

Hong Kong SAR

Hong Kong's Chinese Puzzle

by David Fitzpatrick

At the stroke of midnight on 30 June 1997, Hong Kong was returned to the People's Republic of China. China takes justifiable pride in the smooth transition; but the government in Beijing is now confronted by the demands of reality, which include the need to make detailed arrangements regulating the ties between the Hong Kong Special Administrative Region and the sovereign power.

MUTUAL LEGAL ASSISTANCE

Not the least of the problems concerns the degree and means by which mutual legal assistance in criminal matters is to be made available. The puzzle for the People's Republic is that, while Hong Kong's dependent status must involve a high degree of mutual co-operation with China, the procedural safeguards that exist to govern Hong Kong's co-operation with third jurisdictions may not easily be used as a model: they could operate so as to exclude the sovereign power. On the other hand, if co-operation between Hong Kong and China is to take place without clear safeguards, local and international confidence will suffer.

Mutual legal assistance is an inevitable consequence of the interaction of developed jurisdictions. An extensive trade in goods and services, together with a high level of cultural exchange and social intercourse, is bound to encourage a high degree of integration of each jurisdiction's institutions: a corresponding level of integration should be exhibited by each trading partner's criminal justice system. Mutual legal assistance in civil matters, which underpins trade, will grant the reciprocal enforcement of judgments as a minimum. Such arrangements exist between most developed countries and the level of co-operation usually far exceeds basic assistance by way of reciprocal enforcement.

Mutual legal assistance in criminal matters should, as a minimum, preclude one jurisdiction from being the place of flight for the other's criminal suspects and, in the modern world, should also prevent one jurisdiction from becoming a safe base of operations for those who would participate in criminal acts injurious to the other jurisdiction. It is only in the last 30 years that mutual legal assistance in criminal matters has moved forward from simple extradition and the rendering of fugitive prisoners, to what is the emerging international norm, that is, a high degree of co-operation between respective police forces and prosecutors against serious crime. This co-operation anticipates the selective exchange of intelligence, the gathering and transmission of official records and documentary evidence, securing witness testimony, active assistance in investigations and the seizure and confiscation of the fruits of crime. The UK's *Criminal Justice (International Co-operation) Act 1990* is an example of such co-operation between developed jurisdictions.

Close co-operation will only become possible through mutual trust. Trust should exist at both the political level and at the practical level so that it operates between the key personnel involved in making requests and rendering assistance. Each

minister, judge, police officer and lawyer involved should believe that the other participant's system is essentially rational, fair and staffed by individuals of ability and integrity. That is not to say that each participant will need to be perfect but a component of the trust is an expectation that imperfections will become clear and be remedied. Thus transparency and consistency in relations are significant. Where there is a high level of trust, countries typically enter into a mutual legal assistance treaty, either bilaterally or multilaterally. Alternatively, a lesser form of international obligation may be adopted between participants in the form of a mutual legal understanding or the mutual acceptance of ad hoc arrangements.

MUTUAL UNDERSTANDINGS OR ARRANGEMENTS

Such treaties, understandings or arrangements will not be absolute: they invariably accommodate the possibility of the executive denial of co-operation in specific instances. For example, art. IV of the annex to the 1997 agreement between the governments of Hong Kong and Australia, which governs mutual assistance in criminal matters, contains typical reservations whereby either party may refuse a request which might impair its essential interests. Thus sovereign integrity and political reality may be recognised as co-existing with the hope of a high level of cordial co-operation.

Hong Kong is and has for many years been a highly integrated participant in world commerce. The People's Republic has not yet attained a high level of integration but the Chinese government went to great pains to ensure that the present level of mutual legal assistance available from Hong Kong in civil matters, long established under the British, would be preserved, together with the possibility for development in the future.

In criminal matters, legal co-operation was not as well developed and the future appears less certain. Up to the day of the handover, Hong Kong was in the position to offer mutual legal assistance to a number of countries in the form of extradition on the basis of British treaties, together with the rendition of fugitive offenders to other Commonwealth jurisdictions under UK legislation and administrative arrangements that dated from imperial times. Assistance in criminal matters was also available in the form of a letter of request, whereby a Hong Kong court would assist in the examination of a witness identified as having evidence relevant to an overseas prosecution. The system was regularly employed and worked reasonably well.

This kind of two-way traffic will remain probably strongly biased towards co-operation with English speaking jurisdictions in which there presently reside large Chinese populations with Hong Kong ties. Though the system works, it is apparent that the developed world has moved on: Hong Kong will be expected by the international community to offer a significantly higher level of co-operation, beyond extradition and the taking of evidence, introducing the possibility of assistance by the Hong Kong Police

in overseas' investigations, including the seizure of evidence and the confiscation of assets. Increasingly co-operation also requires each jurisdiction to provide the means whereby a witness in detention might travel in secure conditions to give evidence outside the jurisdiction in which he or she is imprisoned. Hong Kong is the notorious home of at least three powerful international crime syndicates and may not easily avoid being part of international efforts to curb drug dealing, organised crime and money laundering.

Before the handover and anticipating a multiplicity of bilateral and multilateral arrangements, there was an obvious need for a mutual legal assistance ordinance which would permit Hong Kong to participate in a separate capacity from the sovereign (whether that sovereign was the UK or the People's Republic of China). Separate legal arrangements for Hong Kong are, for the time being at least, necessary because the need exists to preserve Hong Kong's continuity of co-operation in a manner which is not linked or limited to arrangements securing co-operation between China and third countries. The criminal justice system of China is neither well developed nor clearly understood outside the People's Republic. Although China may develop a sound system in due course, it is not at present widely perceived as being a transparent system that ensures due process.

CRIMINAL MATTERS

Accordingly, shortly before the handover, two pieces of legislation were introduced dealing respectively with extradition and mutual legal assistance in criminal matters. On 26 March 1997 there was enacted in Hong Kong the *Fugitive Offenders Ordinance*, which came into operation on 25 April 1997. The *Extradition (Hong Kong) Ordinance* (Cap. 236) was repealed and the arrangements whereby persons wanted for prosecution (or for the imposition of sentence) outside Hong Kong were brought together to be dealt with by one uniform process. The ordinance contemplates arrangements which permit the ultimate surrender of suspects between Hong Kong and other jurisdictions, but not the People's Republic of China. The ordinance has been received by Hong Kong's legal community without hostile comment.

The *Fugitive Offenders Ordinance* draws strongly on precedent established in the law of extradition. The alleged fugitive has the following safeguards:

- (1) the requirement of 'double criminality' (s. 2(2)(b));
- (2) the exclusion of offences of a political character (s. 5(1)(a));
- (3) the exclusion of surrender sought for the purpose of prosecution on account of race, religion, nationality or political opinions (s. 5(2));
- (4) the requirement of 'specialty', that is, the offender may only be prosecuted in respect of an offence for which he was surrendered (s. 5(2));
- (5) there would be no re-surrender from the requesting jurisdiction without the offender having the opportunity to leave that jurisdiction (s. 5(s)).
- (6) there would be prima facie evidence sufficient to warrant committal for trial in Hong Kong (s. 10(6)(b)(iii)).

At the time of writing (13 January 1998), there are in place ten *Fugitive Offender Agreements*, each made with a third jurisdiction, five of which are already in operation. It is anticipated that many more will be signed in the next three years.

Despite the handover, China has not yet revealed how and in

what manner it will seek the corresponding rendition of fugitive offenders. When Hong Kong was under British rule, no arrangements recognised by either sovereign power were in operation and no person was ever extradited at the request of the People's Republic, neither did Hong Kong seek similar reciprocal assistance. These self-imposed limits were of little consequence when the only Chinese people who worked in Hong Kong were government officials and when Chinese citizens who fled to Hong Kong illegally were deported back to China by the Hong Kong authorities but now they have become anomalous. In the late 1990s, significant numbers of individuals from each jurisdiction commute daily for the purpose of business and the tourist trade between Hong Kong and China is flourishing. How should Hong Kong and China cope with cross-border crime?

On 26 June 1997, Hong Kong enacted the *Mutual Legal Assistance in Criminal Matters Ordinance*, the greater part of which came into operation on 26 September 1997. The ordinance is widely cast: under s. 2, there are a range of possible methods of assistance that may be offered to jurisdictions outside Hong Kong under formal arrangements to be ratified by the Legislative Council. Alternatively, under s. 5(4), ad hoc co-operation may be given pursuant to requests from third jurisdictions where no mutual legal assistance arrangement has been entered into. Assistance in both circumstances may be refused on a number of grounds, broadly divided into safeguards for the sovereignty of Hong Kong and China, safeguards that parallel the *Fugitive Offender* provisions and safeguards for the individual in respect of compellability in the face of a request requiring testimony. The ordinance permits an overseas investigator to seek testimony before proceedings have been commenced: the target of the investigation is not compellable, but a mere witness has only those protections that are available in the jurisdiction of request (see s. 6(6) and (7)). At the time of writing, Hong Kong has entered into five agreements concerning mutual legal assistance in criminal matters with three more (including one with the UK) anticipated in the near future.

As with the *Fugitive Offenders Ordinance*, the *Mutual Legal Assistance in Criminal Matters Ordinance* precludes the use of the new legislation as a framework for co-operation with China. The People's Republic did not formally seek assistance from the Royal Hong Kong Police (as it then was) before the handover, although regular exchanges had taken place between the police in Hong Kong and the various police forces in the People's Republic.

No law exists in Hong Kong to prevent an overseas investigator from gathering evidence from public sources or from witnesses on a voluntary basis. It would also be possible for the Hong Kong Police to offer a useful level of assistance to the Chinese by purely administrative arrangements. However, without significant legal changes, it will not be possible to assist Chinese enquiries by securing evidence in Hong Kong, nor is there power to freeze the proceeds of crime, nor the power to obtain testimony from an unco-operative witness. A similar situation also exists regarding civil mutual assistance: except for the case of commercial arbitration awards, Hong Kong does not presently enforce Chinese civil judgments.

REASSURANCE NEEDED

When China eventually takes steps to establish arrangements, it is likely that it will deal with the rendition of fugitives at the same time as the wider subject of mutual legal assistance in criminal matters. The two naturally go hand in hand. Assistance

given to the Chinese authorities by the Hong Kong Police will be a less controversial subject than the matter of rendition of wanted persons: China is unlikely to make requests of the Hong Kong Police which threaten its own sovereignty or law and order and vice versa. How will China reassure Hong Kong citizens or place procedural safeguards in the way of the exercise of its own sovereign power?


In contrast with extradition to third countries, it is not to be expected that the sovereign power would permit its requests to its dependent jurisdiction to be challenged in Hong Kong courts on the basis of an overriding political motive. Would China also seek to avoid in any future arrangement to avoid the 'double criminality' requirement that has been for so long a safeguard in the field of extradition and which is expressly maintained in the *Fugitive Offenders Ordinance*? The safeguard tests the conduct complained of against the criminal law of the requested jurisdiction. This is the practical minimum that China should offer in any legal arrangements for the rendition of suspects, though such a safeguard may thereby offer the possibility that a Hong Kong court might need to examine the substantive criminal law of the People's Republic. Extradition also requires proof, normally in documentary form, of a prima facie case: this again could lead to a Hong Kong court examining the means of proof relied upon by the Chinese authorities, possibly exposing fundamental differences of approach in the ways in which evidence is gathered, what is regarded as evidence and how such matters are to be weighed by the courts.

Future arrangements for rendition and assistance would (presumably) operate alongside the long-established Hong Kong administrative practice of deporting those persons who enter illegally from China. Keeping this in mind, it should be possible, in typical instances of flight after violent crime or crimes of dishonesty, for the authorities to deal with the fugitive by deportation where the person has entered Hong Kong illegally. A similar approach, employing Hong Kong's *Immigration Ordinance*, might be adopted for a Chinese citizen suspected of offences in China who has overstayed in Hong Kong or whose right to

residence has been cut short by administrative means. Should such practices continue if and when China introduces a legal framework by which fugitives are rendered from Hong Kong?

Future rendition arrangements will be brought into critical focus should an incident arise whereby China requests the rendition of a Hong Kong permanent resident to face a serious criminal charge which may carry the possibility of the death penalty. Chinese penal provisions are harsh by western standards. The local business community will watch developments with concern. To imagine a further example, if a charge of fraud flowed from a joint venture, Hong Kong investment in Chinese projects might be slowed. Joint ventures in China often involve state organs or are backed by politically powerful individuals.

CONCLUSION

Despite great progress, it has not yet been fully demonstrated that China maintains a clear line between the exercise of executive power and those matters which are expressed by its substantive law and constitution to be within the proper realm of legal remedy. It is for this reason above all that any purely administrative system of rendition or co-operation for mutual legal assistance would be suspect. Most local concerns would be met by a Hong Kong ordinance covering the subject of rendition and co-operation with China with the same safeguards that are available to meet requests from or co-operation with third jurisdictions – but excluding the possibility of questioning the political motive of Chinese requests. The future under such arrangements would still present the judiciary in China and Hong Kong with great challenges, but challenges that can be met and from which both systems may emerge beneficially. Any course which avoids such challenges would demonstrate a lack of confidence by China's political leadership in both legal systems. 

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Glass-Steagall on life support

by Kimberley Anne McCoy

Spring – a time of rebirth and the renewal of hope. But for commercial bankers, those hopes are typically crushed, as Spring represents a time of annual Congressional angst over the future of the *Glass-Steagall Act* 12 USC. The Spring of 1997 was no different. While Congress debated whether the 64-year-old legal division between commercial and investment banking should continue, federal regulators presided over a dramatic end-run around the lawmakers. The board of governors of the Federal Reserve System, through an order effective from 6 March 1997, increased the revenue limits allowed for a s. 20 subsidiary of a bank holding company from 10% to 25%. Consequently, the past five months witnessed a flurry of acquisition activities as commercial banks took advantage of the new regulation.

The recent regulatory reform efforts go some way towards dissolving the barrier between commercial and investment

banking. But despite the success and global influence of the US banking industry, our banking laws remain anachronistic in comparison with other commercial centres. This article focuses on one of those antiquated laws, the *Glass-Steagall Act*. Although the regulators' reform efforts have been welcomed by commercial bankers, the *Glass-Steagall Act* will remain in its moribund state so long as Congress is unable to make the difficult legislative choices necessary to modernize our financial services system. The regulator-led piecemeal reform avoids the inevitable march of market and technological progress, ultimately impacting on the continuing vibrancy of our banking industry. This article will examine the *Glass-Steagall Act*, the regulatory efforts to respond to the banking industry's calls for reform and the economic price of maintaining the status quo.