

## The Controversy of the Amendment of Anti-Extradition in Hong Kong -Threat to the people of Hong Kong

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### Abstract

*The purpose of this article was to analyze the amendment of Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance, which caused widespread controversy in Hong Kong recently. This amendment stemmed from a murder case that occurred in Taiwan, which led the Hong Kong government to decide to fill the legal loopholes in the extradition law. The amendment abolished the prohibition of extradition of China and made the fundamental changes to the vetting procedure for extradition. However, based on the question to the judicial environment in China and the unequal relationship between Hong Kong and China, many Hong Kong people believed that the amendment would seriously threaten their personal safety. The amendment mattered important because people it affected were not only Hong Kong citizens, but also foreigners staying in Hong Kong. And as an important international financial center, the influence of Hong Kong couldn't be underestimated. Therefore, the amendment had triggered a high degree of international concern. This article will analyze the contents of the amendment and the supports and the oppositions to clarify the dispute and discuss whether the amendment is good or bad.*

*Keywords: Hong Kong; Extradition; Amendment*

JEL Classification: Z1.

### 1. Introduction

A murder case happened in Taiwan last year caused the discussion of the extradition of fugitive offenders between Hong Kong and Taiwan. The Hong Kong government proposed the Amendment of Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance in the past six months. However, the amendment caused protests from many Hong Kong people. More than thirty percent of Hong Kong people went on the streets to ask the Hong Kong government to withdraw the amendment, even evolving into many bloody

conflicts. Why did the amendment which Hong Kong Government's claimed that it was to fill legal loopholes and achieve justice would cause so many people's crisis awareness? This involved not only the content of the amendment, but also the complex political relationship between Hong Kong, Taiwan and China, which all made people believe the amendment will threaten their safety and freedom. The significance and the impact of the amendment has been not just for handling the extradition of the murder case happened last year. And the amendment has also left a high degree of international attention. United States, United Kingdom, Canada, EU and other countries have issued statements for hoping the Hong Kong government can consider the amendment carefully again.

## 2. The Dispute of the Background of Extradition Law Amendment

The case that prompted the Hong Kong government to amend the extradition law was “the murder of Poon Hiu-wing”. In this case, Chan Tong-kai, who was a 19-year-old man from Hong Kong, killed his girlfriend, Poon Hiu-wing, who was a 20-year-old pregnant woman from Hong Kong, during their trip in Taiwan in 2018. After that, Chan Tong-kai fled Taiwan and returned to Hong Kong, and he used Poon Hiu-wing's ATM card to heist money in Hong Kong. In order to investigate this case, Taiwan Shilin District Prosecutors Office had issued the warrant of arrest to Chan Tong-kai being effective until 2055, and it had requested the Hong Kong government to extradite Chan Tong-kai to Taiwan for three times. However, the Hong Kong government said it couldn't comply Taiwan's request since there was no any mutual legal assistance agreement between Hong Kong and Taiwan, so it couldn't extradite Chan Tong-kai to Taiwan and it only could sentence to him for 29 months in prison for anti-money laundering crimes.

The Security Bureau, Government of the Hong Kong Special Administrative Region, claimed that in order to fill a serious legal loophole that could allow offenders of serious crimes to escape justice, they would amend the Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance to remove the restriction which not allowed them to be applied to other parts of China outside of Hong Kong(Taiwan was interpreted as part of China here, so other parts of China outside of Hong Kong was including Taiwan under the explanation of The Security Bureau.), to enable Hong Kong to handle requests on a case-by-case basis with any place in the world. Nevertheless, many people in Hong Kong took issued with the argument that it was very unreasonable to open up extraditing criminals to all the China in order to deal with the situation of how to extradite criminals to Taiwan, and this would seriously threaten the human rights of Hong Kong people.

As for the reaction of the Taiwan government, As early as a week after the Hong Kong government announced the amendment proposal in February 2019, the Taiwan government (Mainland Affairs Council Republic of China-Taiwan) indicated that it would not accept the Hong Kong government to negotiate with Taiwan on this bill which was questioned by being politically motivated and violating human rights. However, Hong Kong Legislature still passed the first reading in April 2019. In May, the Taiwan government (Minister of Justice) restated the position that it would reject the Hong Kong government extraditing Chan Tong-kai to Taiwan if it was based on this amendment. But it seemed that this didn't affect the Hong Kong Government remaining committed to continuing the legislative process.

In my opinion, the Hong Kong government was right that the loopholes in the extradition law should be filled, but it seemed on more dubious ground when it claimed that the method of filling was not to establish any mutual legal assistance with Taiwan (even China made "the Joint Effort to Combat Crime and the Mutual Legal Assistance Agreement across the Taiwan Strait" with Taiwan in 2009), but to remove the restriction which not allowed them to extradite people to China, made this amendment obviously lacked persuasiveness. Not to mention that the Taiwan government had clearly and repeatedly indicated that even if this amendment was passed, it would not accept the use of this agreement for judicial extradition, so this revision would not help a little for the case "the murder of Poon Hiu-wing". The Hong Kong government who still insisted on passing the amendment was contradicted it's claimed that the amendment was for extraditing Chan Tong-kai to Taiwan. Based on these observations, it was hard not to question the purpose of the Hong Kong government. And through the following analysis of the amendment may be better to understand why the amendment caused panic among so many people.

### 3. The Query to Legal Protection in the Amendment of Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance

Current Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance allows the Hong Kong government to provide case-based arrangements with areas where long-term mutual agreement has not been reached, but it rules out the application of China (including Chinese mainland, Macao and Taiwan). The main content of the amendment this time is to abolish the regulation of the exclusion. Which means that under the amendment, as long as you are in Hong Kong, and the China government believes that you have committed a crime, no matter you are Hong Kong citizen or foreigners living,

working or transiting in Hong Kong, the Hong Kong Government has the opportunity to extradite you to China for trial in a case-based arrangement.

In addition, the amendment makes a major revision to the vetting of whether to extradite an offender. It removes the legislative scrutiny for case-based arrangements and make the Chief Executive of the Hong Kong government master the power of whether to accept the request for extraditing. As a result, under the amendment, the extraditing requests will go through the scrutiny by the executive authority and the legal process, without the legislative scrutiny.

So, when other countries make requests to the Hong Kong government to extradite an offender, Department of Justice will firstly examine whether the extraditing conditions are met and submit a report to the Chief Executive. Then the Chief Executive has to take into account Department of Justice's advice and decide whether the conditions of the extraditing are met. And in light of the needs of individual cases, the Chief Executive may consider adding more restrictions in the arrangements to further limit the circumstance for offenders, including presumption of innocence, open trial, legal representation, right to cross-examine witnesses, no coerced confession and right to appeal that are in line with general human rights protection. However, these protections are not explicitly stated in the amendment. They will be added to the extradition agreement by executive order depending on the circumstances of the case. After that, the requests will go into the judicial process. Magistrates' Court will openly hear submission of evidence by the requesting jurisdiction and the subject's reply to decide if there is sufficient evidence and whether the conditions to commit a person to custody are met. Lastly, the Chief Executive will make the final confirmation on humanitarian or other grounds and decide whether to issue an extradition order.

The Hong Kong government advocated the system designed in the amendment would give people more complete legal protection because of the multiple safeguards of the scrutinizes by the executive authority and legal process. In addition, there would many countries with different legal systems in the world, such as common law system, civil law system and some of them were comprehensive, so we need to find out a flexible approach to deal with extradition. Under Extradition Law Amendment, when we dealt with different cases from different countries, we could consider whether to join relevant human rights protection according to the circumstances of the specific case. It would make our extradition become more flexible and more effective.

However, Hong Kong Bar Association contradicted the Hong Kong government's view that the amendment could give people more complete legal protection by the scrutinizes by the executive authority and legal process. First, in terms of the scrutiny by the executive authority, based on the unequal relationship

between the Hong Kong government and the China government, the Hong Kong government was hard to reject the requests for extraditing offenders from the China government in the future. Indeed, in Article 24 of Extradition Law Amendment explicitly stated the Chief Executive should comply with the instructions issued by the China Government. As for the legal process, the magistrate's duty in processing the application for transfer was to ensure that the request from the country applying for extradition complies with the procedural requirements and that the case was not sufficiently justified to refuse the transfer. The magistrate couldn't examine whether the person requested to be transferred had committed the relevant offence and whether a fugitive could enjoy a certain level of justice after being extradited. If the extradition application was basically in compliance with the relevant procedural requirements and the court had not enough reason to refuse the request, the magistrate should pass the request. In this situation, the legal process couldn't play the role that the Hong Kong government claimed it could be. Therefore, Hong Kong Bar Association believed that turning the legislative scrutiny into the scrutiny by the Chief Executive would reduce the requirement for personal safety and personal freedom, especially when the mutual legal assistance request was from some jurisdictions where didn't provide international community for criminal trials and basic human rights protection for prisoners, or have a history of violations of human rights.

At this point, I agreed with Hong Kong Bar Association's opinions. Turning the legislative scrutiny into the scrutiny by the Chief Executive would make the power of vetting of whether to extradite an offender be mastered on one person, which might cause great risks to offenders, because the Chief Executive could almost decide everything about offenders by his own opinions and no one could supervise him. Furthermore, by focusing on a flexible extradition approach, the Hong Kong government overlooked the deeper problem of human rights protection. Human rights protection was much more important than the flexible extradition approach. The restrictions for protecting human right should be explicitly stated in the law, not just be added to the extradition agreement by executive order depending on the circumstances of the case, and only be decided by the Chief Executive. The amendment degenerated the Hong Kong society from "rule of law" to "rule of man." People only could trust their Chief Executive. However, what was at stake here was that the Chief Executive who was appointed by the China government had the subordinate relationship with the China government. Even though Extradition Law Amendment did follow the international practice, such as double criminality principle, no death penalty, no political offence, no prosecution on account of race, religion, nationality or

political opinions and so on, it's still really hard to convince the people to believe that the Chief Executive would be a good gatekeeper when the China government made requests to Hong Kong government to extradite someone.

#### 4. Overview of Extradition Between China and Other Countries

According to the information from the Supreme People's Procuratorate of the People Republic of China, as of October 2018, China had already made extradition treaties with thirty-seven countries, mainly in developing countries in Asia and Africa, such as Kazakhstan, Afghanistan, Iran, South Africa, Angola, Algeria, etc. It also included EU member states such as Spain, Portugal, France, and Italy, but did not include common law countries such as Canada, the United Kingdom, and the United States.

However, although France and Italy, the member states of "European Convention on Human Rights", also made extradition treaties with China. There were some special regulations in their treaties. For instance, if the person to be extradited had the nationality of the requested State, the requested State should refuse extradition. The requesting State could only transfer the evidence of the crime to the requested State, and the requested State would take legal action by its own law if it was necessary. Furthermore, if the requested State considered that the offence against which the extradition request was directed was a political offence or that the purpose of the extradition was based on the person's race, sex, religion, nationality, ethnicity or political opinion, or the person's situation might be damaged after extradition, the requested State could refuse the request and didn't need to give full reasons.

Apart from this, China and Australia had planned to sign "Treaty on Extradition between Australia and the People's Republic of China" in 2007. However, after years of discussion, the committee in Parliament of the Commonwealth of Australia which was responsible for this treaty submitted a report in 2016 with comments from Amnesty International and the Law Council of Australia which caused the Australian government to cancel submitting the treaty to the Federal Parliament for voting. The report raised five human rights concerns in China. First, China didn't ratify "the International Covenant on Civil and Political Rights", and it lack a fair trial and did not have an independent judicial system. Many suspects couldn't obtain legal advice, especially in politically sensitive cases. Moreover, forcing confession through torture and ill-treatment was an important part of China's criminal law system. Secondly, China might impose and enforcement the death penalty on non-extremely serious crimes. According to the

reports from NGO, it showed that about 2,400 people were executed in China in 2014. Thirdly, there might be torture, cruel, inhuman or degrading treatment and penalty in China. Even if the treaty mentioned that if the requested State had sufficient grounds to believe that the person being extradited may be subjected to inhuman treatment, it could refuse extradition, but it was still questionable by the community. Fourthly, the treaty did not mention that the requested State could refuse extradition by the reason of "unjust or oppressive." Fifth, the judicial system in China was non-transparency. It would be difficult to pay close attention to the extradited person. In addition, there were records that the China government had abused detainees and prisoners, which made the situation of the extradited person in China be worrying. And in June this year, the New Zealand court also rejected the decision to extradite suspects to China because of concerns about human rights issues.

To sum up, most of the democracies and developed countries remained skeptical about the judicial environment in China. Even though some of them made extradition treaties with China, they would set up a stricter or more reserved extradition mechanism. In contrast, the amendment ignored the human rights issues that many countries were worried about and opened the door for the extradition to China, which made the United Kingdom, Canada, EU and other countries expressed highly concern to Hong Kong.

## 5. Alternatives of Extradition Law Amendment

In the case of the amendment causing so much controversy, what could the Hong Kong government do besides the amendment? Pro-democracy camp in Hong Kong advocated the government to set the sunset clause with Taiwan, which meant set the clause especially for dealing with "the murder of Poon Hiu-wing." After the offender Chan Tong-kai was extradited to Taiwan, the sunset clause would become invalid. Most of Hong Kong people tended to believe that this was the easiest and quickest way to deal with this case. However, the Hong Kong government claimed that serious crimes could happen at any time, so legislation on one single case couldn't plug the loopholes in the current regimes, and inserting a "sunset clause" meant repeating the current procedures of scrutiny and legislation in handling fugitives each and every time when a person was wanted for a serious crime, which was impracticable and had a huge effect and delay on arresting actions.

Alvin Yeung, the legislative councilor in Hong Kong, proposed the idea of “extraterritorial jurisdiction”, which was to expand the power of Hong Kong courts to deal with cases of Hong Kong people suspected of murder, manslaughter or intentional murder outside Hong Kong. In addition, Michael Tien, another legislative councilor in Hong Kong, proposed to imitate the extradition treaty between China and France, which was to make Hong Kong citizens be trialed by Hong Kong courts and only extradite non-Hong Kong citizens. But these two proposals were both rejected by the Hong Kong government. The reason was that according to the common law system, Hong Kong courts didn’t have the criminal retroactivity for cases occurring outside Hong Kong, so these two proposals would undermine the territorial principle in the common law system. Also, it was difficult and unrealistic to obtain evidences and investigate facts outside of Hong Kong. Nevertheless, many barristers jointly issued a statement refuting the statement of the Hong Kong government, that Hong Kong courts had already had the extraterritorial jurisdiction over some criminal cases. For instance, if Hong Kong citizens committed sexual offences involving children outside of Hong Kong, Hong Kong courts also had the power to interrogate. Therefore, the reasons of the Hong Kong Government were not established.

I supported the Hong Kong government’s position that setting the sunset clause was not an ultimate and long-term solution to handle the surrender requests, where necessary, from places that had not signed any long-term agreements with Hong Kong, but under the situation that it was in urgent need to deal with “the murder of Poon Hiu-wing” and so many people rebounded on the amendment, setting the sunset clause first and then finding out a better solution with people in the future might be the best way at the moment. On the other hand, I believed the positions of extraterritorial jurisdiction and imitating the extradition treaty between China and France were both feasible methods that the Hong Kong government should considered, because they could not only take into account the handling of crimes, but also safeguard the rights and interests of Hong Kong people.

## 6. Discussion, and Conclusions

The judicial environment in China has not yet be recognized by many countries in the world, especially democratic countries or developed countries. And in recent years, there still have been incidents of human rights persecution happening frequently in China. The Hong Kong government used the murder case in Taiwan, where was politically controversial, to abolish the prohibition of extradition with China, and gave the power of vetting of whether to extradite an offender to the Chief Executive, who is subordinated to the China government, at the same time. It made the amendment seem to be a political operation. And if the amendment is passed, which makes the power of extradition be controlled by the person subordinate to the China government, will it threaten the judicial independence protected by the principle of “One Country, Two Systems” in Hong Kong? It is really a big question.

This time, in response to the fierce protests of Hong Kong people, the Hong Kong government blindly dispatched the police to use the tear gas, rubber bullets and other weapons to violently suppress the people which caused many bloody conflicts, but never planned to communicate with the people. It was disappointing to see that happening in a highly developed society. What the Hong Kong government did only made people’s dissatisfaction continue to rise, and lead to more and more social contradictions. Although the Hong Kong government couldn’t resist the anger of the people in the end and declared the suspension of the amendment on 15 June 2019 and described the amendment had been “end of life” on 9 July 2019, it had never explicitly stated that the amendment has been abolished, so the protests for the amendment are still going on now. Now, the people have distrusted the Hong Kong government. Many rich people begin to transfer assets because they did not believe in the future of Hong Kong. Foreign businessmen are also considering divesting due to the concerns about Hong Kong’s business environment, political situation and personal safety. What would the Hong Kong government do to the amendment next? And how should it make up for the damage caused by this amendment in Hong Kong in the future? These are the challenges that the Hong Kong government will face.

## References

- [1] Taiwan Shilin District Prosecutors Office Press Release of Requesting the Hong Kong Government to Send the Suspect to Taiwan for the Murder of Poon Hiu-wing, 2 April 2019, <https://www.slc.moj.gov.tw/293537/293550/293551/639560/post>

- [2] Pamphlet on proposed amendments of Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance, Security Bureau of the Government of the Hong Kong Special Administrative Region, [https://www.sb.gov.hk/eng/special/cooperation/Q&A/FOO%202nd\\_booklet\\_EN.pdf](https://www.sb.gov.hk/eng/special/cooperation/Q&A/FOO%202nd_booklet_EN.pdf)
- [3] The Social Disputes of Amendments of Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance, <https://drive.google.com/file/d/1i3l0xPsJP2HdKti0qxyb8GtA6-5qSn7Q/view>
- [4] Plugging a legal loophole to ensure fugitives face justice, Security Bureau of the Government of the Hong Kong Special Administrative Region, 28 February 2019, [https://www.sb.gov.hk/chi/press/articles\\_2019\\_02\\_28.htm](https://www.sb.gov.hk/chi/press/articles_2019_02_28.htm)
- [5] REFERENCE MATERIAL: Response to Hong Kong Government's Proposed Amendments to the Mutual Legal Assistance in Criminal Matters Ordinance and Fugitive Offenders Ordinance, Hong Kong Bar Association, 21 February 2019, <https://reurl.cc/N7Xrp>
- [6] Ministry of Justice of Republic of China Position Statement for Hong Kong Fugitive Offenders Ordinance & Mutual Legal Assistance in Criminal Matters Ordinance, 14 June 2019, <https://www.moj.gov.tw/cp-21-117137-0e4f1-001.html>
- [7] About Extradition: Six Things You Need to Know, BBC News, 11 June 2019, <https://www.bbc.com/zhongwen/trad/world-48582977>
- [8] Summary of HKBA's Observations, Hong Kong Bar Association on the Security Bureau's Proposal to Amend the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 ("MLAO") and the Fugitive Offenders Ordinance, Cap.503 ("FOO"), 4 March 2019, <https://www.hkba.org/sites/default/files/Summary%20of%20HKBA%27s%20Observations%20%28Chi%29%20Final.pdf>
- [9] A Brief Guide to issues arising from the Fugitive Offenders And Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 ("The Bill"), 6 June 2019, <https://reurl.cc/xrglE>
- [10] Additional Observations of the Hong Kong Bar Association ("HKBA") on the HKSAR Government's proposed further changes to the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, 6 June 2019, <https://reurl.cc/y3nYq>
- [11] The Hong Kong Government responded to the fugitives regulations to amend the dispute, saying that "Hong Kong people's port trial" and other programs are not advisable, Initium Media, 7 May 2019, <https://theinitium.com/article/20190507-whatsnew-fugitive-offenders-ordinance/>
- [12] Analysis of extraterritorial judicial power dispute which can solve Taiwan murder case, HK01 News, 14 June 2019, <https://reurl.cc/xrg31>
- [13] Kevin Lau, Why can France sign an extradition treaty with China, but Hong Kong cannot do it, Mingpao News, 9 April 2019, <https://reurl.cc/bOzmv>
- [14] Australia had signed an extradition agreement with China. Congress was opposed to human rights issues. Citizen News, 20 February 2019, <https://reurl.cc/X0epe>
- [15] Charlotte Graham-McLay, the New Zealand court rejected the decision to extradite suspects to China because of concerns about human rights issues, New York Times News, 12 June 2019, <https://cn.nytimes.com/asia-pacific/20190612/new-zealand-china-extradition/zh-hant/>