

# An Examination of the Causes of the Criminal Jurisdiction Model of the Hong Kong SAR of China

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**Abstract:** Since China resumed the exercise of sovereignty over Hong Kong, it has implemented the policy of One Country, Two Systems, conferring on the HKSAR a high degree of autonomy and independent judicial power, including that of final adjudication. The HKSAR enjoys criminal jurisdiction over local criminal cases, except in exceptional circumstances where criminal jurisdiction of the HKSAR is expressly excluded, and the corresponding criminal prosecution authorities carry out investigations, prosecutions and trials in accordance with the provisions of local law and the common law tradition. The HKSAR's model of criminal jurisdiction is generally characterised by a single-track operation, which is the normative manifestation of the single-track model. The formation and development of the HKSAR's normalised model of criminal jurisdiction is attributable to a number of factors, including both policy and legal considerations, and both practical considerations and historical traditions. On balance, the formation and development of the HKSAR's criminal jurisdiction model reflects the Central Authorities' respect for and trust in the HKSAR, and is consistent with the HKSAR's sui generis legal system and unique common law tradition. The formation of the HKSAR's criminal jurisdiction model has its own historical and practical considerations, reflecting the Central Authorities' respect for and trust in the HKSAR, as well as being compatible with the HKSAR's unique legal system and common law tradition. Facing up to and analysing its causes is conducive to the accurate implementation of the principle and policy of One Country, Two Systems, and is conducive to the effective governance of the HKSAR, thus contributing to the stability and progress of One Country, Two Systems.

**Keywords:** One Country, Two Systems, HKSAR, Criminal Jurisdiction, Judicial System, Legal System.

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## 1. Introduction

Since the resumption of the exercise of sovereignty over Hong Kong, China has established the Hong Kong Special Administrative Region (HKSAR) under the principle of One Country, Two Systems and has granted the HKSAR a high degree of autonomy. In accordance with articles 2 and 19(1) of the Hong Kong Basic Law, the HKSAR exercises a high degree of autonomy and enjoys independent judicial power, including that of final adjudication. These provisions provide a clear qualitative grasp of the HKSAR's criminal jurisdiction, giving it a local, self-contained and logically self-contained jurisdictional structure. Article 19(2) of the Hong Kong Basic Law clearly stipulates the scope of the HKSAR's criminal jurisdiction, and provides that the courts of the HKSAR shall have criminal jurisdiction over all criminal cases in the HKSAR, subject to the limitations on judicial power imposed by the legal system and principles previously in force in Hong Kong. On the basis of article 23 and related provisions of the Hong Kong Basic Law, the Central Authorities have authorised the HKSAR to enact laws on its own to safeguard national security, and to investigate, prosecute and adjudicate crimes against national security by the HKSAR's domestic law enforcement, prosecutorial and judicial authorities. The Hong Kong National Security Law also makes it clear that the Central Authorities shall exercise direct jurisdiction over only a very small number of cases of offences against national security that fall within the three specified circumstances in article 55 of the Law, and that the HKSAR shall be responsible for the jurisdiction of the vast majority of cases of offences against national security in the HKSAR. In other words, the HKSAR's jurisdiction over criminal cases, including the vast majority of cases involving offences

against national security, has the attribute of being a single-track mode of operation, which is a normalised mode of operation.

The choice of mode of criminal jurisdiction plays a very important role in the effective prevention, suppression and punishment of crime. Under the principle of One Country, the HKSAR, as a local administrative region of China, has a single-track criminal jurisdiction over matters falling within the scope of its high degree of autonomy, which belongs to the single-track mode of operation under One Country, Two Systems. The HKSAR's single-track model of criminal jurisdiction gives the HKSAR a great deal of autonomy and flexibility in the conduct of its domestic affairs. The formation of the HKSAR's single-track model of criminal jurisdiction has its own historical and practical considerations. Facing up to and analysing its causes is conducive to accurately grasping the intent of the One Country, Two Systems principle, and has important theoretical value and practical significance for the effective governance of the HKSAR, as well as for the effective safeguarding of the sovereignty, security and development interests of the State, and contributes to the stability and progress of One Country, Two Systems. It is of great theoretical value and practical significance to the effective governance of the HKSAR and to the effective safeguarding of national sovereignty, security and development interests, and will also help One Country, Two Systems to move forward.

## 2. The Central Authorities' Respect for and Confidence in the Judicial Power of the HKSAR

Prior to the reunification, under British colonial rule, Hong

Kong never had independent judicial power and the power of final adjudication. After the reunification, under One Country, Two Systems, the HKSAR enjoys a high degree of autonomy which is different from the general autonomy enjoyed by other places. The authorisation by the Central Authorities of the HKSAR to enjoy a high degree of autonomy in the administration of justice reflects not only the concrete implementation of the principle of One Country, Two Systems, but also the accurate implementation by the Central Authorities of the spirit and intent of the Hong Kong Basic Law. [1] The broad scope of the exercise of criminal jurisdiction, the finality of criminal trials in the Court of Final Appeal, and the independence of the judiciary and the selection of judicial officers are all sufficient illustrations of the high degree of autonomy of the HKSAR's criminal jurisdiction.

### **2.1. HKSAR's Unique Jurisdictional Design**

Firstly, it is set up independently of the Mainland's judicial system. Taking into account the marked differences between the legal systems of the Mainland and the HKSAR, with the former being dominated by statute law and the latter by case law, the criminal procedures of the two are also different, and the judicial systems in general are fundamentally different. Granting the HKSAR independent judicial power and the power of final adjudication is conducive to safeguarding a high degree of autonomy. [2] The judicial system of the HKSAR established under the Hong Kong Basic Law strictly adheres to the principle of 'One Country, Two Systems' and the principle of 'Hong Kong people ruling Hong Kong', and the establishment of the Court of Final Appeal has enabled the HKSAR's judicial system to be independent of the Mainland's judicial system and to form its own system. Accordingly, the Central Authorities' supervision and control over the HKSAR's criminal jurisdiction and its operation can only be exercised through restrictions on the scope of the exercise of its criminal jurisdiction and its ultimate power of interpretation of the Basic Law. [3] At this level, the uniqueness of the HKSAR's jurisdiction, as a unitary state with a local administrative region vested with the power of final adjudication of the judiciary, is unparalleled in the world today.[4]

Second, the autonomy of judicial selection. The system of selection of judges in the HKSAR is clearly stipulated in the Hong Kong Basic Law and in local legislation such as the Hong Kong Court of Final Appeal Ordinance, the High Court Ordinance, the District Court Ordinance, the Magistrates Ordinance, the Coroners Ordinance and the Judicial Officers Recommendation Commission Ordinance. The above provisions have clarified the scope of judicial officers in the HKSAR and the autonomy of their selection. This is mainly reflected in the fact that, firstly, judges are composed of permanent judges, non-permanent judges, temporarily appointed judges and specially appointed judges, and that judges may be recruited from other common law jurisdictions. Secondly, temporary judges and temporary magistrates are decided and appointed by the Chief Justice of the Court of Final Appeal. Thirdly, judges are recommended by the Judicial Officers Recommendation Commission, which is composed of local people, and appointed by the Chief Executive. Among them, the appointment of judges of the Court of Final Appeal and the Chief Judge of the High Court shall also be subject to the endorsement of the Legislative Council and reported to the Standing Committee of the

National People's Congress for the record. In this way, the selection of judges in the HKSAR fully demonstrates independence and autonomy, and is an important manifestation of the HKSAR's independent judicial and final adjudication power.

### **2.2. Judicial Power of the HKSAR with a High Degree of Autonomy**

The degree of criminal jurisdiction and scope enjoyed by the HKSAR is unparalleled, both in comparison with the local jurisdiction of provinces, autonomous regions and municipalities directly under the Central Government in the Mainland of China, and with that of the local states in a federal system. On the one hand, the judicial power of the HKSAR is different from the general local judicial power of the Mainland of China. The judicial power of provinces, autonomous regions and municipalities directly under the Central Government belongs to the judicial power under the system of people's congresses which practises democratic centralism. The judicial power of provinces, autonomous regions and municipalities directly under the centralised system of people's congresses is an integral part of the unified judicial power of the Mainland, and the judicial organs of the abovementioned places shall be subject to the guidance and supervision of the Supreme People's Court. In contrast, the highest appellate authority for criminal cases in the HKSAR is the Court of Final Appeal of the HKSAR, not the Supreme People's Court, and the Supreme People's Court does not have any power of checking any level of courts in the HKSAR.

On the other hand, the judicial power of the HKSAR is different from that of a state in a federal system. China is a unitary state, and the HKSAR is a local administrative region of China, whose independent judicial power and power of final adjudication are not inherent, but are authorised by the Central Authorities. It presents a pattern of authorisation and authorisation by the State and then by the local authorities. Moreover, as the HKSAR judiciary is not part of the Mainland's judicial system, the Supreme People's Court does not have the power to supervise the trial activities of the HKSAR judiciary, nor does it have the power to overrule the judgements made by the HKSAR judiciary. By contrast, a federal state consists of local states, where state judicial power is inherent and federal judicial power derives from state authorisation. The federal jurisdiction is derived from the authority of the states, and there is a pattern of reserved authority, 'states first, then the federation'. In a federal system, the federal courts have the power to supervise the activities of the state courts and have the right of review on appeal and ultimately the right of final judgement.[5]

The high degree of judicial power in the HKSAR can be seen in the context of the connotation of independent judicial power and the power of final adjudication of the HKSAR, as well as in comparison with the judicial power of provinces, autonomous regions and municipalities directly under the Central Government in the Mainland, and the setting up of judicial power of the local states in a federal state. The HKSAR enjoys the power of final adjudication over cases within its jurisdiction, which goes far beyond the scope of ordinary local autonomy. [6] Moreover, the Central Authorities, out of their trust in the HKSAR, have vested in the HKSAR the power to enact laws in the interest of national security in the light of local circumstances. [7] As well as in the normal state, criminal jurisdiction in respect of offences against national security is exercised by the HKSAR's

functional bodies. [8] The authorisation granted by the Central Authorities to the HKSAR in respect of the important matter of safeguarding national security is a manifestation of the respect for and trust in the HKSAR's judicial power under the principle of One Country, Two Systems.

### **3. The HKSAR's Unique Common Law Jurisprudential Thinking**

The term Common Law is a conceptual spectrum of considerable diversity and richness. [9] It is not the style of the common law to remain static; on the contrary, it is an important feature of the common law to evolve in response to the actual needs of social development. The historical process of the formation and development of the common law in Hong Kong inevitably involved the importation of the English common law and the integration and evolution of the common law of the HKSAR itself and with the legal system of the Mainland after the Reunification. As a result, Hong Kong's common law tradition encompasses two different elements at two different stages of historical development, namely, a set of legal systems and styles that Hong Kong has learnt over the past century or so under the English legal tradition, and new connotations and implications that the HKSAR has gained from the handling of a series of legal disputes and its interaction with the Mainland's legal system since the Reunification. [10] As a common law jurisdiction, the common law tradition has had a significant impact on the formation and development of the HKSAR's single-track model of criminal jurisdiction. Unlike the adjudicative mindset of the civil law system, which focuses on deductive reasoning, the common law pays more attention to the empirical application of inductive reasoning, and the principle of adherence to precedent occupies an important position in the common law.

#### **3.1. Generation of the Spirit of the Common Law in Hong Kong**

During the British-Hong Kong period, as one of the countries in which the common law is typically applied, the United Kingdom transplanted the common law to Hong Kong. The English common law system and tradition had a direct and profound impact on Hong Kong. During this period, Hong Kong constructed its common law system on the basis of English law and inherited the concept of the rule of law and the principle of stare decisis from the English common law tradition. Firstly, the establishment of the dominant position of the common law in judicial practice. The dominant position of the common law was gradually established when England transmitted the priority of its own common law application to Hong Kong. According to section 3 of the Application of English Law Ordinance 1966, where the common law is appropriate to the circumstances and inhabitants of Hong Kong, it shall have the force of law in Hong Kong unless modified or abrogated by statute law enacted by the legislature. This establishes the predominance of the common law in Hong Kong's judicial practice, and the courts may disapply the application of the English common law only where its application would result in grossly unfair or oppressive consequences. [11] The concept of the common law was implanted and deeply rooted in Hong Kong with the British colonial expansion, and accordingly, the spirit of the common law in Hong Kong was formed.

Second, the importance of 'judge-made law'. The common

law is more of a legal mindset with a unique concept of the rule of law than a system of rules. [12] The latter has had a greater impact on Hong Kong than the former. Although Hong Kong residents had a strong rejection of British colonial rule, they formed a strong psychological identity with the spirit of common law. [13] The spirit of the common law has given Hong Kong judges a prominent role in the development of the law. Judges must understand the theory of a statute and the applicable methods of statutory interpretation on their own at the time of trial and cannot look to the legislator. As a result, judges are freed from the influence of legislators and are able to maximise the expression of their own will in the adjudication of individual cases. This unique logic of common law adjudication has further contributed to the emergence of barriers to the legal profession. 'Hong Kong's original legal tradition and legal system still rely on a group of people with a high degree of homogeneity and specialisation - that is, Hong Kong's legal community - to sustain and develop.' [14] Under the common law, the decisions of the HKSAR judiciary are more a matter of the autonomy of legal professionals who are also part of the system within the constant back and forth between facts and law, and those who are not part of the system are unable to capture the logical patterns of common law adjudicative thinking.

#### **3.2. The Evolving Spirit of The Common Law**

After the reunification, the chain of principles of the common law of the HKSAR has inevitably created the necessary links with the English legal system. However, while inheriting the original common law tradition, the new order of the HKSAR under One Country, Two Systems has also imposed new requirements on the evolution and development of the common law of the HKSAR. [15] The development of the common law in the HKSAR is moving towards, and needs to move towards, a path of common law development independent of the English model.

First, the definition of the common law under the Hong Kong Basic Law. While preserving Hong Kong's common law tradition, the Hong Kong Basic Law is not a wholesale acceptance of the original common law. One is that, after the Reunification, the jurisprudence of the United Kingdom or other common law jurisdictions cannot be substantially binding on the HKSAR and is only of reference significance. Secondly, the previous common law which is incompatible with the constitutional development of the HKSAR and the constitutional system of the State after the Reunification should be abolished. Thirdly, the previous common law adopted as the law of the HKSAR should also be adapted and optimised to conform to the provisions and spirit of the Hong Kong Basic Law. Fourthly, the common law should be subordinate to the enacted law in terms of hierarchy of validity, so as to conform to the unity of the legal system. [16]

Secondly, the interaction between the Hong Kong Basic Law and the common law. Whether rejecting or accepting it, it is inevitable that the HKSAR judiciary will need to interpret the Hong Kong Basic Law to a certain extent in the adjudication of specific cases. The tension between the common law of the HKSAR and the Hong Kong Basic Law has persisted since the reunification. The choice and application of methods of interpretation of the Basic Law applied by the Court of Final Appeal in individual cases has revealed a sense of freeing oneself from the tension. [17] The difference between the common law interpretative approach

and the statutory mode of thinking in individual trials has prompted the HKSAR Judiciary to break away from the established common law thinking and to apply the logic of civil law thinking to accurately grasp the legislative intent and spirit of the Hong Kong Basic Law.

Thirdly, the new requirements of One Country, Two Systems on the spirit of common law in the HKSAR. Although the Judiciary has generally performed well in safeguarding the constitutional development of the HKSAR, [18] the tension between the Judiciary and the HKSAR is still not smooth. Moreover, individual jurisprudence of the HKSAR Judiciary also suffers from an inability to accurately grasp the relationship between the Central Authorities and the HKSAR, as well as the fulfilment of its constitutional responsibility to safeguard national security. The frequent political, economic and cultural exchanges between the HKSAR, which is also a local administrative region of the People's Republic of China, and the Mainland, as well as the practical need for concerted efforts to safeguard national security, require the HKSAR's judicial system and judicial procedures to be in line with those of the Mainland. The evolution and development of common law in the HKSAR cannot be divorced from the basic framework of One Country, Two Systems.

## **4. Relatively Independent Legal System of the HKSAR**

After the reunification, the legal system of the HKSAR, while inheriting part of the legal system from the British-Hong Kong era, has undergone considerable development under One Country, Two Systems and in accordance with the provisions of the Hong Kong Basic Law. The legal system of the HKSAR is fundamentally different from that of the British-Hong Kong era and, to a certain extent, is also different from that of the Mainland, resulting in a self-contained legal system which is entirely different from that of the Mainland. The composition and characteristics of the HKSAR's legal system are one of the key causes of the HKSAR's single-track model of criminal jurisdiction.

### **4.1. Characteristics of Hong Kong's Legal System During the British-Hong Kong Era**

After the British occupation of Hong Kong, the British adopted the Proclamation of Righteousness, which, on the one hand, made it clear that where there are elders governing the countryside, they shall be listened to as in the past [19] thus establishing the principle of applying Chinese laws, customs and practices (except for various kinds of torture) to Chinese in Hong Kong; and, on the other hand, making clear the principle of applying British law to offences committed by foreigners in Hong Kong. To clarify the principle of applying English law to the jurisdiction of foreigners for offences committed in Hong Kong. During the British-Hong Kong period, Hong Kong was orthodox in terms of English legal sources, while retaining to a certain extent the validity of Chinese laws and customs of the Qing Dynasty. Although there was some controversy over the authority of the two Proclamations of Righteousness, [20] the practice laid the foundation of the dualist legal system in Hong Kong at that time.

However, thereafter, due to the strong position of Britain in Hong Kong, the space for the application of Chinese laws and customs gradually narrowed. [21] Hong Kong gradually

developed a legal system dominated by case law, with multiple sources of law co-existing in local and foreign legislation. It is a mixed legal system of a pluralistic nature, constituted by the unique historical and cultural background of Hong Kong. [22] In summary, from the structure of Hong Kong law, it can be found that Hong Kong law exists as a branch of the English common law system, with a multi-layered and pluralistic structure, and is characterised by a combination of rigour, stability, continuity and flexibility [23].

### **4.2. Composition and Characteristics of the Legal System of the HKSAR After Reunification**

First, the sources of law have become richer. Under 'One Country, Two Systems', in the HKSAR, the Constitution has the supreme legal status and the highest legal effect, and the Hong Kong Basic Law has constitutional status. The Hong Kong Basic Law specifies the laws to be applied in the HKSAR, i.e. the national laws listed in Annex III, the Hong Kong Basic Law, the laws previously in force in Hong Kong (including the common law, rules of equity, ordinances, subordinate legislation and customary law), and laws enacted by the Legislative Council, with reference to case law in other common law jurisdictions. Moreover, international agreements applicable to the HKSAR may also form the basis of decisions of the courts of the HKSAR. Compared with the British-Hong Kong era, the HKSAR has a richer source of law and a more robust legal system.

Secondly, the laws previously in force have been preserved. According to Article 18 of the Hong Kong Basic Law, the laws previously in force in Hong Kong included the common law, rules of equity, ordinances, subordinate legislation and customary law. Prior to the handover, the Standing Committee of the National People's Congress (NPCSC) clarified the specific contents of the Laws previously in force and reviewed the ordinances and subsidiary legislation enacted in Hong Kong, so as to preserve the vast majority of the legal system of the laws previously in force. [24] Moreover, out of respect for the spirit of the common law in Hong Kong, the independent judiciary and the power of final adjudication also provide institutional safeguards for the implementation of the common law. [25] As a result, the content and form of effect of the law remains substantially unchanged, although necessary changes, adaptations, limitations or exceptions have been made to some parts of the law.

Thirdly, case law continues to dominate. Although a large number of laws and regulations have been enacted in the HKSAR since the handover, the original pattern of enactment and case law has not been broken, and the dominant position of case law in the legal system remains unchanged. [26] In theory, the Legislative Council of the HKSAR is the legislature of Hong Kong, which enacts, amends and repeals laws in accordance with legal procedures, including, of course, amending and repealing rules of law created by the courts through jurisprudence, thus giving precedence to the enacting law, but this has never happened in practice. On the contrary, the authoritative power of the courts to interpret the law under the common law tradition and the constitutional status of the Basic Law in the HKSAR provide considerable scope for 'judge-made law', which in practice results in the need for enactments to be subjected to case law review before they can take effect.

## 5. Conclusion

For historical reasons, and given the complex combination of proactive and reactive factors, the mode of criminal jurisdiction in the HKSAR is not static, but has had a distinctive trajectory at different periods of history. Cases of offences against national security that should be subject to the direct jurisdiction of the Central Authorities, as stipulated in Article 55 of the HKSAR National Security Law, are a very small minority. The normalised mode of operation of the HKSAR's criminal jurisdiction is a single track. Under One Country, Two Systems and taking into account the actual situation in the HKSAR, the mode of criminal jurisdiction in the HKSAR is clearly characterised by a single-track operation. The formation and development of this normalised mode of criminal jurisdiction in the HKSAR has its own specific causes, which reflect the respect and trust of the Central Authorities for the HKSAR, and are in line with the HKSAR's self-contained legal system and unique common law tradition. The formation and development of the HKSAR's criminal jurisdiction model is a product of the One Country, Two Systems principle. Under One Country, Two Systems, the HKSAR enjoys a high degree of autonomy, and its judicial power and power of final adjudication are independent of the Mainland judicial system. Moreover, the judicial power of the HKSAR is not only extensive, but also final, and the selection of judicial officers is autonomous. In addition, the common law tradition has had a significant impact on the formation and development of the HKSAR's model of criminal jurisdiction, and the common law principles of inductive reasoning and adherence to precedent have played an important role in Hong Kong's judicial practice. After the Reunification, the interaction between the common law of the HKSAR and the Hong Kong Basic Law has contributed to the convergence of the HKSAR judiciary with the Mainland in safeguarding national security. The implementation of the HKBORO signalled a shift in the mode of criminal jurisdiction in the HKSAR from a single-track to a dual-track model for the more effective defence of national security. This shift is not only a sign of respect for and trust in the judicial power of the HKSAR, but also an adaptation and optimisation of the HKSAR's legal system and common law tradition.

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