪者犯案的地方為原則來處理同時涉及香港和內地的刑事案件，即是說如犯罪者，不論是香港居民還是內地公民，在香港作出犯罪行為，便應在香港受香港刑法檢控和審判；如犯罪行為在內地發生，犯罪者，不論是香港居民還是內地公民，須在內地受內地刑法檢控和審判。

3. 根據中英聯合聲明的規定，在香港特別行政區實行的法律為《基本法》，以及與基本法沒有抵觸的香港原有法律和香港特別行政區立法機關制定的法律，但在內地實行的全國性法律（中國憲法除外^①），如國家安全法、反顛覆法例等法例應適用於整個中國，而香港特別行政區為中國的一部份，這些法律在特區是否同樣適用？若是適用，怎樣的處理方法才可符合中英聯合聲明的規定？還有，應由什麼機關執行這些法例？^②

建議：

由於內地與香港採用不同的法律制度，內地的法律不應引用到香港。在外交問題方面，香港須要遵行內地的行政指示，將有關處理方法透過立法程序，在香港生效。為避免內地與香港的法律制度產生混淆，所有適用於香港的內地現行法律，如國籍法，都應在基本法內清楚列明。將來任何適用於香港的新定內地法律，都必須先通過香港的立法程序才能生效。未寫入基本法或未經香港特別行政區立法程序的中國法律，不得應用於香港。

有委員提議另一做法：任何適用於香港的內地新法，在應用於香港前，必須先由全國人民大會之下的委員會（成員包括香港及內地人士）討論及建議。人大將根據其建議作出決定。在人大宣布決定後，適用的法律自動在香港生效，不適用的法律在香港則告無效。

4. 由於香港與內地分別為兩個不同的法律區域，九七年後，香港與內地的司法互助關係，將會是怎樣？

建議：這問題可透過雙邊協定處理。

5. 有關引渡問題，目前香港與其他國家或地區，以及香港與內地其他地方的引渡關係：

引渡逃犯

(1) 香港有關引渡逃犯的法律完全倚賴英國的法例。英國籍着1870年引渡法例，可頒發樞密院令，指示謂該法例適用於已與英國安排將刑事逃犯引渡回該國的外國國家，而樞密院令可宣佈將該法例適用範圍擴展至香港（英國引渡法例第17條）。香港引渡條例（香港法例第236章）僅規定英國引渡法例適用於香港的情形。

(2) 由香港引渡逃犯往請求國，必須符合下列主要條件或保障措施，包括：

- ① 雙重犯罪——逃犯在請求國所犯的事，必須在該國構成罪行，且是英國引渡法例第一附表所列的罪行（引渡罪）；
- ② 「表面證據」規則——所需的證據，須足以令該刑事逃犯在初級偵訊時被法官裁定表面證據成立，猶如他被控的罪行是在香港觸犯一樣（英國引渡法例第10條），而作証書及其認證副本可接受作為證據（英國引渡法例第14及15條）；
- ③ 政治罪行不可引渡——倘要求予以引渡的刑事逃犯所犯罪行屬政治性質，該刑事逃犯不會獲得引渡（第3條），又或要求引渡的目的，是要以該刑事逃犯的種族、宗教、國籍或政治觀點等理由而審訊或懲罰他，則該刑事逃犯亦不會獲得引渡（英國1978年壓抑恐怖主義法例第2條）；

註① 有關中國憲法在香港的適用問題，請參考“基本法與憲法”的最後報告。

② 有關此問題的討論，還可參考“司法管轄權與全國性法律在香港的應用”報告。

- ④ 以前的罪行——除非請求國的法律有條文規定，刑事逃犯除了有事實證明並作為引渡理由的引渡罪外，不會因為他在引渡前所犯的其他罪行而被審訊，否則該刑事逃犯不得予以引渡。

遣送

- (3) 香港與英國或其他英聯邦國家之間有關逃犯的遣回或遣送問題，均依照1967年逃犯（香港）令處理，該法令是將英國1967年逃犯法例內，大部份條文引申應用於香港的。
- (4) 上文第2段所列出的主要條件或保障措施，均適用於遣送問題上；但請求國必須是指定國家（見英1967年法例第2條），涉及的罪行，必須是法令內附表 I 所列出的「有關」罪行。

引渡到中國

- (5) 將中國的逃犯從本港遣回中國時，依照華人移提回籍條例（第235章）處理。該條例所載的主要條件或保障措施，與引渡刑事逃犯到中國的主要條件或保障措施相同。第235章第一附表列出的引渡罪，雖未囊括其他罪名表的罪行，但已載有其中的大部份。

附加保證

- (6) 如果逃犯的罪行在本港並不是死罪，而在請求國則可判處死刑，則在一般情況下，本港不會將該逃犯引渡或交給該國家，除非該國家能提出保證，說明不會判之以死刑。

問題：在九七年後，香港與其他國家或地區，以及香港與內地其他地方的引渡關係是怎樣？就通緝犯的引渡問題，香港與內地其他地方將作什麼安排？

建議：

- (1) 縱觀以上各點，第2段所列出的主要條件理應予以應用。尤其在本港將犯事者遣回中國大陸所需證據方面，至低限度應為可通過初級偵訊的證據（即表面證據）。至於為遣回逃犯的目的而列出有關罪行方面，則上文提及的華人移提回籍條例、逃犯（香港）令及英國引渡法例內所附載的罪名表均可作為借鑒。應考慮將逃犯（香港）令及引渡法的規定「納入」香港特別行政區的本地法例中。
- (2) 適用範圍，應包括中國大陸交回逃犯予香港的問題。

6. 九七年後，中央的駐港官員在香港是否可享有民事及刑事方面的如外交人員可享有的特權或豁免權？

建議：

這些權利祇適用於派駐外國的外交人員，而香港是中國領土的一部份，並非外國，所以，在一般情況下，中央的駐港官員在港不會享有這些特權或豁免權。然而，如果香港派駐內地的官員在內地享有某些特權或豁免權，中央派駐香港的官員也應享有同等待遇。

7. 目前駐港英軍在英軍直接管轄的地方，如作出犯罪行為，處理的情況如下：

- (1) 士兵之間犯下刑事罪行

在下列情況中發生的刑事罪行，不會在香港法庭審訊：

- ① 該項罪行是由於士兵執行職務犯下的；
- ② 屬於侵犯人身的罪行（例如毆打）；
- ③ 涉及英國政府或「個人」財物的罪行，這裏的「個人」是指同英軍有關的個人（即英軍人員或他們的家屬）。

(2) 士兵對平民犯下的刑事罪行

香港法庭擁有審判權，除非該罪行是由於士兵執行職務犯下的。

(3) 平民對士兵犯下的刑事罪行

任何情形下香港法庭都擁有審判權。

至於英軍人員，不論是否在當值時，對平民犯下民事過失，都要面對索取損害賠償的民事訴訟。此等案件會在香港法庭審理，在此情形下，與訟人為該士兵及其僱主（即英國政府）。實際上，如有關的民事訴訟是由於士兵執行職務而引起的，國防部在大多數情形下會為有關士兵提供法律援助及補償他的損失。

問題：九七年後，中央駐港人民解放軍在香港該遵守什麼法律？

建議：

- (1) 解放軍如駐札香港，在軍營外須服從特別行政區法律。
- (2) 解放軍在軍營內須服從軍紀。不過，如果在軍營內發生的刑事罪行涉及平民（既解放軍以外的人），則不論他是犯罪者或受害人，亦須按特別行政區法律處理。但是，解放軍由於執行職務觸犯刑事罪，受害人雖是平民，該軍人仍應受軍法制裁，而毋須引用特別行政區法律。

註：「執行職務」一語的意義是有局限性的。上述所指的刑事罪必須與執行職務有關。舉例來說，一名士兵在當值時強姦婦女，他所犯的罪顯然與職務毫無關連，所以應交由香港法庭裁決。反過來說，一名負責守衛的士兵在當值時察覺有人擅闖軍營，在拘捕時，由於濫用武力引致該人死亡，那名士兵便須受軍法裁決。

