

## A BROKEN FIREWALL: THE EXTRADITION LAW AND THE RULE OF LAW IN HONG KONG

### SUMMARY

Fears in Hong Kong about amendments to extradition legislation are widespread. In a recent fact-finding trip, Hong Kong Watch interviewed business leaders, lawyers and pro-democracy leaders. All were very concerned that the legislation could fundamentally compromise one-country, two-systems and break the 'firewall' which currently separates Hong Kong's legal system from the legal system of mainland China.

Pro-democracy leaders are concerned that the law could be used as a tool to silence Beijing's critics. Not only would it allow Mainland China to extradite its opponents, political activists fear this new power would have a 'chilling effect' on future political protest by generating fears of potential extradition. Business leaders are concerned that the law jeopardises their safety in Hong Kong, and the integrity of the city's rule of law, which is the cornerstone of Hong Kong's status as an international financial hub.

### RECOMMENDATIONS

#### TO THE GOVERNMENT OF HONG KONG:

- Immediately abandon the amendments to the legislation;

#### TO INTERNATIONAL PARLIAMENTARIANS:

- Issue statements explaining your concerns about the extradition law, and write to your governments urging them to make representations to the Hong Kong government;

#### TO INTERNATIONAL GOVERNMENTS:

- Publicly and privately register your concerns with the government of Hong Kong, calling for longer public consultation and the legislation to be dropped if it does not provide enough safeguards;
- Work with business leaders to raise public awareness about the full implications of the changes to legislation for Hong Kong's status as an international financial hub;

#### TO BUSINESS LEADERS:

- Raise your concerns in public and private with the Hong Kong government, the media, and international governments;

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## WHAT ARE THE PROPOSED AMENDMENTS?

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The Hong Kong government's proposed amendments to existing extradition legislation will allow, for the first time since the handover, the city to enter into one-off case-by-case extradition arrangements with mainland China.<sup>i</sup> The amendments also reduce the level of scrutiny required for the government to extradite someone by giving the Chief Executive of Hong Kong the power to sign off on these arrangements without consulting the city's Legislative Council.

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## HOW HAVE THEY BEEN JUSTIFIED?

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These changes have been justified by the Hong Kong government as correcting a loophole in existing legislation. Pointing to the Hong Kong government's inability to surrender a fugitive criminal from Taiwan currently residing in Hong Kong, the Hong Kong Chief Executive Carrie Lam has argued that the amendments are necessary to rationalise existing legislation and plug a 'gap in the law'.<sup>ii</sup>

However, describing the exemption of mainland China from the 1997 Fugitive Offenders Ordinance as a 'loophole' is misleading. The Hong Kong legislature in 1997 consciously chose not to apply case-by-case extradition arrangements with the rest of the People's Republic of China. This decision was made in view of the human rights record and the legal system in China. The Hong Kong government have failed to explain why these concerns are no longer salient or explain what has changed.

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## WHY ARE MEMBERS OF THE PRO-DEMOCRACY MOVEMENT CONCERNED?

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A wide-range of pro-democracy activists, working in politics, law and civil society, have expressed significant misgivings about the proposed amendments to the legislation. These groups have two key concerns:

### **1. A lack of trust in the judicial system in China and distrust in the mainland's human rights record**

According to the World Justice Project rule of law rankings, Hong Kong's rule of law is ranked 16<sup>th</sup> in the world while China's rule of law is ranked 82<sup>nd</sup>.<sup>iii</sup> Although Hong Kong's rule of law is under pressure, there is a sharp disparity between the two systems. The law courts in mainland China are an arm of the state, forced confession is frequently practiced, and activists often face imprisonment for crimes they have not committed. Hong Kong's common law system is not open to such abuse, and although it is under pressure, the separation of powers remains more or less intact. The amendments to the extradition law would significantly compromise the firewall which separates these sharply different systems.

The Hong Kong Bar Association has said that the ‘fugitives bill is a step backwards from the perspective of international cooperation in criminal justice’, and have raised significant reservations about fundamental differences between the judicial and criminal justice systems of Hong Kong and the Mainland.<sup>iv</sup> Senior Counsel Michael Blanchflower, former senior assistant director of public prosecutions in Hong Kong and an expert on extradition law, said: “Since special surrender arrangements could be made with places... where corruption of police, prosecutors and judges may be prevalent, the authentication requirements for such arrangements should be more restrictive and more onerous.”<sup>v</sup>

In early April, Amnesty International and Human Rights Watch issued a joint statement condemning proposed changes which “would allow people to be sent to jurisdictions, notably mainland China, where they are at risk of torture or other ill-treatment, and unfair trials.” The treatment of the five booksellers abducted from Hong Kong in 2015 exacerbates fears that the extradition law may, in time, be used to legally justify similar treatment of activists. Lam Wing Kee, one of the booksellers who was abducted in 2015 but is currently residing in Hong Kong, has fled to Taiwan due to his fears about the implications of the proposed amendments.<sup>vi</sup>

Another point of concern is the fact that the jurisdiction of Chinese civil law is not confined to the territory of mainland China, meaning that the actions of Hong Kong activists while in Hong Kong could be considered crimes in China. Billy Li, the convenor of the Progressive Lawyer’s Group, a group of barristers in the city, told us: “You don’t have to leave Hong Kong to commit a crime in China.” The same would potentially be true of other international jurisdictions: you conceivably do not have to leave the United Kingdom, Canada or the United States to commit a crime in China.

## **2. Fears that the Hong Kong Chief Executive will be unable to reject dubious extradition requests**

The Hong Kong government responds to these fears by arguing that there are human rights safeguards in the extradition law, and that the Hong Kong Chief Executive and Hong Kong courts still have the right to refuse any request.

However, there are two reasons that pro-democracy groups doubt this conclusion. First, there is little evidence to say that Carrie Lam has either the will or the ability to contradict a command from her superiors in Beijing. From the disqualification of lawmakers through to the passage of the co-location bill, the current Hong Kong Chief Executive has consistently failed to engage with constitutional or human rights arguments when having to enforce the will of the central government. It is unlikely that she, or any replacement with a similar political persuasion, would put up a serious objection if the central government sought the extradition of an activist on ‘national security’ grounds.

In addition, the courts are only asked to consider the *prima facie* evidence to substantiate a criminal indictment, leaving the judgement of the case to the other jurisdiction.<sup>vii</sup> This means that the courts do not have to be able to prove the case beyond reasonable doubt, but only be satisfied that there is a possible case. As a result, the courts do not have enough power to act as a meaningful safeguard against the abuse of the new extradition arrangement.

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## WHY IS THE BUSINESS SECTOR CONCERNED?

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There are members of the business sector who have publicly expressed similar reservations:

- **The American Chamber of Commerce** have said they have “grave concerns about the mainland legal and judicial system” and have warned that “the proposed arrangements will reduce the appeal of Hong Kong to international companies considering Hong Kong as a base for regional operations.”<sup>viii</sup>
- **The former Liberal Party Chairman and Leader James Tien** is a vocal opponent of the bill, highlighting that the renditions across the border were deliberately ruled out in the 1980s because of fears of the implications for the rule of law.<sup>ix</sup>
- **The Hong Kong tycoon Joseph Lau** has sought a judicial review on the possibility of retrospective application because he fears rendition to Macau to serve a sentence which he was handed out in absentia by the courts in 2014.<sup>x</sup>

However, the business community’s misgivings go beyond these widely publicised examples. We have conducted a series of private, confidential interviews on the condition of anonymity with senior executives and financial analysts which reveal the depth of concern.

One senior executive at a leading bank in Hong Kong said that:

*“Both the Chinese and the British governments established a requirement that there is a firewall between the two legal systems. There was a rationale to having the firewall. Introducing a case-by-case extradition mechanisms is like opening a pandora’s box.”*

Another senior executive said: “The extradition bill could fundamentally derail the integrity of ‘one-country, two-systems.’”

For one hedge-fund manager, the reason for these fears of the extradition law is “booksellers syndrome”: a fear among Hong Kong’s elite that they will be treated in a manner similar to the five Hong Kong booksellers who were abducted and arbitrarily detained in mainland China, or the tycoon Xiao Jianhua who was abducted from the Four Seasons Hotel in 2017.

He continued: “You start impacting the average person’s freedoms here, and it would be the end of the place... spiriting people away over the border would undermine business confidence.”

For one Managing Director at another international bank, the key problem is the opacity of the Chinese legal system: “People in Hong Kong are quite pragmatic. Good governance has ensured that we have not had to care too much about politics. However, business people are very worried about the extradition law. In China, the legal system is a bit opaque, the heads of businesses have been imprisoned.”

A second hedge-fund manager said that the amendments would mean he no longer feels safe to honestly forecast Hong Kong’s finances, as he worries it could be construed to be contrary to Chinese national interests: “If the extradition law is in effect, I cannot be neutral or objective in my financial analysis, I will have to praise the motherland.”

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## CONCLUSION: IMPLICATIONS FOR HONG KONG

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One senior executive said to Hong Kong Watch: “This law will have long-term repercussions in Hong Kong. It will cast doubt on business confidence, influencing long-term planning about regional domicile... Many organisations are formulating their own risk diversification strategies, they can see the structural political risks.”

The proposed amendments could cause significant damage to Hong Kong’s international reputation. It has the potential to break down the firewall between the mainland and Hong Kong, undermining the city’s rule of law and autonomy, perpetuating booksellers’ syndrome among businessmen, and weakening business confidence in the city as an international financial hub. ‘One-country, two systems’ is a very successful brand for Hong Kong. It allows the city to be ‘Asia’s World City’, with all the privileges that entails. But the brand requires the endorsement of the international community. The extradition bill amendments alone would not be sufficient to lead to a retraction of that endorsement, but if it were combined with further measures which undermined Hong Kong’s rule of law and autonomy, such as the draconian national security legislation that appears to be next on the Hong Kong government’s agenda, the cumulative effect could be devastating.

In the words of Lord Patten of Barnes, the last governor of Hong Kong: “These changes are an assault on Hong Kong’s values, stability and security. They create fear and uncertainty at a time when we should all be working to safeguard Hong Kong’s reputation as one of the world’s greatest business and financial centres. No wonder some chambers of commerce have openly expressed the strong views that others feel privately. Any political activism is also put in danger. These measures are a direct attack on the principle of one country two systems and Hong Kong’s autonomy under the rule of law.”<sup>xi</sup>

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- <sup>i</sup> Hong Kong Bar Association (HKBA), 'Observations of the Hong Kong Bar Association on the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019', 2 April 2019. Online, accessed here: <https://www.hkba.org/sites/default/files/HKBA%20Observations%20on%20FOMLACM%20Bill%202019%20%28Final%29.pdf>
- <sup>ii</sup> NewsGovHK, 'Law change plugs loophole', 3 April 2019. Online, accessed here: [https://www.news.gov.hk/eng/2019/04/20190403/20190403\\_114343\\_518.html](https://www.news.gov.hk/eng/2019/04/20190403/20190403_114343_518.html)
- <sup>iii</sup> World Justice Project, 'WJP Rule of Law Index 2019'. Online, accessed here: <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>
- <sup>iv</sup> HKBA, 'Observations of the Hong Kong Bar Association' 2 April 2019.
- <sup>v</sup> SCMP, 'Hong Kong Bar Association calls government's extradition proposal a 'step backward', while extradition lawyers says it does not offer sufficient protections', 2 April 2019. Online, accessed here: <https://www.scmp.com/news/hong-kong/politics/article/3004370/hong-kong-bar-association-calls-governments-extradition>;
- <sup>vi</sup> SCMP, 'Bookseller Lam Wing-kee heads to Taiwan fearful of mainland extradition', 27 April 2019. Online, accessed here: <https://www.scmp.com/news/hong-kong/politics/article/3007905/bookseller-lam-wing-kee-leaves-hong-kong-taiwan-fearing>
- <sup>vii</sup> Jason Y. Ng, 'Dangerous and unnecessary: why Hong Kong's extradition proposal is a legislative menace', *Hong Kong Progressive Lawyers Group*, 3 March 2019. Online: accessed here: <https://hkplg.org/2019/03/03/jason-y-ng-on-hong-kongs-extradition-proposal/>
- <sup>viii</sup> Nicolle Liu, 'US lawmakers warn over Hong Kong's proposed extradition law', *Financial Times*, 5 April 2019. Online, accessed here: <https://www.ft.com/content/738d29e8-5773-11e9-a3db-1fe89bedc16e>
- <sup>ix</sup> The Standard, 'James Tien sees room for shelving or scaling down extradition bill', 8 March 2019. Online, accessed here: [http://www.thestandard.com.hk/breaking-news\\_print.php?id=123607](http://www.thestandard.com.hk/breaking-news_print.php?id=123607)
- <sup>x</sup> Kris Cheng, 'Fugitive tycoon Joseph Lau files legal challenge against Hong Kong's China extradition law plan', *Hong Kong Free Press*, 1 April 2019. Online, accessed here: <https://www.hongkongfp.com/2019/04/01/just-fugitive-tycoon-joseph-lau-files-legal-challenge-hong-kongs-china-extradition-law-plan/>
- <sup>xi</sup> Tom Grundy, 'An assault on Hong Kong's values, stability and security': Ex-colonial leader Chris Patten hits out over China extradition law', *Hong Kong Free Press*, 29 April 2019. Online accessed here: <https://www.hongkongfp.com/2019/04/29/assault-hong-kongs-values-stability-security-ex-colonial-leader-chris-patten-hits-china-extradition-law/>