



HONG KONG, CHINA

Human Rights Committee Consideration of the 4th Periodic Report of Hong Kong, China

Submission for the Review of the State report of Hong Kong, China by the Lawyers for Lawyers Foundation and The 29 Principles

Amsterdam, The Netherlands
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I. INTRODUCTION

Submitting Parties

1. Lawyers for Lawyers ('**L4L**') is an independent, nongovernmental organization, supported by contributions from private individuals and organizations related to the legal profession. Established in 1986, L4L has special consultative status with ECOSOC since 2013.¹
2. L4L promotes and protects the independence of the legal profession through the support and empowerment of lawyers around the world who face reprisals, improper interferences, and undue restrictions, as a result of discharging their professional functions.² In doing so, we advocate for adherence to core values underpinning the legal profession, in conformity with internationally recognized human rights laws, norms and standards, including but not limited to the International Covenant on Civil and Political Rights ('**ICCPR**')³ and the Basic Principles on the Role of Lawyers ('**Basic Principles**').⁴
3. The 29 Principles (based on the "UN Basic Principles on the Role of Lawyers") is a UK-based organisation supporting lawyers facing human rights oppression. The 29 Principles is committed to provide various supports to lawyers to help them fulfil the roles described in the Basic Principles, in particular on promoting the rule of law.

Concerning

4. On 14 February 2020, the Government of the Hong Kong Special Administrative Region submitted its fourth periodic report on its implementation of the ICCPR.⁵ At its 129th session, the Human Rights Committee ('**the Committee**') adopted a List of Issues prior to reporting on Hong Kong, China. Since this report focuses on the concerns of L4L and The 29 Principles regarding the position of lawyers in Hong Kong, China. Hong Kong, China will hereinafter be referred to as '**State party**'.⁶
5. During its 135th session, from 27 June to 29 July 2022, the Committee will consider the fourth report submitted by the State party under article 40 of the Covenant and adopt concluding observations that will assist the State party in the implementation of the Covenant. In the context of this review, L4L and The 29 Principles wish to contribute to the concluding observations made by the Committee. Our submission will focus on the situation of lawyers in the State party, particularly the obstacles to the independent exercise of their profession and violations committed against them.

¹ For more information visit our website: <https://lawyersforlawyers.org/en/about-us>/<https://lawyersforlawyers.org/en/about-us/>

² For more information visit our website: <https://lawyersforlawyers.org/over-ons/wat-doen-wij>/<https://lawyersforlawyers.org/over-ons/wat-doen-wij/>.

³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('**ICCPR**').

⁴ Basic Principles on the Role of Lawyers, adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 ('**Basic Principles**').

⁵ Fourth Period Report Submitted by China under Article 40 of the Convention, 14 February 2020, CCPR/C/CHN-HKG/4.

⁶ List of issues in Relation to the Fourth Periodic Report of Hong Kong, China, Human Rights Committee, 26 August 2020, CCPR/C/CHN-HKG/Q/4 ('**List of issues**').

Executive summary

6. This submission outlines the key areas of concern of L4L and The 29 Principles about the failure of the State party's failure to comply with its international human rights commitments to guarantee effective access to legal services provided by an independent legal profession as set out in the Basic Principles, which is required to ensure the right to equality before courts and tribunals and to a fair trial, in accordance with Article 14 of the ICCPR. Concerns with regards to liberty and security (Article 9 of the ICCPR) and the right to freedom of expression (Article 19 of the ICCPR) are also highlighted in this submission.
7. This submission highlights the following issues that give rise to L4L's and The 29 Principles concerns:
 - a. Incompatibility of the National Security Law with the ICCPR
 - b. Criminal prosecution and harassment of lawyers
 - c. Reform of the legal aid system
 - d. External interference in the work of judges
8. These concerns support the conclusion that the professional rights and privileges of lawyers in the State party are violated systematically. This impairs their ability to provide effective legal representation and consequently severely undermines the proper functioning of the rule of law and the adequate protection of rights to which all persons are entitled, including the rights to effective remedy and fair trial. The work of lawyers is indispensable for the public confidence in the administration of justice and to ensure effective justice for all person.
9. In addition to the violations of their professional rights and privileges under article 14 of the ICCPR, these violations also encroach upon other rights that lawyers, like other citizens, are entitled to, including the rights to security of person (article 9 ICCPR), and freedom of expression (article 19 ICCPR).
10. Given the vital role of lawyers in the protection of the rule of law and the protection of rights, and the fact that lawyers in the State party are specifically targeted because of their work as lawyers, L4L and The 29 Principles would like to recommend the Committee to specifically address the position of lawyers, whenever appropriate, when reviewing the State party's implementation of the ICCPR.

Methodology

11. L4L and The 29 Principles have been closely following the situation of lawyers in the State party. The information for this submission is collected through ongoing desk-research, interviews and engagement with and reports from lawyers from the State party and other local and international stakeholders.

II. SUBSTANTIVE PART

Effective Mechanisms for the Protection of Human Rights

12. The adequate protection of human rights and fundamental freedoms requires that every citizen has effective access to justice and legal assistance. Legal assistance can only be provided effectively in a judicial system where lawyers, along with judges and prosecutors, are able to carry out their professional activities independently. This follows from – amongst other international instruments - the ICCPR.

13. Interference in the work of lawyers may lead to violations of the right to a fair trial under Article 14 of the Covenant, as has been recognized by the Committee.⁷ In particular, the Committee has stated that *'lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter'*.⁸ Lawyers should also be able to *'meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications'*.⁹
14. The right to a fair trial also entails the principle of equality of arms. In view of the Committee, this means that *'the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant'*.¹⁰
15. In its task of promoting and ensuring the proper role of lawyers, the State Party should respect and take into account the Basic Principles within the framework of its national legislation and practice.¹¹ Adherence to the Basic Principles is considered a fundamental precondition for the adequate protection of the human rights and fundamental freedoms to which all persons are entitled.¹²
16. It is the State party's duty under the ICCPR to respect and guarantee that all persons within its jurisdiction have effective and equal access to lawyers of their own choosing, and that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or improper interference from any quarter, or be threatened with sanctions for any action taken in accordance with recognized professional duties, standards and ethics.¹³
17. The State party must also ensure that lawyers are adequately protected when their security is threatened because of carrying out their legitimate professional duties, and that they are not be identified with their clients or their clients' causes.¹⁴ In addition, the State party must recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential.¹⁵ The Basic Principles affirm that lawyers, like other citizens, are entitled to the right to freedom of expression and assembly.¹⁶
18. However, Lawyers for Lawyers has received information that the State party fails to fully respect and ensure the guarantees for the proper functioning of lawyers under Articles 9 and 14 of the ICCPR. This impairs their ability to provide effective legal representation and consequently severely undermines the proper functioning of the rule of law and the adequate protection of rights to which all persons are entitled, including the rights to effective remedy and fair trial. The work of lawyers is indispensable for the public confidence in the administration of justice and for ensuring effective justice for all persons.

A. Incompatibility of the National Security Law with the ICCPR

⁷ Human Rights Committee, General Comment No.32, CCPR/C/GC/32, para.34. See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, especially article 12.

⁸ Ibid, par. 34.

⁹ Ibid, par. 34.

¹⁰ Ibid, par. 13.

¹¹ Basic Principles, Preamble, paragraph 11.

¹² Basic Principles, preamble, paragraph 9.

¹³ Idem, Principles 1,2 and 16.

¹⁴ Idem, Principles 17 and 18.

¹⁵ Human Rights Committee, General Comment No.32, CCPR/C/GC/32, paragraph 34. In particular, the Committee has stated that lawyers should also be able to "meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications." See also Principle 22 of the Basic Principles.

¹⁶ Principle 23 of the Basic Principles.

19. In its List of Issues in relation to the fourth periodic report of the State, the Committee requested the State party to clarify the compatibility with the ICCPR of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region¹⁷ ('**National Security Law**') and to comment on reports that journalists, academics, students, politicians and human rights defenders are increasingly facing threats, physical attacks, cyberattacks, harassment and intimidation.¹⁸ The Chinese authorities have responded to this request by stating that the National Security Law had been enacted not only to safeguard national security and to prevent, suppress and impose punishment for offences endangering national security, but also to maintain prosperity and stability of Hong Kong and to protect the lawful rights and interests of Hong Kong residents, and that it is in conformity with the ICCPR.¹⁹
20. The National Security Law was adopted by the Standing Committee of China's National People's Congress ('**SCCNPC**') on 30 June 2020.²⁰ According to the SCCNPC, the National Security Law was enacted in order to maintain prosperity and stability in the Hong Kong Special Administrative Region ('**HKSAR**'); to prevent, suppress and impose punishment for offences endangering national security; and to protect the lawful rights and interests of HK residents.²¹
21. Experts have argued that the National Security Law undermines Hong Kong's authority and constitutes a violation of the 'One Country, Two Systems' principle enshrined in the Joint Declaration on the Question of Hong Kong and the Basic Law.²² Under Article 23 of the Basic Law, the HKSAR has the power to enact its own laws on national security, thus prohibiting the SSNPC from bypassing Hong Kong's own legislative council.
22. The National Security Law punishes any act of secession, subversion, terrorism and collusion with foreign forces with a maximum sentence of life imprisonment.²³ These offences are very broadly defined by the National Security Law and this has led to the arbitrary or politically motivated persecution of human rights defenders and lawyers.²⁴
23. The National Security Law also threatens the independence of the Hong Kong judiciary. Under Article 44 of the National Security Law, Hong Kong's chief executive has the power to appoint judges to hear national security cases. These judges may be removed if they make 'any statement or behaved in any manner endangering national security'. Furthermore, the National Security Law limits the possibility of judicial review by vesting the power of interpretation of the National Security Law to the SCCNPC.²⁵
24. Finally, the National Security Law infringes the right to a fair trial by authorizing some trials to be held behind closed doors in order to protect State secrets.²⁶ Article 46 of the National Security Law also states that a case may be tried without a jury on the grounds of the protection of State secrets, involvement of foreign factors in the case, and the protection of the personal safety of jurors and

¹⁷ List of issues, paragraph 3.

¹⁸ Ibid, paragraph 20.

¹⁹ Replies of Hong Kong, China to the List of Issues in Relation to its Fourth Periodic Report, 28 September 2021, CCPR/C/CHN-HKG/RQ/4.

²⁰ BBC News, 'Hong Kong Security Law: What Is It and Is It Worrying?' (30 June 2020) <<https://www.bbc.com/news/world-asia-china-52765838>> accessed 20 May 2022.

²¹ National Security Law, Art. 1. Retrieved from: [https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_\(a406\)_en.pdf](https://www.elegislation.gov.hk/doc/hk/a406/eng_translation_(a406)_en.pdf).

²² House of Commons Library, 'National Security Law and Recent Events' (20 Sep. 2021) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9318/>> accessed 20 May 2022.

²³ National Security Law, Arts. 20-30.

²⁴ Lawyers for Lawyers, 'Concerns about position of lawyers in Hong Kong' (1 July 2022) <<https://lawyersforlawyers.org/en/concerns-about-position-of-lawyers-in-hong-kong/>> and Lawyers for Lawyers, 'Ongoing concerns on the situation in Hong Kong and the independence of the Bar Association' (14 April 2022) <<https://lawyersforlawyers.org/en/ongoing-concerns-on-the-situation-in-hong-kong-and-the-independence-of-the-bar-association/>>

²⁵ National Security Law, Art. 65.

²⁶ National Security Law, Art. 41.

their family members. Defendants may also be sent to Mainland China in cases concerning offences endangering national security, where they risk being subjected to acts of intimidation, ill-treatment and torture.²⁷ This could constitute a violation of the right to a fair trial as stipulated in article 14 of the ICCPR.

Using National Security Law to order CSOs to handle operational information

25. Under close monitoring from the authorities and the increasing political threat, any civil society groups, including associations of lawyers, have to compromise their stances or refrain from criticizing the government in order to avoid being a target of the authorities. They are also threatened by the expanded investigation power of the authorities under the national security law.
26. It is noteworthy that the Hong Kong police is empowered by the Schedule 7 of the Implementation Rules for Article 43 of the national security law to make an ex parte application to the Court of First Instance for an order to request any person or group to furnish information or produce materials related to prevention or investigation of national security offences. If anyone fails to comply with the order “without reasonable excuse”, he or she can be fined \$100,000 and imprisoned for 1 year²⁸. Furthermore, the Schedule 5 of the Implementation Rules for Article 43 allows the Commissioner of Police, with the approval of the Secretary for Security, to order any “foreign or Taiwan agents” to furnish information or produce materials. Failing to comply with the request can result in a fine of \$100,000 and imprisonment for 6 months²⁹.
27. On 21 September 2021, the China Human Rights Lawyers Concern Group announced its disbandment.³⁰ Before that, the police ordered the group to furnish information and produce material under Schedule 5 of the Implementation Rules for Article 43 of the NSL.
28. The 612 Humanitarian Relief Fund, which provided financial assistance for thousands of protesters who need counsel service, psychological or medical support, was ordered by the police, under Schedule 7 of the Implementation Rules for Article 43 of the National Security Law, to furnish the police with the fund’s operational information.³¹ The Fund then announced to cease operation in September 2021. However, the trustees of the fund, including a barrister, were arrested in May 2022 for “colluding with foreign force” under the National Security Law.³²

B. Criminal prosecution and harassment of lawyers

29. Lawyers, like any other individual, have the right to freedom of expression, as is stipulated by Article 19 of the ICCPR. According to Article 23 of the UN Basic Principles on the Role of Lawyers, lawyers particularly have the right to take part in public discussions of matters concerning the law, the administration of justice, and the promotion and protection of human rights. The freedom of expression that lawyers enjoy in connection to their professional functions should not only be guaranteed in light of the rights of the lawyer, but also in protection of the rights of their clients.

²⁷ National Security Law, Art. 55.

²⁸ s2(13), Schedule 7 of the Instrument A406A Implementation Rules for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

²⁹ s3(2), Schedule 5 of the Instrument A406A Implementation Rules for Article 43 of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

³⁰ SCMP, ‘Hong Kong group supporting mainland China lawyers to disband after police demand information citing national security law’ (21 Sept 2021), <https://www.scmp.com/news/hong-kong/politics/article/3149601/hong-kong-group-supporting-mainland-china-lawyers-announces>.

³¹ The Government of the Hong Kong Special Administrative Region, ‘Police investigate 612 Humanitarian Relief Fund’ (1 Sept 2021) <<https://www.info.gov.hk/gia/general/202109/01/P2021090100848.htm?fontSize=1>>

³² SCMP, ‘Cardinal Joseph Zen arrested by Hong Kong’s national security police, Vatican expresses concern’ (11 May 2022) <https://www.scmp.com/news/hong-kong/law-and-crime/article/3177350/ex-scholar-tied-fund-protesters-arrested-hong-kong>.

30. Ever since the adoption of the National Security Law, an increasing number of lawyers and pro-democracy activists have been arrested on charges of subversion or organizing illegal assemblies for exercising their right to freedom of expression or defending human rights.
31. On 28 Feb 2021, 47 former opposition legislative councillors and activists were charged with conspiring to subvert state power under the National Security Law as they organized or participated in unofficial pro-democracy primaries in 2020. Amongst the defendants, there were two barristers and one legal scholar³³.
32. Barrister Chow Hang-tung and a solicitor were imprisoned for organizing or participating illegal assemblies after peacefully exercising their rights to assembly in relation to their involvement in the organizing of the annual candlelight vigil in Hong Kong to commemorate the 1989 Tiananmen Massacre in 2020³⁴.
33. Chow Hang-tung, also the vice-chair of the Hong Kong Alliance in Support of Patriotic Democratic Movements of China, has been detained for other charges of “incitement to subversion” and being a foreign agent since 8 September 2021. Her applications for bail have been refused. UN human rights experts expressed deep concern about her arrest and urged authorities to refrain from the use of the National Security Law and reconsider its application.³⁵ On 4 January 2022, the West Kowloon Magistrates Court convicted Chow Hang-tung for inciting others to knowingly participate in an unauthorized assembly, based on two articles that she wrote about the Tiananmen Massacre vigil in June 2021, an assembly that was banned by the police. She is sentenced to serve 22 months in prison.
34. There has been a tendency of lawyers facing harassment, intimidation and cyberattacks from the state media, which published several articles to criticise or smear the targeted dissidents before the national security police launch investigations against them.
35. On 1 March 2022, a human right lawyer left Hong Kong following facing enormous criticism and intimidation from the state media and being summoned by the police for interrogation³⁶. The lawyer was a main target of the Chinese Government and the state media. According to the statistics of an independent media outlet, from 22 January 2021 to 1 March 2022, there were 290 articles about this lawyer in Wenweipo and Taikungpo, two newspapers run by the state media outlet in

³³ SCMP, ‘National security law: 47 Hong Kong opposition figures charged with conspiring to subvert state power, after arrests over roles in bloc’s primary’, 28 Feb 2021, https://www.scmp.com/news/hong-kong/politics/article/3123475/national-security-law-47-hong-kong-opposition-figures?utm_source=copy_link&utm_medium=share_widget&utm_campaign=3123475

³⁴ SCMP, ‘Hong Kong court jails 9 activists, ex-lawmakers for roles in banned Tiananmen Square vigil’, 15 Sept 2021, <https://www.scmp.com/news/hong-kong/politics/article/3148796/hong-kong-court-jails-9-activists-ex-lawmakers-roles-banned>

SCMP, ‘Hong Kong media tycoon Jimmy Lai, 7 others get jail sentences ranging from 4½ to 14 months over banned Tiananmen Square vigil’, 13 Dec 2021, <https://www.scmp.com/news/hong-kong/law-and-crime/article/3159502/hong-kong-media-tycoon-jimmy-lai-7-others-get-jail>

³⁵ OHCHR, ‘Hong Kong: Arrests under national security law of serious concern, UN experts call for review’, 12 October 2021, retrieved from: <https://www.ohchr.org/en/press-releases/2021/11/hong-kong-arrests-under-security-law-are-serious-concern-un-experts-call>.

³⁶ SCMP, ‘National security law Ex-Bar Association chairman leaves Hong Kong for UK after meeting with police’ (2 March 2022) <<https://www.scmp.com/news/hong-kong/law-and-crime/article/3168893/national-security-law-ex-bar-association-chairman>>

Hong Kong³⁷. On 25 April 2021, the Liaison Office of the Central People's Government (the LOCPG) called him "an anti-China politician with close connections with foreign forces".³⁸

36. On 21 April 2022, a law firm which represented several famous activists including Joshua Wong and always took cases about LGBTQ rights, announced to close down without citing any reason.³⁹
37. After arresting the trustees of the 612 Humanitarian Relief Fund, the National Security Department of the Hong Kong Police said they had lodged complaints against several lawyers to the Law Society and the Bar Association, claiming that they were found "breach(ing) of professional codes." It was reported that at least 30 barristers were involved in the complaints.⁴⁰
38. It is unusual to see a national security authority accuse lawyers of professional misconduct. More importantly, the allegations are, according to the local media reports, mainly about barristers receiving cheques from the fund directly instead of through solicitors, and lawyers telling the judges they were providing pro bono services while receiving money from the fund, which are not related to national security. It raised concern over whether the complaints only aimed to intimidate lawyers, particularly those who represented anti-ELAB protesters.

C. Reform of the Legal Aid system

39. In Hong Kong, the Legal Aid Department (LAD) provides legal aid schemes for any person who cannot afford to pay for lawyers for their court cases, which is vital for ensuring a fair trial and the right to equality before courts and tribunals.
40. In October 2021, following the criticism by the state media and pro-Beijing politicians, who claimed that the legal aid schemes had been abused by the protesters who have been prosecuted because of protests in 2019 and those who challenged the Government's policy or decision by launching judicial reviews, the LAD announced to impose a number of restrictions on the applications of the legal aid schemes, including not allowing applicants to choose their criminal lawyers except in cases "under exceptional circumstances", limiting the number of judicial reviews barristers and solicitors can take on 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.⁴¹
41. No public consultation was conducted before the implementation of the new restrictions. The new restrictions have only been discussed at a panel meeting on 26 October 2021 in the Legislative Council, where the then chairman of the Bar Association Mr Paul Harris SC and the then chairman

³⁷Commons, '夏博義涉違國安法接受調查 任主席一年 左報 155 篇文章極力針對 (Paul Harris is under investigation for violating the national security law. Being the chairman for a year, he has been strongly targeted by state media in 155 articles)' (1 March 2022)

<<https://commons.hk.com/2022/03/01/%e5%a4%8f%e5%8d%9a%e7%be%a9%e6%b6%89%e9%81%95%e5%9c%8b%e5%ae%89%e6%b3%95%e6%8e%a5%e5%8f%97%e8%aa%bf%e6%9f%a5%e3%80%80%e4%bb%bb%e4%b8%bb%e5%b8%ad%e4%b8%80%e5%b9%b4%e3%80%80%e5%b7%a6%e5%a0%b1-155/>>

³⁸China Daily, 'Liaison office of central gov't in HKSAR criticizes bar association chief for whitewashing violence, challenging rule

<<https://www.chinadaily.com.cn/a/202104/26/WS6086505fa31024ad0baba6ab.html>>

³⁹HK Free Press, 'Hong Kong law firm Vidler & Co, which handled protest-related cases, to close after 19 years', 21 April 2021. Retrieved from: <https://hongkongfp.com/2022/04/21/hong-kong-law-firm-vidler-co-which-handled-protest-related-cases-to-close-after-19-years/>.

⁴⁰Singtao Daily, '近 30 義務大狀被投訴收「612」酬金 (Nearly 30 pro-bono lawyers were complained for receiving "612" remuneration)', (14 May 2022) <<https://std.stheadline.com/daily/article/2462357/%E6%97%A5%E5%A0%B1-%E6%B8%AF%E8%81%9E-%E8%BF%9130%E7%BE%A9%E5%8B%99%E5%A4%A7%E7%8B%80%E8%A2%AB%E6%8A%95%E8%A8%B4%E6%94%B6-612-%E9%85%AC%E9%87%91>>

⁴¹The Chief Secretary for Administration's Office, Legal Aid Department, 'Proposed Enhancement Measures to the Legal Aid System in Hong Kong', (26 Oct 2021) <<https://www.legco.gov.hk/yr20-21/english/panels/ajls/papers/ajls20211026cb4-1677-1-e.pdf>>

of the Law Society of Hong Kong Mr Stephen Hung both said they did not have enough time to consult their members as the Administration's paper was made available four days before the meeting.⁴² After the panel meeting, the new restrictions took effect on 15 December 2021.

42. The right to choose one's own lawyers is a basic right enshrined in Article 35 of the Basic Law and Articles 10 and 11 of the Hong Kong Bill of Rights, which mirror to Articles 14(1) and 14(3) of the ICCPR. Moreover, Article 1 of the UN Basic Principles on the Role of Lawyers includes the right of all persons to call upon the assistance of a lawyer of their choice to establish their rights and defend them.
43. Under the new arrangement, the aided persons who involve in criminal cases will be assigned a lawyer by the authority. This means that even though an aided person has already had a lawyer who has been following up on their case from the beginning and is familiar with the details of the case, the aided person has still to be forced to replace their lawyer with a new one assigned by the LAD.
44. It has been stated that 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 mainland China.⁴³ It was furthermore reported that some defendants have already decided not to apply for the legal aid scheme even though they cannot afford to pay the costs.⁴⁴

New obstacle to judicial review applicants

45. Judicial review is an important channel for anyone who wants to challenge the government's decisions or policies. As the legal costs for judicial review can be high, the legal aid scheme is vital to ensure those who cannot afford the fee to apply for the review.
46. Under the new cap of aided judicial review cases a counsel can take on every year, and given that the number of lawyers who have expertise in public law and judicial review is limited in Hong Kong, 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. According to Article 6 of the Basic Principles arrested persons are entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services. As the Government's side can freely choose their representative and enjoy enormous resources, the new restriction will result in compromising the fairness of the judicial review trial.

D. External interference in the work of judges

The Controversy over Separation of Powers

47. "Separation of powers" has long been regarded by the public as the most important feature of the State party's governmental system. Article 2 of the Basic Law provides that Hong Kong "enjoy(s) executive, legislative and independent judicial power." Also, Article 64 emphasises the Hong Kong

⁴² the Legislative Council, "Minute of special meeting held on Tuesday, 26 October 2021, at 2:30 pm in Conference Room 3 of the Legislative Council Complex, Panel on Administration of Justice and Legal Services", (26 Oct 2021) <<https://www.legco.gov.hk/yr20-21/english/panels/ajls/minutes/ajls20211026.pdf>>

⁴³ Voice of America, '香港首宗國安法定罪案明年3月上訴開審 學者憂法援改制變官派律師 (Hong Kong's first national security law case will be appealed in March next year. Scholars worry about government assigned lawyers in view of the legal aid reform)' <<https://www.voacantonese.com/a/cantonese-it-hong-kong-1st-nsf-cse-appeal-and-reactions-on-legal-aid-reform-20211126-ry/6328974.html>>

⁴⁴ Ubeat Magazine, '法援改制 掀官派律師疑慮 (The reform of the legal aid system raised concern of government assigned lawyers)' (28 Dec 2021) <https://ubeat.com.cuhk.edu.hk/157_legal-aid/>

Government must be “accountable” to the Legislative Council and Article 85 provides that the courts of Hong Kong “shall exercise judicial power independently, free from any interference.”⁴⁵

48. In August 2020, it was reported that the Education Bureau ordered six major publishers of Liberal Studies textbooks to remove the phrase “separation of powers” in a voluntary textbooks review. Shortly afterwards both the Secretary of Education Mr Kevin Yeung and the Chief Executive Carrie Lam said there was no “separation of powers” in Hong Kong constitution, which was echoed by the Hong Kong and Macau Affairs Office of the State Council (HKMAO) and the Liaison Office of the Central Government. In the statement of HKMAO, it stated that the separation of powers never existed in the State party and the Chief Executive, who was accountable to the Central People’s Government, had a dominant and central position in the political system. Although it recognised the independence of the judiciary in its statement, it also emphasised that “the independence of the judiciary doesn’t mean judiciary is dominant”.⁴⁶
49. More importantly, HKMAO criticised that some people were trying to “expand the power of the legislature and the judiciary, undermine the authority of the Chief Executive and the Hong Kong Special Administrative Region, reject Beijing’s comprehensive jurisdiction over Hong Kong...and turn Hong Kong into an independent political entity”.⁴⁷
50. The debate about whether the separation of powers exists in the constitution of the State party raised the public’s concern, worrying the Chinese authorities and the Hong Kong Government intended to put political pressure on the judiciary by suddenly provoking the controversy.

Systematic attacks on judges

51. It is noteworthy that whilst the debate on the separation of powers was ongoing, some state media outlets and pro-Beijing politicians simultaneously attacked a number of judges and their decisions, criticising them for acquitting the defendants who participated in the social movements in 2019 or granting bail for them.⁴⁸
52. Moreover, on 2 September 2020, two pro-Beijing legislative councillors Holden Chow Ho-ding and Elizabeth Quat, released an “anonymous” letter from a “blue judge” (a judge who is pro-Beijing) in a YouTube video. Chow read the content of the letter, which said that a High Court judge criticised the “blue judges” that they should be careful about their comments and are deserved to be doxxed. The content of the letter was found to be false following a statement made by the Judiciary confirming that “the remarks attributed to the speaker by the anonymous letter are untrue”.⁴⁹

⁴⁵ the Hong Kong Bar Association, ‘HKBA statement on separation of powers. (Chinese Only)’ (2 Sept 2020)

<<https://www.hkba.org/sites/default/files/20200902%20-%20HKBA%20statement%20on%20separation%20of%20powers%20%28C%29.pdf>>

⁴⁶ Xinhua, ‘國務院港澳辦發言人：關於香港特別行政區實行“三權分立”的說法必須糾正 (The spokesperson of the Hong Kong and Macao Affairs Office of the State Council : The statement about the "separation of powers" in the Hong Kong Special Administrative Region must be corrected)’ (7 Sept 2020) <http://big5.www.gov.cn/gate/big5/www.gov.cn/xinwen/2020-09/07/content_5541339.htm>

⁴⁷ SCMP, ‘No ‘separation of powers’ in Hong Kong, Beijing agency say, adding Deng Xiaoping spelled out stance in 1987.’ (8 Sept 2020) <<https://www.scmp.com/news/hong-kong/politics/article/3100590/no-separation-powers-hong-kong-beijing-agencies-say-adding>>

⁴⁸ Wenweipo, ‘暴徒保釋紛着草 市民質疑法官失職 (Rioters flee after getting bail. People question judges on negligence.)’ (31 August 2020) <<http://news.wenweipo.com/2020/08/31/IN2008310016.htm>>

⁴⁹ Judiciary of Hong Kong, ‘Judiciary’s response to media enquiries’ (2 Sept 2020) <<https://www.info.gov.hk/gia/general/202009/02/P2020090200763.htm?fontSize=1>>

53. Facing malicious attacks on judges, the then Chief Justice Geoffrey Ma released an 18-page statement on 23 September 2020 restating the principles governing the administration of justice, an unusual move made by the top judge.⁵⁰

The resignation of overseas judges

54. Since the handover in 1997, the Court of Final Appeal (CFA) was established to replace the position of the Judicial Committee of the Privy Council as the highest court of appeal in Hong Kong. Stipulated in Article 82 of the Basic Law, judges from overseas can still be invited to sit on the CFA. The presence of overseas judges can be viewed as a symbol of the independence of the Hong Kong judiciary.
55. However, after the implementation of the National Security Law, a number of overseas judges decided to quit their posts because of the concern over the National Security Law, including Australian Justice James Spigelman and former president of the British Supreme Court Baroness Brenda Hale.⁵¹
56. In March 2022, UK Supreme Court president Lord Robert Reed and vice-president Lord Patrick Hodge resigned from the CFA as they “cannot continue to sit in Hong Kong without appearing to endorse an administration which has departed from values of political freedom, and freedom of expression”.⁵² The UK government also confirmed that no serving UK judges will sit in Hong Kong courts anymore.⁵³

Pressure on the Bar Association and Law Society

57. The Hong Kong Bar Association (‘HKBA’) and the Law Society of Hong Kong (‘LAWSOCHK’) are the professional groups of barristers and solicitors which have statutory powers for the registration of counsels in Hong Kong. As professional groups, they always expressed their legal opinion on political issues and public policies. Under Article 24 of the UN Basic Principles on the Role of Lawyers, professional associations of lawyers shall exercise its functions without external interference.
58. The two self-regulatory bodies were under enormous political pressure after the social movements in 2019 as the Government tried to interfere in the elections of both groups’ leaderships.
59. Before the LAWSOCHK’s election, Chief Executive Carrie Lam said the government would sever the tie with the Law Society if its professional role “is overridden by politics”.⁵⁴The People’s Daily,

⁵⁰ Chief Justice Geoffrey Ma, ‘Statement by the Honourable Chief Justice Geoffrey Ma’ (23 Sept 2020) <[https://www.hkcfa.hk/filemanager/common/pdf/Statement%20by%20CJ%20of%20CFA%20\(23%20Sep%202020\)%20Eng.pdf](https://www.hkcfa.hk/filemanager/common/pdf/Statement%20by%20CJ%20of%20CFA%20(23%20Sep%202020)%20Eng.pdf)>

⁵¹ Reuters, ‘Hong Kong judiciary says British judge to step down from city’s top court’ (4 June 2021) <<https://www.reuters.com/world/china/hong-kong-judiciary-says-british-judge-step-down-citys-top-court-2021-06-04/>>

⁵² The Supreme Court of the UK, ‘Role of UK Supreme Court judges on the Hong Kong Court of Final Appeal – update’ (30 March 2022) <<https://www.supremecourt.uk/news/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal-update-march-2022.html>>

⁵³ Foreign, Commonwealth & Development Office, Ministry of Justice The Rt Hon Elizabeth Truss MP, and The Rt Hon Dominic Raab MP, ‘Press release: Foreign Secretary supports the withdrawal of serving UK judges from the Hong Kong Court of Final Appeal’ (30 March 2022) <<https://www.gov.uk/government/news/foreign-secretary-supports-the-withdrawal-of-serving-uk-judges-from-the-hong-kong-court-of-final-appeal>>

⁵⁴ SCMP, ‘Hong Kong leader warns city’s lawyers that officials could cut ties if legal body puts politics over professionalism’ (17 Aug 2021) <<https://www.scmp.com/news/hong-kong/politics/article/3145304/hong-kong-leader-warns-citys-lawyers-officials-could-cut>>

the state-run media of China, published a comment before the election, urging the LAWSOCHK for focusing on professionalism instead of politics and “not following the step of the HKBA.”⁵⁵

60. The state media and pro-Beijing supporters in Hong Kong also criticised the pro-democracy candidates before the election. On 21 August, one of the pro-democracy candidates, Jonathan Ross, announced to withdraw his candidacy after receiving threatening messages.⁵⁶ At the election, the seats were won by five candidates who advocated “professionalism over politicisation”. The HKBA also changed its leadership. The new chairman said the Association will “not speak out or handle political issues”.⁵⁷

Recommendations to the State Party:

- (a) Review the National Security Law to ensure its compliance with the fundamental rights and freedoms contained in the ICCPR and revise the National Security Law and other related laws and ensure that the rights enshrined in the Hong Kong Bill of Rights and the Basic Law are ensured.**
- (b) Take measures to prevent the harassment of lawyers and attempts to impede or interfere on improper grounds with their defence of clients, in accordance with Article 14 of the Covenant and articles 16 and 18 of the Basic Principles on the Role of Lawyers.**
- (c) Take all necessary measures to prevent that lawyers suffer or be threatened with prosecution or other sanctions on improper grounds, in accordance with article 14 of the Covenant and article 16 of the Basic Principles on the Role of Lawyers.**
- (d) Take measures to guarantee the effective protection of the right of freedom of expression of lawyers as set out in article 19 of the Covenant and article 23 of the Basic Principles on the Role of Lawyers, in particular their right to take part in public discussion of matters concerning the law, the administration of justice the promotion and protection of human rights, without suffering professional restrictions by reason of their lawful action**
- (e) Guarantee the right of all persons to call upon the assistance of a lawyer of their choice to establish their rights and defend them by revising the Legal Aided Schemes, in accordance with article 14 of the Covenant and article 1 of the Basic Principles on the Role of Lawyers.**
- (f) Repeal the new restriction on aided judicial review cases**
- (g) Take all the necessary steps to ensure the decisions and the judgements made by courts will not be affected by political interference.**
- (h) Ensure that the Bar Association and the Law Society in Hong Kong can operate without any political interference and express their views without fear of reprisals.**

⁵⁵ HK01, ‘人民日報：律師會應搞專業不搞政治 不應步大律師公會後塵 (The People Daily: The LAWSOCHK should focus on professionalism instead of politics and should not follow the step of the HKBA)’ (14 August 2021)
<<https://www.hk01.com/sns/article/663667>>

⁵⁶ SCMP, ‘Council member of Hong Kong’s largest lawyers’ association withdraws re-election bid, citing safety fears as group makes police report over ‘threats’ (21 Aug 2021)
<<https://www.scmp.com/news/hong-kong/politics/article/3145899/council-member-hong-kongs-largest-lawyers-association>>

⁵⁷ The Standard, ‘Bar Association will stay away from politics: new chairman’ (20 Jan 2022)
<<https://www.thestandard.com.hk/breaking-news/section/4/186243/Bar-Association-will-stay-away-from-politics:-new-chairman>>