

**Submissions of Asian Academy of International Law
to the Human Rights Committee
In relation to the 4th Periodic Report of Hong Kong, China**

1. Asian Academy of International Law (the “**Academy**”) refers to the Committee’s List of Issues in relation to the 4th Periodic Report of Hong Kong, China (the “**HKSAR**”).
2. The Academy would like to make submissions on the issue of “access to justice, independence of the judiciary and the right to a fair trial.” These fundamental rights have been firmly rooted in the Legal System of the HKSAR, as they are protected by the Common Law. These principles of the Common Law have also been elaborated in the Human Rights jurisprudence developed through the Hong Kong Court of Final Appeals in the last 25 years.
3. Under the concept of “One Country, Two Systems”, Article 8 of the Basic Law enacts:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.



4. The Hong Kong Courts have continued to operate under the jurisprudential umbrella of the common law for the last 25 years. These principles come under the general rubric of the Rule of Law, as first enunciated by the English Legal Scholar, A.V. Dicey and later elaborated by legal scholars in Common and Civil Law jurisdictions. Principal among the statements regarding the Rule of Law are guarantees of access to justice, independence of the judiciary and the right to a fair trial.

5. The Basic Law enacted under the Constitution of the People's Republic of China gives Hong Kong the legal right to practice its laws dating back to its founding as a jurisdiction for the last 150 years based on the Common Law, although the People's Republic practices a different legal system in the Mainland based on the Civil Law. This is the formula known as "One Country, Two Systems".

6. The formula of "One Country, Two Systems" has stood the HKSAR in good stead. In the World Bank's Worldwide Governance Indicators, Hong Kong's rule of law index improved from 69.85 before 1997 to consistently more than 90 since 2003. According to the World Justice Project's 2021 Index, Hong Kong's rule of law ranked 19th amongst 139 researched jurisdictions. If one looks at the Civil Justice Factor and the Criminal Justice Factor, HKSAR ranked even higher at 16th and 18th respectively.



7. That Hong Kong remains one of the foremost international financial and commercial centres of the world is testament to the fact that the rule of law is firmly embedded in the governance and community life of the HKSAR. After the enactment and implementation of the Hong Kong National Security Law, it has been said by certain foreign governments and media that this Law has sapped and weakened the foundations of the rule of law in the HKSAR. There is nothing further from the truth in this accusation. The National Security Law of the HKSAR has restored social order and security, so that the rule of law in the HKSAR may be given its rightful role in the governance of the HKSAR in protection of its citizens and those who transact business here. Without social order and security, it will not be possible to consolidate the rule of law as a long-term and unremitting subject that is reviewed and refined in a timely manner according to the future social development of the HKSAR. The Academy believes that this is the common aspiration of all civilised nations under International Law.

8. Echoing the UN 2030 Agenda, the HKSAR, with the full support of our National Government, has launched the 10-year “Vision 2030 for Rule of Law” project to promote the rule of law at national and international levels so as to ensure equal access to justice for all. The Academy is encouraged to see the administration’s commitment to build and maintain a fair and rule-based society underpinned by the rule of law through collaboration with stakeholders towards sustainable development, and will fully participate in the implementation of this Agenda.



9. The project “Vision 2030 for Rule of Law” is founded in the belief that the rule of law should be implemented as an “outcome-based” project which is designed to serve the people for which it is designed. Thus, the success or otherwise of the project should be based on objective data and information rather than perception-based and subjective assessment. This is why, the Rule of Law Task Force, empanelled by the HKSAR’s Department of Justice comprising of prominent judges (including one of the judges of the International Court of Justice), legal scholars and lawyers, have made recommendations that certain “common denominators” of the rule of law should be used as a starting point for formulating an objective methodology to review the practice of the rule of law, recognising diversity in practice due to differences in cultures, socio-economic features and legal traditions. These common denominators include access to justice, independence of the judiciary and the right to a fair trial.
10. The Academy is pleased to see the administration’s continued commitment to the Vision 2030 Project and its invitation to engage NGOs to take forward the study and work relating to the review of the practice of rule of law in the HKSAR and beyond.
11. All of the above no doubt will reinforce and consolidate HKSAR’s leading role in promoting the rule of law.
12. Whilst the Academy notes the clear commitment to the rule of law in the HKSAR, it is saddened to note the steps taken in the international arena by certain countries, which saps and weakens the rule of law.



13. Most notable among the actions sapped and weakened the rule of law are unilateral sanctions imposed by some States in contravention of International Law. Sanctions as international measures should only be put in place by the United Nations under Article 41 of the *Charter of the United Nations* to achieve peace and international security, while most unilateral sanctions are promulgated in the interest of the security and interest of one country, avoiding the requirements of Article 41. The travesty of justice which unilateral sanctions has created may be vividly demonstrated in the recent case of *JSC VTB Bank v. Alexander Katunin* decided by the BVI Court, in which the English lawyer sought leave to come off the record as the Russian company's legal representative. While the BVI Court noted that the entities subject to unilateral sanctions have been unfairly deprived of access to lawyers and justice and on this basis would have dismissed the application, it gave the lawyer leave to come off the record, if the lawyer were able to show that he could not be paid. One aspect of the sanctions is the prevention of banks to pay, and thus, this enabled the lawyer to deprive his client of his access to justice.
14. The above is not an isolated incident. Strong evidence suggests that some international law firms have terminated retainers with their Russian clients to avoid any so-called "reputational risk" and those abandoned entities had to go elsewhere in search of legal representation. For example, members of the Academy have encountered cases where an entity to an arbitration had to resort to a domestic lawyer on a case governed by English law simply because the English law firm had discontinued the retainer and even then, the domestic lawyer is finding it impossible to get paid through banks because all primary sanctions carry the threat of secondary sanctions. This threat gives unilateral sanctions exorbitant and long-arm reach.



Due to these long-arm reach of the sanctions imposed by the sanctioning States, professionals and service providers in the HKSAR are afraid to accept instructions from sanctioned clients or even those who have dealings with them, even though those unilateral sanctions have no legal force within the jurisdiction. Access to justice is now denied to a large number of people by virtue of these sanctions.

15. The UN General Assembly have no less than three occasions condemned the use of unilateral sanctions. The Academy is disappointed about the continued use of such sanctions, in particular when some entities have been unfairly deprived of some fundamental legal protection as a result of such sanctions. As Jack J. in the *VTB Bank* case quite rightly pointed out, a legal system affords a party being stigmatised as a pariah the right to legal representation to advise them and to advocate in Court. Put it shortly, even a pariah has rights.
16. Another concern in connection with unilateral sanctions is the attempted interference by other States with the independence of judiciary of the HKSAR. On 3 May 2022, seven US congressmen wrote to the President of the USA, urging the Administration to impose sanctions on the National Security Law designated judges of the HKSAR judiciary and prosecutors.
17. Not only did this amount to an unlawful interference with a State's internal affairs, more importantly it is inconceivable how a legislator who values rule of law could make such a move. Such a move was promptly met by condemnation in the strongest terms by the HKSAR Judiciary, the Administration and the two legal professional bodies.



18. All in all, the rule of law has been well-maintained since 1997 and all stakeholders within the HKSAR jurisdiction, the Judiciary, the Administration and the two legal professional bodies have been doing their respective parts to uphold it. The threats, if any, in fact come from external sources, particularly from those actual or threatened unilateral sanctions imposed (or sought to be imposed) paying no heed to international law.

19. It is obvious that those threats could not be removed single-handedly by the HKSAR Administration for it is not the author of such unilateral sanctions. It could only be resolved by States honouring international law principles of non-interference and against unilateral sanctions.

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