COMMENT

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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 Tze-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 Tze-keung Case,' <http://www.info.gov.hk>.

11 May Tam and Lucia Tangi, 'Yang Dismisses Interference Claim,' Hong Kong Standard, 3 November 1998.

12 I 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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