

**Mandate of the Special Rapporteur on the independence of judges and lawyers**

Ref.: OL CHN 2/2023  
(Please use this reference in your reply)

19 April 2023

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 44/8. In this connection, I would like to refer to three legislative actions that have been brought to my attention, which could interfere with the legal profession and impact the right to a fair trial and the independence of the judiciary in Hong Kong.

For this reason, I would like to bring to the attention of your Excellency's Government information I have received concerning provisions of the National Security Law, amendments to the Legal Aid Scheme, and proposed amendments to the Legal Practitioners Bill in Hong Kong.

First, the Law of the People's Republic of China on Safeguarding National Security (National Security Law or NSL) in the Hong Kong Special Administrative Region (HKSAR) may interfere with the legal profession and the right to a fair trial.<sup>1</sup> The National Security Law was adopted by the Standing Committee of China's National People's Congress (SCNPC) on 30 June 2020, promulgated on 1 July 2020, and remains in force.

Questions regarding the human rights possible impacts of this legislation have been previously addressed by other Special Procedures mandate-holders in communications sent on 23 April 2020 (CHN 7/2020) and 19 June 2020 (CHN 13/2020). I thank Your Excellency's Government for the reply received to CHN 7/2020. However, concerns persist in light of new interpretive acts concerning the NSL.

Many of the provisions in the NSL seem to be at odds with your Excellency's Government international legal obligations, in particular as set out in the International Covenant on Civil and Political Rights (ICCPR) and customary law norms recognized in the Universal Declaration of Human Rights (UDHR). Through this letter, I do not wish to make an exhaustive analysis of the NSL, rather, to explain how this legislation, together with recent decisions taken in the HKSAR would affect the independence of the judiciary, the ability of lawyers to exercise their profession independently, and the due process guarantees of the right to a fair trial.

*Overview of applicable international human rights law standards*

I would like to draw the attention of your Excellency's Government to the International Covenant on Civil and Political Rights, signed by China on 5 October 1998. While China is yet to ratify the ICCPR, as a signatory to the Covenant, China has an obligation to refrain from any acts which would defeat its object and purpose prior to its entry into force (article 18 of the 1969 Vienna Convention on the Law of Treaties). In addition, key provisions of the Universal Declaration of Human Rights

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<sup>1</sup> English translation available at [http://www.xinhuanet.com/english/2020-07/01/c\\_139178753.htm](http://www.xinhuanet.com/english/2020-07/01/c_139178753.htm).

reflect customary international law that are binding on Member States, including China.

In addition, international human rights law and standards such as the ICCPR remain in force in the Hong Kong Special Administrative Region of the People's Republic of China in accordance with Section XI of Annex I to the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong<sup>2</sup> and article 39 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.<sup>3</sup> Under article 2 of the ICCPR, Hong Kong SAR is under a duty to ensure that individuals under its jurisdiction enjoy the rights in the Covenant and adopt laws as necessary to ensure that the domestic legal system is compatible with the Covenant. Moreover, the Covenant compels States to take active and specific administrative, judicial and legislative measures to ensure that all of the rights enshrined in the Covenant are protected and that effective remedies are provided if they are breached.

The right to a fair trial is protected in both instruments mentioned above. Article 10 of the Universal Declaration on Human Rights recognizes that everyone has the right to a fair and public hearing by an independent and impartial tribunal. Article 14 of ICCPR stipulates that: “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. This article also provides a set of procedural guarantees that must be made available to persons charged with a criminal offence, including the right of accused persons to have access to, and communicate with, a counsel of their own choosing.

In its general comment no. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. They should also be able “to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter”<sup>4</sup>.

### *Independence of the judiciary*

Provisions of the NSL could undermine the independence of the Judiciary in the HKSAR and restrict access to justice in Hong Kong.

For example, under article 44, Hong Kong's Chief Executive is the authority with the power to appoint judges to hear national security cases. Judges are designated as eligible to hear such cases by the Chief Executive for a period of one year and may be removed if they have made ‘any statement or behaved in any manner endangering national security’. The list of designated judges is not public, allegedly due to security concerns. No judge who has not been specially designated by the Chief Executive may hear or determine national security cases.

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<sup>2</sup> Available at <https://www.cmab.gov.hk/en/issues/jd3b.htm>.

<sup>3</sup> Xianggang Jiben Fa art. 39, available at [https://www.basiclaw.gov.hk/en/basiclawtext/chapter\\_3.html](https://www.basiclaw.gov.hk/en/basiclawtext/chapter_3.html).

<sup>4</sup> CCPR/C/GC/32, para. 34

The National Security Law also authorizes, under article 46, that some trials may proceed without a jury on the grounds of the protection of “State secrets”, involvement of foreign factors in the case, or the protection of the personal safety of jurors and their family members. The Secretary for Justice has unchecked authority to remove a jury and decide if the case would then be heard by a three-judge panel.

Article 55 allows the NSL-created Office for Safeguarding National Security (OSNS) to take over a case that it deems sufficiently “complex” because it involves “external elements” (alternatively translated as “overseas forces”). Once the OSNS asserts control over a case, it works with the Supreme People’s Court in Beijing to transfer the case to mainland China. This transfer of jurisdiction would risk undermining KHSAR’s good faith compliance with article 14 of the ICCPR. Indeed, unless such transfers fully guarantee the fair trial rights set out under article 14, such transfers are a de facto breach of that article.

Judicial review is an important channel for anyone who wants to challenge the government’s decisions or policies. The National Security Law limits the possibility of judicial review by vesting the power of interpretation of the National Security Law to the Standing Committee of China’s National People’s Congress, a legislative body. This provision would oust in practice an essential power of the judiciary in national security matters, hindering the independence of the judiciary.

Provisions contained in articles 44, 46 and 55 of the National Security Law described above would allow the interference of both the executive and the legislative branches in judicial matters<sup>5</sup>. I would like to remind Your Excellency’s Government that international human rights standards provide that tribunals should be established by law and be independent of the executive and legislative branches of government and enjoy independence in deciding legal matters in proceedings that are judicial in nature<sup>6</sup>.

#### *Judicial guarantees and due process*

As mentioned above, I would also like to highlight that the NSL may affect the guarantees of due process provided for in the right to a fair trial.

#### *Pre-trial detention*

The presumption in favour of bail has been removed from NSL cases, as under article 42.2: “(n)o 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”. Authorities may now detain without trial almost any individual for months at a time, without effective judicial oversight, as long as that person has been accused of a national security crime. In practice, once bail is denied, pre-trial detention could then become a form of indefinite detention without trial.

I would like to bring to your attention article 9(3) of ICCPR: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting

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<sup>5</sup> A/HRC/32/34, para. 40, A/HRC/11/41, para. 18

<sup>6</sup> CCPR/C/GC/32, paras. 18 and 19.

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.” By establishing a presumption that defendants under the NSL should be detained, the law would run directly afoul of the guarantee that pre-trial detention not be “the general rule”.

### *Judicial oversight of police powers*

National security cases are handled by the newly created National Security Division (NSD) of the Hong Kong Police Force. Article 43 of the NSL allows for the creation of new rules governing the investigatory powers of the NSD. In July 2020, the new Committee for Safeguarding National Security (CSNS) issued new implementation rules under article 43 and mandated an expansion of investigatory powers in the following areas: police searches; surrender of travel documents; freezing of assets; censorship of online material; power to compel testimony; surveillance and interception of communications. These new rules remove procedural safeguards, allowing the police to act unilaterally, for example, with a warrantless search, by freezing property, through blocking online content, and by carrying out surveillance without a judge’s warrant. In addition, because there are no disclosure requirements concerning the use of these broad powers, it is not known if, when, and against whom these warrantless surveillance powers have been used.

These extensive powers granted to the police forces, combined with a lack of due process guarantees, may create a dangerous freedom for the Hong Kong Police Force to act without judicial oversight.

### *Interference with the legal profession and the right to access to counsel*

Finally, I would like to share information received about undue interference with the legal profession in Hong Kong. The changes made to legal aid schemes in Hong Kong, may affect the right to have a lawyer of one’s own choosing, as well as the right to judicial review.

I would like to highlight that the Human Rights Committee, in its general comment no. 32, stated that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”. The Committee further indicated that “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter”<sup>7</sup>.

### *Reform of the Legal Aid system*

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. 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, and by those who challenged the

<sup>7</sup> CCPR/C/GC/32, para. 10; para. 37

Government's policies or decisions by launching judicial review cases. The new restrictions include not allowing applicants to choose their own criminal lawyers except "under exceptional circumstances"; limiting the number of judicial review cases that barristers and solicitors can take to 3 and 5 each year respectively; and reducing the civil case assignment limits for solicitors and counsel from 35 and 20 to 30 and 15 each year respectively.

No public consultation was conducted before the implementation of the new restrictions.

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. According to reports, this could create a fear, especially amongst those prosecuted under the NSL, that they will be assigned a lawyer with strong ties to the Hong Kong Government or the authorities in mainland China. Some defendants have already decided not to apply for legal aid even though they cannot afford to pay the costs of legal counsel on their own.

#### *New obstacles to judicial review*

Under the new cap of judicial review cases a counsel can take on every year under the legal aid scheme and given that the number of lawyers who have expertise in public law and judicial review is limited in Hong Kong, reports suggest that it would be difficult for the applicants to find a suitable lawyer to represent them. If the applicants cannot find a suitable lawyer, they may have to accept the lawyer assigned by the LAD, who may not have enough experience or expertise to handle the case.

As the legal costs for judicial review can be high, the legal aid scheme is vital to ensure those who cannot afford the fees to apply for review.

#### *Foreign counsel*

In December 2022, the Standing Committee of the National People's Congress ruled that Hong Kong's Chief Executive, and not the courts, is empowered to decide whether overseas lawyers may work on NSL cases. The Chief Executive is charged with determining whether such overseas lawyers pose a threat to national security. Hong Kong courts must now obtain approval from the Chief Executive before admitting any foreign lawyer without local qualifications to work on national security cases. If the courts do not do so, the city's national security committee, which is led by the Chief Executive and Beijing's liaison office chief, will make a decision on the matter. The SCNPC's decision transfers the approval process from the judicial branch to the executive.

Under the national security law, the decisions made by the committee cannot be challenged by a judicial review. Changes made to the ability of foreign lawyers to act in national security cases in Hong Kong may affect the right of defendants to have a lawyer of one's own choosing, as well as the right to judicial review of such decisions.

*Proposed amendments of the Legal Practitioners Bill*

Amendments to the above-mentioned bill were tabled in the legislature on 21 March 2023. The stated objective of these amendments is: “to provide for admission of overseas lawyers as barristers in Hong Kong for cases concerning national security; and to provide for related matters” for both the Legal Practitioners Ordinance and the Barristers (Admission) Rules.

In the draft bill, article 27AA on Interpretation provides that: “a reference to a case concerning national security includes but is not limited to— (i) a case in connection with an offence under the HK National Security Law or any other offence endangering national security; and (ii) a case in connection with any measures taken for, or in connection with, safeguarding national security, whether under the HK National Security Law or any other law”.

National security is not a term of art, nor does the use of this phrase as a legislative matter give absolute discretion to the State. Rather, when national security functions as a legal basis for criminal sanction it must, to meet the requirements of precision and clarity under the ICCPR (article 9(1)), be expressly linked to a defined set of criminal acts and not criminalize acts and entitlements which are lawful under international law.<sup>8</sup> I would like to recall that overly broad national security legislation where the precise parameters of individual actions to be observed are vague and open-ended would run counter to this aspect of your Excellency’s treaty obligations.

Furthermore, article 27F provides that a decision made by the Chief Executive in this regard “is not liable to be questioned in any court of law, and no legal proceedings of any form may be instituted in respect of the decision”.

I would like to reiterate that international human rights standards provide that tribunals should be independent of the executive and legislative branches of government and enjoy independence in deciding legal matters<sup>9</sup>.

Foreign lawyers have been part of Hong Kong’s legal tradition for many years, and they have been able to represent clients upon approval by the relevant court in Hong Kong. According to reports, current amendments to the Legal Practitioners Ordinance that are being debated would go further than the changes imposed by the SCNPC by categorically banning foreign lawyers from acting in national security cases. These amendments have undergone first reading on 22 March 2023. In addition, reports suggest that decisions on foreign lawyers’ visas may offer another method for the authorities to restrict the work of foreign lawyers in Hong Kong. I would like to remind Your Excellency that international human rights standards require governments to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to prevent threats to lawyers, including prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics<sup>10</sup>.

<sup>8</sup> The Human Rights Committee’s General Comment 35 on the Right to Liberty and Security of Person, CCPR/C/GC/35.

<sup>9</sup> CCPR/C/GC/32, paras. 18 and 19.

Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990. <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers>

I recommend review and reconsideration of the National Security Law to ensure that the law is in compliance with China's international human rights obligations with respect to the HKSAR. I also recommend improving access to legal aid in HKSAR and urge you to consider reviewing the proposed amendments to the Legal Ordinance bill. I stand ready to engage in dialogue with Your Excellency's government on this very important matter.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned assessment of the National Security Law.
2. Please explain how the legislation is compatible with Your Excellency's Government's obligations under article 14 of the ICCPR and article 11 of the UDHR and how Your Excellency's government may remediate the inconsistencies with international human rights standards enshrined in the NSL.
3. Please provide information on the measures taken to ensure the independence of the judiciary in Hong Kong Special Administrative Region, in line with obligations under ICCPR.
4. Please provide information on how Your Excellency's Government intends to enforce the extra-territorial jurisdiction of the legislation as enshrined in article 55 to ensure compatibility with the ICCPR.
5. Please identify the positive measures and oversight provided by your Excellency's Government on the exercise of the powers now enumerated in the legislation.
6. Please provide information regarding the measures taken to ensure access to effective legal aid schemes, that allow clients to freely choose their counsel.
7. Please provide information on how measures taken by Your Excellency's Government to ensure that lawyers may exercise their legal profession in accordance with the Basic Principles on the Role of Lawyers.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite  
Special Rapporteur on the independence of judges and lawyers