

UNJustHK BRIEFING PAPER

UNIVERSAL PERIODIC REVIEW

ACCESS TO JUSTICE, INDEPENDENCE OF THE JUDICIARY AND RIGHT TO A FAIR TRIAL

HONG KONG

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- There were no recommendations made in relation to this topic on the Hong Kong Special Administrative Region, China (HKSAR) in the Third UPR Cycle.
- This briefing paper is prepared by advocates on the ground. It will focus on legislative actions which could interfere with the legal profession and impact the right to a fair trial and the independence of the judiciary in Hong Kong.

A. Restriction on Judicial Oversight over the Granting of Bail

- Article 42 of the National Security Law (NSL) imposes a new bail principle in the HKSAR: “No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.” (emphasis added)
- This Article establishes a stringent threshold for bail since the accused is now required to establish a negative state of affairs.
- As of the date of writing, among the individuals charged under the NSL, **71% were denied bail.**ⁱ
- The **UN Special Rapporteur on the independence of judges and lawyers** has criticised the law as imposing a presumption against bail, resulting in a *de facto* pre-trial conviction of the accused who may face an indefinite detention without trial.ⁱⁱ
- Further, the automatic denial of bail or reversal of onus is tantamount to stripping the court of its discretion to exercise effective judicial oversight, contrary to **Principle 4 of the UN Body of Principles**ⁱⁱⁱ and **Article 9(3) of the ICCPR.**^{iv}
- It must be noted that the Court of Final Appeal has held that this stringent standard is also applicable to

RECOMMENDATION 1:

- **Revise Article 42 of the National Security Law to ensure that the principle of presumption in favour of bail is guaranteed, with the burden upon the court for establishing reasons for detention, in line with the recommendation of the Human Rights Committee ^{vi} ; and pending such revision, refrain from applying it**

all the offences that concerns the endangering of national security, e.g. sedition cases governed by pre-existing legislation.^v

B. Independence of the Judiciary

- Appointment and removal of NSL judges: Articles 44 and 47 of the NSL provide the Chief Executive with excessive power, such as the power to appoint judges, from a list that is not made public and in consultation with the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region and the Chief Justice of the Court of Final Appeal, to hear national security cases.
- Article 44 also provides that judges who make any statement or behaved in any manner endangering national security will be removed.
- **6 UN Special Rapporteurs**^{vii}, as well as the **UN Human Rights Committee** ^{viii} , have criticised the Articles for undermining the independence of judges since the provisions are casted in a broad and imprecise manner and appear to undermine the right to freedom of expression held by the legal professional under **Article 25 of the ICCPR**.

RECOMMENDATION 2:

- **Revise Articles 44 and 47 of the National Security Law to ensure the independence of the judiciary and protect the judiciary from any form of interference, in line with Principle 3.2 of the Bangalore Principles; and pending such revision, refrain from**
- Complaints against judicial conduct: the Judiciary announced in May 2021 to put in place a new two-tier structure for handling relevant pursuable complaints from August 2021, which includes a newly formed Advisory Committee on Complaints against Judicial Conduct.
- It is worthwhile to note that the announcement came after months of repeated criticisms by pro-Beijing legislators against judges for allegedly displaying leniency towards defendants in protest cases.^{.ix}
- In its 2022 report, the Advisory Committee reported whilst there was no justified pursuable complaint in 2022, follow-up actions were taken to advise the judges or judicial officers concerned in respect of three complaints that were considered not substantiated, including a case where the Magistrate making remarks that may show political inclination.^{.x}
- The Committee should also take note that the Judiciary updated the Guide to Judicial Conduct in May, asking judges at [87] to “avoid expressing views to the media, even on an anonymous basis”, raising doubt on whether this suggestion was based on multiple anonymous interviews that judges took over the past two years.^{.xi}
- These guidelines and recommendations are inconsistent with the international standards stipulated in the **Principle 8 of the Basic Principles on the Independence of the Judiciary**^{.xii} and **Principle 4.6 of the Bangalore Principles of Judicial Conduct**^{.xiii}, which provide that “[a] judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”

RECOMMENDATION 3:

- **Duly fulfil its positive duty to allow for any judge and judicial officer to exercise the judicial function independently, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason, in accordance with Principle 1.1 of the Bangalore Principles.**

SUGGESTED QUESTION:

- Please provide an exhaustive list of the types of recommendations that the Advisory Committee on Complaints against Judicial Conduct can make, how it would deliberate on these recommendations, and particularly how these recommendations, if adopted by the Chief Justice, would affect the promotion, transfer, suspension and cessation of judicial officers

C. AMENDMENT TO THE LEGAL AID SCHEME

- In Hong Kong, the Legal Aid Department (LAD) provides legal aid services for any person who cannot afford to pay for a lawyer to defend them, which is vital for ensuring a fair trial and the right to equality before courts and tribunals.
- In October 2021, the LAD imposed a number of restrictions on the application of the legal aid scheme.
- Under the new arrangement, those receiving legal aid in criminal cases will be assigned a lawyer by the Director of Legal Aid. This means that even if a defendant has already had a lawyer on their case, they may be forced to replace their lawyer with a new one assigned by the LAD.
- These restrictions were apparently implemented in response to allegations that the legal aid scheme had been “abused” by individuals who were prosecuted for their participation in protests in 2019.^{.xiv}
- This suggests that one purpose of the reform is for appointed lawyers to have an agenda different from their clients’ protection, which would be inconsistent with relevant standards in the **Basic Principles on the Role of Lawyers**^{.xv}.

“14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.”

- Such concern is shared by the **UN Special Rapporteur on the independence of judges and lawyers**^{.xvi} and the **UN Human Rights Committee**^{.xvii}.

- The imposition of disloyal lawyers would be a particular problem in NSL cases, which incur large expenses that may pressure defendants to either hire a legal aid lawyer assigned by the state, whose independence is now in credible doubt, or to plead guilty under undue pressure. This coercive effect can be seen in a recent case of eight legal aid applicants charged under the NSL who were suddenly prohibited from nominating the counsels who were originally in charge of their cases. As a result, three of them are planning to withdraw from the scheme.^{xviii}

RECOMMENDATION 4:

- **Take sufficient measures, including by establishing an independent legal aid authority, to guarantee the rights to timely and competent legal aid and to counsel of choice, including in the case of persons charged under the National Security Law, in line with the recommendation of the Human Rights Committee.**^{xix}

ⁱ Tracking the Impact of Hong Kong's National Security Law", 5 April 2022, ChinaFile, chinafile.com/tracking-impact-of-hong-kong-national-security-law

ⁱⁱ Letter of mandate of special rapporteur on the independence of judges and lawyers to the People's Republic of China, OL CHN 2/2023, 19 April 2023.

<<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=27992>>

ⁱⁱⁱ Body of Principles (Principle 4): "any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority".

^{iv} Article 9(3) of the ICCPR: "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

^v See: HKSAR v Lai Chee Ying" (2021) 51 HKLJ 1.

^{vi} Concluding observations of the Human Rights Committee, Hong Kong, China, U.N. Doc. CCPR/C/CHN-HKG/CO/4, 11 November 2022.

<https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CCPR%2FC%2FCHN-HKG%2FCO%2F4&Lang=en>

^{vii} Joint letter of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on minority issues to the People's Republic of China, OL CHN 7/2020, 23 April.

<<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25196>>

^{viii} See note vi above.

^{ix} Hong Kong Free Press, "A political show': Beijing hits back at Western criticism of Hong Kong national security arrests" (13 May 2022). Available at:

<https://hongkongfp.com/2022/05/12/a-political-show-beijing-hits-back-at-western-criticism-of-hong-kong-national-security-arrests/>

^x Advisory Committee on Complaints against Judicial Conduct Annual Report 2022

<[https://www.judiciary.hk/doc/en/about_us/Advisory%20Committee%20Annual%20Report%202022%20\(Eng\).pdf](https://www.judiciary.hk/doc/en/about_us/Advisory%20Committee%20Annual%20Report%202022%20(Eng).pdf)>

^{xi} Vice News, "Inside the Surreal Trial of the 'Most Benevolent Terrorist in the World'" (20

September 2021). Available at: <https://www.vice.com/en/article/93y47p/hong-kong-national-security-trial-tong-ying-kit>

^{xii} Reuters, "Hong Kong judges battle Beijing over rule of law as pandemic chills protests" (14 April 2020). Available at

<https://www.reuters.com/investigates/special-report/hongkong-politics-judiciary/>

^{xiii} Principle 8, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>

^{xiv} Principle 4.6, available at: https://www.unodc.org/res/ji/import/international_standards/bangalore_principles/bangaloreprinciples.pdf

^{xv} Natalie Wong, "Hong Kong authorities could tighten limits on number of legal aid cases individual lawyers can take on as pressure rises for reform of system", South China Morning Post (16 June 2021). Available at: <https://www.scmp.com/news/hong-kong/law-and-crime/article/3137551/hong-kong-authorities-could-tighten-limits-number>

^{xvi} Government press release, "2022 Guide to Judicial Conduct published" (16 May 2022). Available at <https://www.info.gov.hk/gia/general/202205/16/P2022051600194.htm>

^{xvii} See note ii above.

^{xviii} See note vi above.

^{xix} Stand News, 【整頓法援】多個國安法被告被委派非自選律師 至少 3 被告擬放棄法援自資打官司 (23 November 2021). Available at: <https://collection.news/thestandnews/articles/155897>

^{xix} See note vi above.