

An Analysis of the Penal Jurisdiction and Operation Mechanism of the Hong Kong Special Administrative Region Before the Implementation of the "Hong Kong National Security Law"

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Abstract: The penal jurisdiction of the Hong Kong Special Administrative Region has a unique legal status under the framework of the “one country, two systems” policy and the “Basic Law of Hong Kong”. After the return of the Hong Kong SAR, it enjoys independent judicial power and final adjudication power according to law. Its penal jurisdiction reflects a high degree of independence and universality on the basis of the principle of territoriality, covering the vast majority of criminal cases occurring in Hong Kong. However, the exercise of this power has a clear scope, including being limited by the original legal system and principles, excluding jurisdiction over the conduct of the State, and being uniformly arranged by the central government in case of war or emergency. The operation mechanism of penal jurisdiction in the Hong Kong Special Administrative Region is a self-contained system, covering three stages of investigation, prosecution and trial. It is independently completed by local law enforcement and judicial institutions according to law, which embodies the high degree of autonomy and procedural independence of the criminal justice system in the Hong Kong Special Administrative Region. The penal jurisdiction of the Hong Kong SAR and its operating mechanism reflect the fundamental requirements of the principle of national sovereignty and meet the practical requirements of “one country, two systems”. In the future, in the field of safeguarding national security affairs, we should strengthen the connection between the local penal jurisdiction of the Hong Kong Special Administrative Region and the direct jurisdiction of the central government, ensure that the “one country, two systems” is stable and far-reaching, and effectively safeguard national sovereignty, security and development interests.

Keywords: “One country, two systems”; Hong Kong Special Administrative Region; Penal jurisdiction; Operating mechanism

Online publication: October 26, 2025

1. Introduction

The penal jurisdiction of the Hong Kong Special Administrative Region refers to the power of the Hong Kong Special Administrative Region to investigate, prosecute, try and punish a specific range of criminal cases under the relevant provisions of China’s “Constitution” and “Basic Law of Hong Kong”^[1]. Under the “one country, two systems”, as a local administrative region in China, the scope of criminal cases exercised by the penal jurisdiction of the Hong Kong Special

Administrative Region has certain restrictions. The study of penal jurisdiction inevitably requires a detailed analysis and demonstration of the jurisdiction and scope of penal jurisdiction in the Hong Kong Special Administrative Region. Based on the system design of “one country, two systems”, it is necessary to clarify the boundaries and exceptions of the penal jurisdiction of the Hong Kong SAR. According to the provisions of the Basic Law of Hong Kong, the positive provisions and negative restrictions of the jurisdiction of the Hong Kong Special Administrative Region can clearly explain the penal jurisdiction of the Hong Kong Special Administrative Region, and then combine the relevant provisions of the local laws of the Hong Kong Special Administrative Region to clarify the operation procedures of the penal jurisdiction of the Hong Kong Special Administrative Region.

2. Independence and universality of penal jurisdiction in Hong Kong SAR

2.1. The independence of the penal jurisdiction of the HKSAR

The formation and development of Hong Kong's penal jurisdiction has a strong historical trace. During the Hong Kong-British period, Hong Kong did not enjoy independent judicial power. In order to meet the needs of colonial rule, Britain gave the final right of appeal in Hong Kong cases to the Judicial Committee of the Privy Council established in London, thus realizing the ultimate control of Hong Kong in judicial power^[2]. After the return, the Court of Final Appeal became the highest and final appellate court in the HKSAR. “The establishment of the Hong Kong Court of Final Appeal system means the end of the Hong Kong colonial court system, and its operation is the most important symbol of the end of the Hong Kong colonial judicial power”^[3]. The establishment and operation of the Hong Kong Court of Final Appeal marks the formation of a new and complete trial system^[4].

Since the restoration of sovereignty over Hong Kong, China has established the Hong Kong Special Administrative Region, implemented the “one country, two systems”, and given the Hong Kong Special Administrative Region a high degree of autonomy. Specifically, in the judicial field, the Hong Kong Special Administrative Region enjoys independent judicial power and final adjudication. Penal jurisdiction is an important part of judicial power. After the establishment of the Hong Kong Special Administrative Region, in accordance with the provisions of the Basic Law of Hong Kong, the power of final adjudication belongs to the newly established Court of Final Appeal of the Hong Kong Special Administrative Region. Since the Hong Kong SAR is endowed with independent judicial and final jurisdiction, its penal jurisdiction is substantially different from that of Hong Kong and Britain. Independent judicial power and final adjudication power reflect the independence of judicial power in essence. Correspondingly, the penal jurisdiction of the Hong Kong SAR is also independent under the design of “one country, two systems”. As a result, the jurisdiction and scope of the penal jurisdiction of the Hong Kong SAR have been greatly expanded, which fully reflects the independence of the judicial power of the Hong Kong SAR^[5].

2.2. The extensive scope of the exercise of penal jurisdiction in the Hong Kong Special Administrative Region

According to the current situation of Hong Kong's legal system and the provisions of the Basic Law of Hong Kong, the main principle of penal jurisdiction in the Hong Kong SAR is the principle of territorial jurisdiction. That is to say, the judicial organs of the Hong Kong SAR have independent judicial and final jurisdiction over criminal cases in the Hong Kong SAR, and the mainland judicial organs have no jurisdiction^[6]. From this point of view, the Hong Kong SAR handles criminal cases on its own according to the provisions of local laws. In general, the central government does not intervene in criminal cases in the Hong Kong SAR. According to the provisions of Article 2 and Article 19 (1) of the Basic Law of Hong Kong, the Hong Kong SAR implements a high degree of autonomy and enjoys independent judicial power and final adjudication power. The above-mentioned provisions clearly define the qualitative grasp of the penal jurisdiction of the Hong Kong Special Administrative Region, and give it a local self-integrated and logically self-consistent jurisdiction structure. Based on the above legal provisions, the jurisdiction of Hong Kong SAR over criminal cases presents the

attribute of a monorail operation mode.

Article 19, paragraph 2, of the Basic Law of Hong Kong has made clear provisions on the scope of penal jurisdiction cases in the Hong Kong Special Administrative Region. In addition to continuing to retain the restrictions on judicial power imposed by the original legal system and principles of Hong Kong, the courts of the Hong Kong Special Administrative Region have penal jurisdiction over all criminal cases in the Hong Kong Special Administrative Region. This article gives positive provisions on the scope of penal jurisdiction cases in the Hong Kong Special Administrative Region, and the scope of penal jurisdiction cases in the Hong Kong Special Administrative Region has clear guidelines. Moreover, based on Article 23 and related provisions of the “Basic Law of Hong Kong”, the central government authorizes the HKSAR to legislate on its own to safeguard national security, and the local law enforcement, prosecution and judicial organs of the HKSAR shall investigate, prosecute and try relevant crimes against national security. From the above provisions, it can be seen that under the policy of “one country, two systems”, the Hong Kong Special Administrative Region implements “Hong Kong people rule Hong Kong” and “high degree of autonomy”. For the vast majority of criminal cases, the Hong Kong Special Administrative Region handles them on its own, which fully reflects the breadth of the penal jurisdiction of the Hong Kong Special Administrative Region.

3. Boundaries of the penal jurisdiction of the Hong Kong SAR

The penal jurisdiction of the Hong Kong Special Administrative Region has obvious authorization attributes. Its independence is not independent in the sense of sovereignty, and it cannot be independent of national sovereignty. Its effectiveness is lower than the penal jurisdiction in the national sense ^[7]. As a local administrative region under a unitary state, the penal jurisdiction enjoyed by the HKSAR has local characteristics, and is a structural arrangement of judicial power in various regions within the scope of national sovereignty ^[8]. Under the “one country, two systems”, the independent judicial power and final adjudication power of the Hong Kong SAR reflect the integrity of the local criminal justice system, but do not mean that the criminal justice power of the Hong Kong SAR is complete ^[4]. Therefore, within the scope of the national judicial system, based on the internal mechanism of the principle of national sovereignty, the penal jurisdiction of the Hong Kong SAR should be effectively restricted by this sovereignty mechanism ^[9]. Under the “one country, two systems”, the HKSAR has penal jurisdiction over the vast majority of criminal cases, while it does not have penal jurisdiction over cases in certain specific circumstances. Under the internal constraints of the principle of national sovereignty, the central government has also explicitly restricted the criminal judicial power of the Hong Kong Special Administrative Region through Article 19, paragraphs 2 and 3 of the Basic Law of Hong Kong, when granting independent judicial and final adjudication power to the Hong Kong Special Administrative Region. All these indicate that the penal jurisdiction of the Hong Kong SAR has certain restrictions.

3.1. Restrictions on the original legal system and principles

Article 19, paragraph 2, of the Basic Law of Hong Kong clarifies the principled restrictions on the penal jurisdiction of the Hong Kong Special Administrative Region, that is, it is limited by the original legal system and principles of Hong Kong. The inherent limitations of the original legal system and principles on penal jurisdiction refer to the fact that the Constitution and the law do not clearly stipulate that the court shall not intervene in the review. However, due to the characteristics of judicial power and the status of the court under the entire constitutional system, the court has to adopt a self-limiting approach and waive jurisdiction over certain specific matters ^[10]. Continue to maintain the original legal system and principles of the Hong Kong SAR penal jurisdiction restrictions, which itself contains the “sovereign non-review” principle ^[10].

The above provisions are one of the negative restrictions on the penal jurisdiction of the Hong Kong SAR. If the pre-return legislation or common law restricts the penal jurisdiction, the Hong Kong SAR has no jurisdiction. Specific to the penal jurisdiction of the Hong Kong Special Administrative Region, its internal restrictions mainly cover the following

aspects: First, the original legal system and principles belong to the Anglo-American legal system and form restrictions; the second is the restrictions formed by the return to the former British colonies; the third is the restriction caused by the special situation in the region before the return^[11]. Before the return, Hong Kong's local case law was generally divided into two categories: one was the case made by the Hong Kong court, and the other was the court's interpretation of the statute law^[12]. Although after the return, the Hong Kong SAR has increased the proportion and influence of the statute law in the legal system of the Hong Kong SAR by formulating a large number of written legislative norms, its common law tradition is still in use today, and the dominant position of case law has not changed. To a certain extent, this shows that the determination of penal jurisdiction in the Hong Kong SAR is influenced by both case law and statute law. Therefore, the jurisdiction and scope of the penal jurisdiction of the Hong Kong SAR need to be determined in two ways: one is to be determined by the corresponding statute law, and the other is to be determined by the judicial organ in the case judgment. Both of these methods need to be combined with legislation or case analysis, and by tracing the scope of the jurisdiction of the court before the return of Hong Kong, to determine whether the courts of the Hong Kong SAR have jurisdiction^[13].

3.2. There is no right to govern the conduct of the State

According to the provisions of paragraph 3 of Article 19 of the Basic Law of Hong Kong, the courts of the Hong Kong Special Administrative Region have no jurisdiction over acts involving national defense, diplomacy, and other national acts. The provisions of this article constitute another negative restriction on the penal jurisdiction of the Hong Kong SAR in cases where the Hong Kong SAR has no jurisdiction. The restrictions on the penal jurisdiction of the Hong Kong Special Administrative Region are reflected in two aspects. First, the Hong Kong Special Administrative Region cannot exercise penal jurisdiction in cases of national defense, diplomacy and other national acts. Second, when the courts of the Hong Kong Special Administrative Region encounter factual problems involving national defense, diplomacy and other national acts, they should be confirmed by the certificate issued by the Chief Executive and certified by the Central People's Government, and cannot be directly tried and judged^[14]. That is, the penal jurisdiction of the Hong Kong SAR is limited by two aspects: cases involving state acts and related facts^[15]. The above-mentioned article actually clarifies that the central government has the decision-making power to determine whether it belongs to "national defense, diplomacy and other state acts"; on this issue, the provisions of the Basic Law of Hong Kong are clear and definite, and there is no room for any vague understanding^[16]. To clarify the scope of the penal jurisdiction of the HKSAR, it is necessary to interpret the "national defense, diplomatic and other state acts" stipulated in Article 19, paragraph 3 of the Basic Law of Hong Kong, and clearly define the normative expression of national defense, diplomatic acts, etc.

Some legal professionals in the Hong Kong SAR advocate that the understanding of common law should be adopted, believing that "national defense, diplomacy and other state acts" are limited to warring acts between countries and whether to recognize foreign governments and other diplomatic acts. In the process of drafting the "Basic Law of Hong Kong", there was indeed such a proposition^[17]. But obviously, this understanding is not in line with the provisions of the "Hong Kong Basic Law" and the normative intent, and is not correct. The "national defense, diplomacy and other state acts" are related to the power of the central government stipulated in the Basic Law of Hong Kong, and their understanding should be placed within the overall framework of the Basic Law of Hong Kong, rather than the understanding of common law. If the Hong Kong SAR, as a local administrative region, can exercise jurisdiction over state acts, it will inevitably have a certain impact on the central power and the relationship between the central government and the SAR. Therefore, national defense and diplomatic behavior should be interpreted in a broad sense. This clause should be understood as stating that state behavior should include other state behaviors in addition to national defense and diplomacy. The design of this clause is an example of legislative technology, in which the "wait" should be "wait outside," that is, not just limited to its enumerated national defense and diplomacy^[18]. On the basis of the policy of "one country, two systems", for the purpose of maintaining "one country," any act of exercising sovereignty by a central state organ is a state act^[19]. Especially when the crime of endangering national security in the Hong Kong Special Administrative Region involves the exercise of interests of state acts, the Hong Kong Special Administrative Region has no right to penal jurisdiction, but should be

subject to the jurisdiction of the central government based on the treatment of state acts.

3.3. Restrictions on the penal jurisdiction of the Hong Kong Special Administrative Region under the state of war or emergency

According to Article 18 (4) of the Basic Law of Hong Kong, when the country enters a state of war or the Hong Kong Special Administrative Region enters a state of emergency, the relevant national laws will be implemented in the Hong Kong Special Administrative Region. The legislative purpose of this article is to safeguard the interests of national unity, security and development. On the one hand, the country's entry into a state of war means that the country faces a real global danger. In this grim situation, the Hong Kong Special Administrative Region should be duty-bound to share the obligations and responsibilities of safeguarding national security and safeguarding national interests with other regions of the country. On the other hand, this clause is an emergency response mechanism presupposed to prevent unrest in the Hong Kong SAR that endangers national unity or security. It is the final treatment mechanism retained by the central government to safeguard national security^[20].

However, it should be made clear that the spatial and temporal effects of the “national law” in the above provisions are limited to a certain extent, that is, it is not implemented in the Hong Kong SAR under normal circumstances, but can only be implemented in the Hong Kong SAR in a specific state of legal war or emergency^[21]. Based on the “one country, two systems,” in order to ensure the exercise of the Hong Kong SAR’s high degree of autonomy, the scope of the “national law” in this clause cannot be infinitely expanded, but should be clearly limited to “laws related to the state of emergency, such as laws on martial law, material control, human mobilization, air defense and chemical defense”^[22], and “may involve martial law, national defense law, mobilization law and criminal law”^[11]. However, it should be made clear that it is temporary, and the exercise of state emergency powers should also end after the end of the state of emergency^[23]. The implementation of national criminal law in the Hong Kong SAR, based on Article 18, paragraph 4, of the Basic Law of Hong Kong, cannot become the norm. However, it is undeniable that in this special state, if the national criminal law is implemented in the Hong Kong SAR, it is obviously necessary for the actual exercise of the penal jurisdiction of the Hong Kong SAR to be subordinated to the overall situation of safeguarding national security, and the penal jurisdiction of the relevant cases should be uniformly allocated and handled by the central government. At this time, according to the law, the corresponding organs under the central government should be responsible for the jurisdiction and handling of criminal cases in the Hong Kong Special Administrative Region, including crimes against national security, and the Hong Kong Special Administrative Region has no right to exercise penal jurisdiction.

4. The operation mechanism of penal jurisdiction in Hong Kong SAR

4.1. The legal basis for the operation of penal jurisdiction in the Hong Kong Special Administrative Region

Hong Kong is deeply influenced by Britain and has obvious characteristics of the Anglo-American law system. There is no complete and independent criminal procedure code to stipulate the operation procedure of penal jurisdiction in Hong Kong SAR. The basic system, procedure steps, methods and methods of criminal procedure are scattered in a series of separate laws, regulations and many common law cases^[24]. At the level of statutory law, it is mainly the “Regulations on Criminal Procedure” that centrally stipulate criminal proceedings. The specific application of the regulations often requires the formulation of corresponding procedures, or rules to assist in the implementation, such as “criminal appeal procedures”, “criminal public prosecution procedures”, “final court case handling rules”, and so on. This kind of subsidiary legislation is regulated by the judiciary to a certain extent. In addition, the regulations closely related to the criminal procedure also include the regulations of the judicial organs at all levels of the Hong Kong Special Administrative Region, the police department, the Independent Commission Against Corruption and other functional agencies^[25]. In addition, a large number of cases also involve criminal procedure.

Article 87 of the Basic Law of Hong Kong stipulates that the criminal procedure of the Hong Kong Special Administrative Region retains the principle of application in Hong Kong. Not all the provisions in the ‘Constitution’ are directly implemented in the Hong Kong Special Administrative Region, but are implemented in an appropriate way^[26]. Both “unification” and “different one” are important features of China’s legal system after the return of Hong Kong^[27]. Based on the differences in historical conditions, the mainland applies the written legal system, while the Hong Kong SAR follows the common law tradition. The relevant agencies of the Hong Kong Special Administrative Region apply the criminal substantive law and criminal procedure law of the Hong Kong Special Administrative Region to criminal cases within their jurisdiction, but do not apply national laws. Therefore, starting from the tradition of legal provisions and the application of law, the operation of the penal jurisdiction procedure in the Hong Kong Special Administrative Region presents a certain degree of independence, which is a set of monorail operation mechanisms different from those in the mainland.

4.2. The program design of penal jurisdiction operation in the Hong Kong Special Administrative Region

The Hong Kong Special Administrative Region enjoys a high degree of autonomy, and its various systems and operating modes are not the same as those in the mainland. Among them, the legal system and the judicial system have more obvious independence and closure^[28]. The penal jurisdiction of the Hong Kong SAR can generally be divided into investigation jurisdiction, prosecution jurisdiction and trial jurisdiction. In general, the investigation, prosecution and trial of criminal cases are respectively exercised by the Hong Kong Police Department, the Department of Justice and the judiciary.

(1) The investigation procedure

The Police Department of the Hong Kong Special Administrative Region is the main criminal investigation organ of the Hong Kong Special Administrative Region. It is responsible for the investigation of most criminal cases and enjoys the right to investigate criminal cases. The police department has different functional departments, a clear division of labor, in order to more effectively combat crime. Among them, the criminal investigation department under the police department is responsible for investigating most criminal cases and enjoys extensive criminal investigation power.

(2) The prosecution procedure

The prosecution system of the Hong Kong SAR has the characteristics of the common law system and is completely independent of the court system. It is an important statutory body representing the Hong Kong SAR government to prosecute crimes and exercise prosecution functions^[29]. According to Article 63 of the Basic Law of Hong Kong, the Department of Justice of the Hong Kong Special Administrative Region is responsible for criminal prosecution. The Department of Justice is an independent specialized prosecution agency under the Hong Kong SAR Government. One of its important functions is to review prosecutions. The Criminal Prosecution Division of the Department of Justice is the largest department responsible for the prosecution of most criminal cases in the Hong Kong SAR^[30]. All criminal cases in the Hong Kong SAR, whether the criminal suspect has filed a lawsuit after being investigated or arrested, and what level or which specific judicial institution to file a lawsuit, are all authorized by the Department of Justice of the Hong Kong SAR^[24].

(3) The trial procedure

The judicial organs at all levels in the Hong Kong Special Administrative Region are the judicial organs specializing in the trial and adjudication of cases, and they independently exercise judicial power according to law. Specifically, the judicial organs exercising penal jurisdiction in the Hong Kong Special Administrative Region mainly include the Magistrate’s Court, the District Court, the High Court, and the Court of Final Appeal. In addition, juvenile courts are also empowered to try specific criminal cases, and the Coroner’s Chamber may also deal with individual issues involving criminal cases. Different judicial institutions exercise penal jurisdiction according to their respective division of labor and authority. The Court of Final Appeal of the Hong Kong Special Administrative Region is the highest criminal case within the jurisdiction of the Hong Kong Special Administrative Region, and it is also the final appellate body. This is also the meaning of the independent judicial

power and final adjudication power of the Hong Kong Special Administrative Region.

The handling procedure of criminal cases under the jurisdiction of the Hong Kong Special Administrative Region is a phased, continuous and independent procedure of investigation, prosecution and trial, without any interference. The local criminal cases in Hong Kong SAR are resolved with the court in the scope of local criminal procedure according to the local legal system, so as to realize the self-closed loop of investigation, prosecution and trial. Under the “one country, two systems,” the Hong Kong SAR’s jurisdiction over criminal cases within its penal jurisdiction is an independent, self-contained, and self-consistent monorail operation mechanism.

5. Conclusion

The design of the penal jurisdiction and its operating mechanism of the Hong Kong Special Administrative Region fully reflects the principle of “one country, two systems” and the wisdom of the rule of law. Its unique position not only embodies a high degree of autonomy, but also is restricted by national sovereignty. Hong Kong’s criminal justice system has formed a self-contained monorail operation mode under the premise of following the “Hong Kong Basic Law”. The independent operation of this power in the judicial field has ensured the stability of the Hong Kong SAR society and the continuation of the common law tradition to a certain extent. However, its jurisdiction is not absolute, and it must be subject to central powers such as state behavior and national defense diplomacy, and accept the application of national laws in a specific state. The penal jurisdiction of the Hong Kong SAR and its operational mechanism should continue to adhere to the principle of “one country, two systems”. Under the legal framework composed of the Constitution and the Basic Law, we should improve the connection and coordination between the Hong Kong SAR and the national criminal justice mechanism, not only to ensure the independence of the Hong Kong judiciary, but also to safeguard national security and the unity of the rule of law. Especially in the field of safeguarding national security affairs, we should continue to strengthen the connection between the local penal jurisdiction of the Hong Kong Special Administrative Region and the direct jurisdiction of the central government to ensure that the “one country, two systems” is stable and far-reaching, and effectively safeguard national sovereignty, security and development interests.

Funding

Guangdong Provincial Education Science Planning Higher Education Special Project (Project No.: 2025GXJK0578); Guangdong Provincial Philosophy and Social Science Planning General Project (Project No.: GD25THQ01)

Disclosure statement

The author declares no conflict of interest.

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