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ARTICLE

Canaries or Colonials? The Reduced Prominence of the 'Overseas Judges' on Hong Kong's Court of Final Appeal

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Abstract

Typically one member of a sitting panel of Hong Kong's Court of Final Appeal is a senior jurist drawn from another common law jurisdiction. In the Court's early years, these 'overseas judges' were responsible for writing approximately one quarter of the lead opinions across a vast range of cases. This article demonstrates, however, that this practice has changed. The overseas judges now write a smaller share of lead opinions and no longer write lead opinions related to issues of fundamental human rights or the relationship between Hong Kong and the rest of China. This article suggests this change has been made for good reason. Though valid questions about the legitimacy of the role of the overseas judges can be made, they also continue to perform a valuable communicative role regarding the status of Hong Kong's judicial independence under the 'one country, two systems' framework. A recent rise in attacks on overseas and other 'foreign' judges in Hong Kong can be understood as part of a broader project that seeks to constrain the role of the independent judiciary. By continuing to invite overseas judges to sit on the Court of Final Appeal but reducing their public prominence, the Court has sought not only to reduce avenues for attacks on the legitimacy of particular decisions, but to protect the autonomy and independence of the judiciary more broadly.

Key words: China; courts; Hong Kong; judging

Hong Kong is a common law jurisdiction that has long prided itself on its commitment to the rule of law, guarded by a highly-trained, professional, and independent judiciary. It is also, of course, part of the sovereign territory of an authoritarian party-state with a civilian-socialist legal tradition. One aspect of the 'one-country, two systems' model designed to reconcile this situation was the preservation of Hong Kong's common law legal system[1] and independent judicial power.[2] Thus, while the People's Republic of China (PRC) remains resolutely opposed to anything on the Mainland that resembles the notion of judicial independence, Hong Kong's legal system includes an apex court (the Court of Final Appeal) with the power to review laws for compatibility with the *Basic Law of Hong Kong* (Hong Kong's quasi-constitution) and to invalidate them should they be lacking.[3] Interestingly, in the course of its duties the Court of Final Appeal invites judges from other common law jurisdictions to sit as full members for three years at a time – a practice that is constitutionally provided for[4] and has continued for 22 years.

[1]Basic Law of Hong Kong, art 8 (henceforth 'the Basic Law').

[2]The Basic Law, art 2.

[3]The Basic Law, art 11. In *Ng Ka Ling v Director of Immigration* 2 HKCFAR 4, the Court of Final Appeal concluded that this provision was the basis for a broad judicial 'rights review' power, including the ability to invalidate legislation it deemed incompatible with the Basic Law (see paras 60–64).

[4]The Basic Law, art 82.

Importing judges in this way is unusual, but not unprecedented. A number of very small or very poor states have done so as a means of overcoming severe capacity limitations in legal talent. Elsewhere, overseas judges have been used in post-conflict scenarios as part of a reconciliation process. But Hong Kong is neither poor nor post-conflict, and it appears unique in that it is a wealthy, well-developed jurisdiction that places no limitations on the kinds of cases that overseas judges may hear. On its face, the ongoing use of overseas judges in Hong Kong is an uncomfortable colonial echo with distinctly racial overtones. Hong Kong has imported judges for the Court of Final Appeal *only* from the United Kingdom and a few of its former colonies; all have been white, and all but two have been male. Notwithstanding that the practice is provided for in the Basic Law, there are fair questions that can be raised about its legitimacy on a normative basis. Yet, a good argument can also be made that their use remains justified as an important symbolic aspect of Hong Kong's judicial autonomy under the 'one country, two systems' model.

This article demonstrates that the Court of Final Appeal itself has altered the prominence of the overseas judges in an attempt to reconcile these two realities. There has been a notable reduction in the proportion of decisions in which the lead opinion is individually written by an overseas judge – down from approximately 25 per cent between 1997 and 2010 to roughly 19 per cent over the last five years. The overseas judges also no longer appear to pen opinions that relate to the relationship between Hong Kong and the Central Authorities or to critical public law questions including the boundaries of human rights protections. These two factors amount to a significant shift from the role the overseas judges played on the Court previously. This article argues that this shift can be understood as the behaviour of a strategic political actor seeking to reduce the risk of having contentious decisions 'de-legitimized' (even if unfairly) by being associated with an overseas member, whilst maintaining the messaging benefits the presence of overseas judges provides both domestically and internationally about the state of Hong Kong's autonomous judicial system under the 'one country, two systems' framework.

Part I of this article offers a comparative perspective on the use of overseas judges and explains the origin of their use in Hong Kong. In Part II I suggest that there are fair concerns about the legitimacy of judicial decision-making by those unconnected to a society, and thus special justification must be made for their use. Part III therefore considers the justifications put forth for the ongoing use of overseas judges in Hong Kong, concluding that the only valid argument is the symbolic message their presence communicates about the status of Hong Kong's judicial independence under 'one country, two systems'. Part IV analyzes the Court's output and argues that it appears to be reducing the prominence of the overseas judges in comparison to the role they played in the earlier years of the Court. In Part V I suggest that this strategy is best understood as a response to critiques of overseas judges that are cloaked in the language of legitimacy but in fact are not made out of genuine principle. Instead, they are simply part of a broader project to reduce the scope of Hong Kong's judicial autonomy under the 'one country, two systems' framework.

What are 'Overseas Judges'?

The Use of Overseas Judges: A Comparative Perspective

The use of non-local, expatriate, foreign, or overseas (the terminology varies in the literature; for consistency I will use 'overseas' hereafter) judges on appellate courts is unusual in common law jurisdictions but not unheard of. Dale finds that there are three different common law judicial models that adopt the use of overseas members.[5] The first of these he calls the 'expatriate model', under which judges are drawn from other nations to sit on local appellate courts. A number of microstates of the South Pacific use this model. The Fiji Islands allows non-citizens to serve as judges on

[5]Gregory Dale, 'Appealing to Whom - Australia's Appellate Jurisdiction over Nauru' (2007) 56 International & Comparative Law Quarterly 641, 642.

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renewable three-year terms providing they have held high judicial office in another country (from a specified list) or have practiced in another country for at least fifteen years.[6] Kiribati allows the appointment of non-citizens to the Court of Appeal providing they have held office as a judge in another country.[7] The Marshall Islands allows the appointment of non-citizens to any of its courts providing they are approved by a Commission.[8] Micronesia allows the appointment of anyone with at least five years' experience practicing law in any jurisdiction to its Supreme Court.[9] Nauru allows the appointment to the Court of Appeal of anyone entitled to practice for five years as a barrister or solicitor in Nauru, and this entitlement has been interpreted to include foreign judges who may not necessarily have qualified locally.[10] Palau allows non-citizens to be appointed to its Supreme Court providing they have been admitted to practice law before the highest court of their home jurisdiction for at least five years prior to appointment.[11]

Papua New Guinea allows the appointment of non-citizens as judges at any level if they have practiced law in another jurisdiction with a substantially similar legal system for at least five years or has been a judge of a court of unlimited jurisdiction in the same.[12] Samoa allows the appointment to its Supreme Court of non-citizens who have practiced as a barrister in an 'approved country' for a period of not less than eight years.[13] The Solomon Islands allows non-citizens to be appointed as judges to the Court of Appeal providing they have held high judicial office in any Commonwealth country (or a non-Commonwealth country as prescribed by Parliament), or if they have practiced as a barrister or solicitor in such a country for not less than five years.[14] The Tongan Court of Appeal allows the appointment of non-citizen judges if they have held high judicial office elsewhere or have practiced as a barrister in a Commonwealth country for not less than ten years.[15] Tuvalu allows the appointment of non-citizens as judges to its High Court if they have served as a judge in any legal system 'similar' to that of Tuvalu, or if they have practiced for not less than five years as a barrister or solicitor in the same.[16] Vanuatu allows non-citizens to be appointed to the bench as a matter of convention, though the practice is not specified in its constitution.[17]

The 'expatriate model' is also found outside the South Pacific. In Botswana, for instance, anyone who has held office as judge of a court of unlimited jurisdiction in a Commonwealth country may be appointed to sit on the Court of Appeal.[18] Indeed that Court is currently composed *entirely* of judges drawn from fellow Commonwealth member nations, and no ethnic Motswana has ever been appointed. High Court judges (who in contrast are all Motswana) are allowed, however, to sit in the Court of Appeal while it is in session in order to prepare for 'eventual localization', though when that will occur is unspecified.[19] Gambia allows the appointment of individuals to its Supreme Court

[6]Constitution of the Republic of Fiji 2013, ss 105(2) and 110(1).

[7]Constitution of Kiribati 1979 (revised 2013), s 81(3).

[8]Constitution of the Republic of the Marshall Islands 1979 (revised 2005), art VI(1)(4).

[9]Annotated Code of the Federated States of Micronesia, art 107.

[10]Court of Appeal Act 2018, s 9(2), which refers to the Supreme Court Act 2018, s 9; for practice see Anna Dziedzic, 'A New Court for Nauru' (The Interpreter, 8 Aug 2018) <https://www.lowyinstitute.org/the-interpreter/new-court-nauru> accessed 13 Jul 2021.

[11]Constitution of Palau 1981 (revised in 1992), s 8.

[12]National Court Act 1975 (Cap 38), s 2.

[13]Constitution of the Independent State of Samoa 1962 (revised 2017), art 65(3).

[14]Constitution of the Solomon Islands 1978 (revised 2014), s 78(3).

[15]Constitution of Kingdom of Tonga 1875 (revised 2013), s 85(1).

[16]Constitution of Tuvalu 1986 (revised 2010), s 124.

[17]'Court of Appeal' (Judiciary of the Republic of Vanuatu) <https://courts.gov.vu/about-us/court-of-appeal> accessed 13 Jul 2021; see also Miranda Forsyth, 'Understanding Judicial Independence in Vanuatu' (SSGM Discussion Paper 2015/9, Australian National University) <http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/DP-2015-9-Forsyth-ONLINE_0.pdf> accessed 13 Jul 2021.

[18]Constitution of Botswana 1966 (revised 2005), s 100(3).

[19]'About the Court of Appeal' (Administration of Justice, 6 Aug 2021) https://www.justice.gov.bw/services/about-court-appeal> accessed 13 Jul 2021.

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who have held office on a similar court of unlimited jurisdiction in another common law country for not less than five years, or who have practiced before a court of unlimited jurisdiction in another common law country for not less than twelve years.[20] Lesotho allows the appointment of overseas judges who have held judicial office elsewhere in the Commonwealth (or outside the Commonwealth as prescribed by Parliament) for at least five years.[21]

Singapore uses a variant of this model: its constitution allows the appointment of what it terms 'international judges' to its Supreme Court.[22] However, the constitution also provides that Parliament may limit the classes of cases that may be heard by an international judge.[23] Currently, international judges are limited to sitting *only* in the Singapore International Commercial Court.[24] Swaziland allows the appointment of non-citizens to the Supreme Court if they have either practiced law in another Commonwealth country or the Republic of Ireland for not less than fifteen years, or if they have served as a judge in a superior court of unlimited jurisdiction in the same for not less than seven years.[25] Finally, while Brunei does not allow its courts the power of judicial review of legislation, the Sultan may refer questions of constitutional interpretation to a three-person tribunal. Non-citizens may be appointed to the tribunal; all that is required is that it be composed of one member who has previously held judicial office or practiced law for at least twenty years anywhere in the world, one who must have done the same for ten years, and one who is an expert in Islamic tradition or law.[26]

The above examples are all drawn from the common law world,[27] but there are also two examples of the model being used in civil law jurisdictions and one in a hybrid jurisdiction. In Liechtenstein, the constitution provides that while the President of the Constitutional Court must be a citizen, two of the other four members need not.[28] In Monaco, members of the Supreme Court must simply be over 40 and 'selected from competent jurists', and in practice are frequently drawn from the senior ranks of the French judiciary.[29] In Seychelles, appointees to the Court of Appeal must only satisfy the Constitutional Appointments Authority that they can effectively discharge the role.[30] The majority of judges in Seychelles are non-citizens.[31]

There are also two examples of the expatriate model being used in post-conflict scenarios as part of a reconciliation process, though only one remains.[32] The 1960 Constitution of Cyprus was written in part with the goal of managing tensions between the Turkish and Greek Cypriot communities. One tool in the service of this goal was a Supreme Constitutional Court composed of one Turkish-Cypriot judge, one Greek-Cypriot judge, and one judge from a neutral third country,

[20]Constitution of Gambia (The) 1996 (revised 2018), s 139.

[21]Constitution of Lesotho 1993 (revised 2011), s 120(3).

[22]Constitution of the Republic of Singapore 1965 (revised 2016), art 95(4)(c).

[23]Constitution of the Republic of Singapore 1965 (revised 2016), art 95(10).

[24]Supreme Court of Judicature Act (Cap 322), s 5A.

[25]Constitution of Swaziland 2005, s 154(1)(a).

[26]Constitution of Brunei Darussalam 1959 (revised 2006), art 86(7).

[27]Brunei has a parallel Shariah law system for Muslims that supersedes the common law in family and property law, and since 2014 Shariah criminal law supersedes the common law for both Muslims and non-Muslims alike. See Syariah Penal Code Order 2013. Gambia also applies Shariah law to Muslims for family and property matters administer by the Cadi Courts. See Constitution of Gambia, s. 137. Swaziland has parallel 'traditional courts' for certain matters. See Constitution of Swaziland, s 227 and Swazi National Courts Act 1950, s 8.

[28]Constitution of Liechtenstein 1921 (revised 2011), art 105.

[29]'The Supreme Court' (Gouvernement Princier – Principaute de Monaco) <https://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Supreme-court> accessed 13 Jul 2021.

[30]Constitution of Seychelles, art 122.

[31]'Foreign dominance of Seychelles judiciary increases' (Afrol News, 11 Nov 2011) <http://www.afrol.com/articles/31646> accessed 13 Jul 2021.

[32]A similar model was proposed for a Croatian 'Human Rights Court', but that Court was never established. See Joseph Marko, 'Foreign Judges: a European Perspective', in Simon NM Young & Yash Ghai Y (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2013) 639.

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who would also act as the President of the Court.[33] Ersnt Forsthoff (a German) acted as President of the Court from 1960–1963, though the system ultimately collapsed under the strain of continued constitutional crises and conflict.[34] While the relevant provision remains 'on the books' of the Cypriot Constitution, the Supreme Court – for which the constitution does not mandate the use of overseas judges – has absorbed all the functions of the Supreme Constitutional Court.[35] A similar tripartite model has been in use in Bosnia & Herzegovina since the end of the conflict of the 1990s. Bosnia & Herzegovina is composed of two territorial political entities as established in the Dayton Accords – the Federation of Bosnia & Herzegovina (FBiH), and Republika Srpska (RS). The mandated composition of the Constitutional Court reflects an attempt to mediate judicial struggle between the former armed combatants in part through the use of overseas judges as 'balancers' on the Court. The Court is composed of nine members: four selected by the House of Representatives of the FbiH, two selected by the Assembly of the RS, and three selected by the President of the European Court of Human Rights.[36] The latter three judges may *not* be citizens of Bosnia & Herzegovina or any neighbouring state.[37]

Dale's second model is the 'supranational appellate' model, in which a Court hears appeals from two or more national jurisdictions and produces a single supranational jurisprudence.[38] For instance, the Judicial Committee of the Privy Council in the United Kingdom continues to hear appeals from the following Commonwealth countries: Antigua and Barbuda, the Bahamas, the British Indian Ocean Territory, the Cook Islands, Niue, Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Tuvalu.[39] The Court of Appeal of the Eastern Caribbean Supreme Court hears appeals from the local High Courts and Magistrates Courts of Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, as well as three British Overseas Territories (Anguilla, the British Virgin Islands, and Montserrat).[40] The Caribbean Court of Justice hears appeals from the courts of Barbados, Belize, and the Commonwealth of Dominica.[41] The now defunct East African & West African Courts of Appeal also used this model.[42]

The third model Dale identifies is the 'offshore municipal' version, whereby one territory uses another's appellate court as its own court of appeal. Though the court in this model does hear cases from more than one jurisdiction, the court's primary purpose is located within its home jurisdiction and the judges only take an oath to serve their home societies.[43] This distinguishes it from the supranational model. Unlike the expatriate model, overseas judges in the offshore model are also not individually imported to serve temporarily on a local court – rather an *entire* overseas court sits as, in effect, a local appellate court. For instance, the Solomon Islands and Kiribati used the Fijian Court of Appeal as their appellate court until 1977, while Western Samoa used the Court of Appeal

[33]The Constitution of Cyprus, art 133(1).

[34]Marko (n 32) 639.

[35]'The Cyprus Judiciary' (Supreme Court of the Republic of Cyprus) <http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLJudiciary_en/DMLJudiciary_en?opendocument> accessed 13 Jul 2021.

[36]Constitution of Bosnia & Herzegovina, art VI(1)(a).

[37]Constitution of Bosnia & Herzegovina, art VI(1)(b).

[38]Dale (n 5) 643.

[39]'Role of the JCPC' (Judicial Committee of the Privy Council) <https://www.jcpc.uk/about/role-of-the-jcpc.html> accessed 13 Jul 2021.

[40]'Home' (Easter Caribbean Supreme Court) <https://www.eccourts.org/> accessed 13 Jul 2021.

[41]'Home' (The Caribbean Court of Justice) <https://www.ccj.org/> accessed 13 Jul 2021.

[42]Until 1954 the West African Court of Appeal served as an appellate court for the (then) British colonies of the Gold Coast, Nigeria, Gambia, and Sierra Leone. Until 1977, the East African Court of Appeal heard appeals from jurisdictions including (what were then known as) the Aden Protectorate, the Colony of Aden, British Kenya, British Seychelles, British Somaliland, Nyasaland, the Sultanate of Zanzibar, Tanganyika, Saint Helena, Uganda Protectorate, and subsequently independent Kenya, Tanzania, and Uganda. See Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford University Press 2013).

[43]Dale (n 5) 655.

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of New Zealand as its appellate court until 1962.[44] Nauru relied on the Australian High Court as its appellate court between 1976 and 2018, at which point it withdrew from the relevant treaty[45] apparently to ensure the successful prosecutions of three political dissidents.[46] There are no remaining examples of this model.

The Hong Kong system of 'overseas non-permanent judges' reflects Dale's 'expatriate' model, and it is to it that I now turn.

The Use of Overseas Judges on the Hong Kong Court of Final Appeal

The 1984 Joint Declaration[47] between the United Kingdom and the People's Republic of China delineated the basic terms upon which sovereignty over Hong Kong would be transferred from the former to the latter, including the promise of a high degree of autonomy for Hong Kong including an independent judicial system. These and other 'basic policies' regarding Hong Kong were to be implemented through a Basic Law and would remain unchanged for fifty years.[48] Annex I to the Joint Declaration expanded on the meaning of these 'basic policies'. In the context of the judicial system, this included assurance that 'judges shall be chosen by reference to their judicial qualities *and may be recruited from common law jurisdictions*' (emphasis mine).[49] That principle was subsequently incorporated into the Basic Law, which was promulgated in 1990 (though of course did not take effect until 1 July 1997). Annex II to the Joint Declaration created the Sino-British Joint Liaison Group (JLG) to address and resolve any issues regarding the implementation of the Joint Declaration.[50]

One of these issues was the practical implementation of inviting overseas judges to sit on the new Court of Final Appeal, which would replace the Judicial Committee of the Privy Council as Hong Kong's apex court. While the Basic Law made it clear that the Chief Justice had to be a Chinese national with no right of citizenship or permanent residency elsewhere, there was no further detail given on how precisely the Court ought to be composed.[51] Jordan says this ambiguity was 'welcomed' by the people of Hong Kong, who believed it ensured the flexibility necessary to protect 'the independence of the judiciary and to retain investors' confidence in the legal system.'[52] However, the JLG seemed to circumscribe this flexibility when it proposed the '4+1 model': the Court of Final Appeal would be a five-member panel composed of the Chief Justice, three permanent members drawn from Hong Kong, and one rotating 'non-permanent' judge drawn from one of two panels. The first panel would be composed of retired or serving Court of Appeal judges, while the second panel would be composed of prominent judges from other common law jurisdictions. The fifth judge would alternately be drawn from each panel. The 'demand to restrict foreign judges'

[44]ibid 649.

[45]Agreement Between the Government of Australia and The Government of The Republic of Nauru Relating to Appeals to The High Court of Australia from The Supreme Court of Nauru (Australia Treaty Series 1977 No 1, 6 Sep 1976) (entered into force on 21 Mar 1977) <http://classic.austlii.edu.au/au/other/dfat/treaties/ATS/1977/11.html> accessed 13 Jul 2021.

[46]Ben Doherty, 'Nauru's former president accuses Australia of being complicit in "political prosecution"' *The Guardian* (4 Apr 2018) <https://www.theguardian.com/world/2018/apr/04/nauru-withdraws-right-of-appeal-to-australias-high-court-blocking-political-protestors> accessed 13 Jul 2021.

[47]'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' (Constitutional and Mainland Affairs Bureau) <https://www.cmab.gov.hk/en/issues/jd2.htm> accessed 13 Jul 2021.

[48]ibid, art 3.

[49]'Joint Declaration – Annex I(III)' (Constitutional and Mainland Affairs Bureau) <https://www.cmab.gov.hk/en/issues/jd3.htm#judi> accessed 13 Jul 2021.

[50]'Joint Declaration – Annex II' (Constitutional and Mainland Affairs Bureau) <https://www.cmab.gov.hk/en/issues/jd4.htm> accessed 13 Jul 2021.

[51]The Basic Law, art 90.

[52]Ann D Jordan, 'Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region' (1997) 30 Cornell International Law Journal 335, 347.

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was a response, argues Jordan, to 'China's recent realization that the independence of the judiciary in the common law context' meant much more than the ability properly adjudicate disputes 'within the parameters set by the supervisory organs.'[53] While the JLG's discussions leading to the '4+1 model' were unpublished and 'recorded solely in [its] confidential records of the meetings',[54] the proposal was nonetheless interpreted at the time as acquiescence to the Chinese members' demands regarding the composition of the Court.[55]

Both the Bar Committee and the Council of the Law Society opposed the proposal, arguing that limiting the use of overseas judges to one on any given case meant the putative Court of Final Appeal would pale in stature to the Privy Council it sought to replace, and would be nothing more than a re-branded Court of Appeal.[56] In December 1991 the Legislative Council formally debated the '4+1' proposal. Opponents argued that the Basic Law referred to 'judges' (plural) from common law jurisdictions and thus there should be more than one overseas judge on the bench at any given time.[57] Others suggested that Hong Kong lacked a sufficient pool of high quality judicial talent, and so the new Court ought to be able to more easily drawn on overseas expertise in its early days.[58] Still others argued that the language of Article 82 of the Basic Law seemed to leave it to the Court itself to determine under which circumstances to invite overseas judges to participate, but the '4+1 model' greatly limited that freedom.[59] On this account, the restriction to a single overseas judge (and none at all half the time, given the use of alternating panels) 'contravened the spirit and the letter of the Joint Declaration and the Basic Law.'[60] Supporters of the proposal argued in turn that 'judges' (plural) referred only to the *possibility* of inviting multiple judges to sit as part of the overseas panel rather than an obligation to have more than one hearing a given case.[61]

The Legislative Council rejected the proposal 34–11, the 'first time in history that the Hong Kong legislature had stood up to oppose an agreement reached by Britain and China on the future of Hong Kong.'[62] Yet despite this opposition, almost no meaningful concessions were obtained; only a series of technical amendments were proposed in response by the Political Affairs Subgroup of the China-based Preliminary Working Committee (PWC).[63] The sole substantive concession offered by the PWC was to abandon a proposal that would have seen final decisions of the Court subject to veto in exchange for a clear commitment that that Court would not have jurisdiction over acts of state.[64] The Legislative Council eventually accepted the '4+1 model' in 1995 in exchange for an agreement that the legislation to establish the Court would be immediately passed,

[53]ibid 345, 347.

[54]Donna Lee, 'Discrepancy between Theory and Reality: Hong Kong's Court of Final Appeal and the Acts of State Doctrine' (1997) 35 Columbia Journal of Transnational Law 175, 186.

[55]ibid 180.

[56]Sir William Goodhart et al, *Countdown to 1997: Report of a Mission to Hong Kong* (International Commission of Jurists 1992) 89.

[57]James TH Tang & Frank Ching, 'The MacLehose-Youde Years: Balancing the "Three-Legged Stool," 1971–86', in Ming K Chan (ed), *Precarious Balance: Hong Kong between China and Britain, 1842–1992* (Taylor & Francis 1994) 189. See also 'The Jury's Out on Ip's Court of Appeal Plan' *South China Morning Post* (29 Apr 1995) <https://www.scmp.com/article/115882/jurys-out-ips-court-appeal-plan> accessed 13 Jul 2021.

[58]Alison W Conner, 'Final Appeal Court Proposal Stirs Controversy in Hong Kong' (East Asian Executive Reports, 15 Nov 1991) 9.

[59]Alison W Conner, 'Legal Institutions in Transitional Hong Kong', in Ming K Chan (ed), *The Challenge of Hong Kong's Reintegration with China* (Hong Kong University Press 1997) 86.

[60]Conner, 'Final Appeal Court Proposal' (n 58) 7. See also Goodhart et al (n 56) 89.

[61]Bob Allcock, 'Challenges to Hong Kong's Legal System in View of Hong Kong's Return to Chinese Sovereignty' (Speech at the Conference on the Bicentenary of the French Civil Code, City University of Hong Kong, 9 Nov 2004) <https://www.doj.gov.hk/en/community_engagement/speeches/pdf/sg20041110e.pdf.> accessed 13 Jul 2021.

[62]Tang & Ching, 'The MacLehose-Youde Years' (n 57) 189.

[63]Lee (n 54) 188.

[64]Shiu-Hing Lo, 'The Politics of the Debate over the Court of Final Appeal in Hong Kong' (2000) 161 The China Quarterly 221, 224.

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even though it would not come into effect until 1 July 1997.[65] The fear had been that if the proposal was again rejected and legislation establishing the Court was not enacted by the colonial legislature, then Beijing might impose a significantly worse option when it had a freer hand to do so in 1997.[66] While some continued to argue[67] that new legislation[68] was contrary to the Joint Declaration and the Basic Law, no formal legal challenge was brought.[69]

The Court of Final Appeal thus came into existence on 1 July 1997 on the lines of the '4+1 model'. Then and now, to be eligible for appointment as an overseas non-permanent judge a proposed candidate must be a judge or retired judge of a court of unlimited jurisdiction in another common law jurisdiction, ordinarily resident outside Hong Kong, and never have served as a judge of the High Court or District Court or as a permanent magistrate in Hong Kong.[70] The Chief Executive acting in accordance with the recommendation made by the Judicial Officers Recommendation Commission (JORC) nominates *all* judges, both local and overseas.[71] The JORC is composed of nine members: the Chief Justice (who sits as chair), the Secretary of Justice, two other judges, one barrister, one solicitor, and three persons unconnected with the practice of law.[72] The JORC votes to recommend on a supermajority basis – where nine members are present, seven must vote in favour to advance a recommendation. The Legislative Council must endorse any recommendations made for the appointment of overseas judges under this process and any appointment must subsequently be reported to the Standing Committee of the National People's Congress.[73]

Overseas judges take the same oath of office as the local judges, requiring them to uphold the Basic Law and 'bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China.'[74] They are unrestricted in the cases over which they may preside. They are limited, however, to renewable three-year terms whereas the permanent (local) judges are appointed until the statutory retirement age. The overseas panel is currently composed of fourteen members, all regarded as of the very highest calibre.[75] Former overseas judge Sir Anthony Mason said that all of his colleagues on the Court of Final Appeal (both local and overseas), were 'of irreproachable integrity [and] dedicated to the rule of law.'[76] Reflecting on his experience as a local judge working alongside the overseas members, Justice Joseph Fok found a particular advantage they brought was specialist expertise in discrete areas of the law.[77] There is not, however, tremendous diversity to their

[65]Allcock, 'Challenges to Hong Kong's Legal System' (n 61).

[66]Conner, 'Legal Institutions in Transitional Hong Kong' (n 59) 86. See also Tang & Ching, 'The MacLehose-Youde Years' (n 57) 190.

[67]See Michael C Davis, 'Human Rights and the Founding of the Hong Kong Special Administrative Region: A Framework for Analysis' (1996) 34 Columbia Journal of Transnational Law 301. See also Johannes Chan, 'To change or not to change: the crumpling legal system', in Mee-kau Ngaw & Si-ming Li (eds), *The Other Hong Kong Report 1996* (The Chinese University Press 1996) 22.

[68]Court of Final Appeal Ordinance (Cap 484) (Hong Kong).

[69]Goodhart et al (n 56) 91.

[70]Court of Final Appeal Ordinance, s 12(4).

[71]ibid s 9.

[72]Judicial Officers Recommendation Commission (Cap 92), s 3(1). This approach flows from the requirement established under Article 88 of the Basic Law.

[73]See The Basic Law, art 90. It is unclear whether this grants the Standing Committee has a substantive power to reject judicial appointments; if the Standing Committee claims such a power it has not yet attempted to exercise it.

[74]Oaths & Declarations Ordinance (Cap 11), Sch 2, Part V. For commentary on how the overseas NPJ feel about taking this oath, see reported views in Joseph Fok, 'The Influence of the Australian judges on the Hong Kong Court of Final Appeal' (Speech to the Law Council of Australia (Hong Kong Chapter), 3 Nov 2016) 16 <https://www.hkcfa.hk/filemanager/speech/en/upload/182/LCA%20HK%20Chapter%20speech.pdf> accessed 13 Jul 2021.

[75]"The Overseas Non-Permanent Judges' (Hong Kong Court of Final Appeal, 29 May 2021) <https://www.hkcfa.hk/en/about/who/judges/npjs/index.html> accessed 13 Jul 2021.

[76]Anthony Mason, 'Sharing Expertise with the Developing World' (2001) 26 Alternative Law Journal 7.

[77]Fok (n 74) 24.

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backgrounds. At the time of writing in early 2020, all fourteen members of the overseas panel are white, and only two are women (indeed, these two are the first women ever to sit on the Court of Final Appeal in *any* capacity). There are nine Britons[78] (all of whom are Oxbridge educated), four Australians, and one Canadian.

To what extent must there be a link between a Judge and the Society she Judges?

A judge is, of course, a product of her own upbringing and ideology rather than a hyper-objective decision-maker, and this takes on increased significance in the context of overseas judging. If we accept that effective and legitimate judicial decision-making requires an appreciation of context, it is not a stretch to claim that judges that are cultural outsiders are going to have a harder time than insiders. One of the strengths of the common law is that it is responsive to context – the 'reasonable person', for instance, is not a universal constant but a product of time and place. A potential challenge for imported judges is that they may come with an exaggerated or misguided belief in their powers to be entirely objective and make decisions that ignore the different realities of Sydney as compared to the Solomon Islands, or Vancouver as compared to Vanuatu. In short, they may 'lack sufficient local contextual knowledge to appropriately perform the constitutional function.'[79]

Conversely, if an overseas judge is conscious of this risk and so chooses to be reflexively deferential to a local judge on a mixed bench, then questions about the effectiveness of the tribunal itself may be raised. After all, if one (or more) voices consistently defer, what is the purpose of a multi-member bench? Thus, says Baird, as cultural outsiders overseas judges must 'tread a fine line between making culturally inappropriate decisions at one end of the spectrum and taking cultural sensitivity to an extreme.'[80] It is difficult to determine the extent to which this kind of internal deference by the overseas members happens on the Court of Final Appeal, since deliberations are necessarily private. However, overseas judge Lord Millet recounts in his autobiography being asked by then Chief Justice Li to delete a statement in a draft judgment regarding his deference to the local judges on the question of the reasonable expectations of a Chinese businessperson. The Chief Justice, Millet explains, wanted the public to view the overseas members as full Hong Kong judges who happened to be invited from other jurisdictions, not 'foreign judges'.[81] This same language has been echoed by the current Chief Justice: 'Non-permanent judges are not in any sense foreign judges. When they sit in Hong Kong, they are Hong Kong judges.'[82]

In any event, the CFA has long operated as a 'collegiate' institution, in which all the judges discuss the cases before them together. There is thus plenty of opportunity for the overseas judges to have any nuances explained to them by their colleagues when necessary. Even where they may deal with aspects of Hong Kong culture that are unfamiliar to them, they have the benefit of collegiate relationships with their colleagues. Indeed, an overseas judge has only ever dissented from a majority holding twice since 1997,[83] and only once has a local member dissented from a lead opinion

[78]One of whom is a dual South African-British national.

[79]Rosalind Dixon & Vicki C Jackson, 'Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts' (2019) 57 Columbia Journal of Transnational Law 283, 290.

[80]Natalie Baird, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2013) 19 Canterbury Law Review 80, 80–81.

[81]Peter Millet, *As in Memory Long* (Wildy, Simmonds, & Hill Publishing Inc 2015) 192. The case was *China Everbright-IHD Pacific Ltd v Ch'ng Poh* (2002) 5 HKCFAR 630. Cited in Fok (n 74) 20.

[82]Alvin Lum, 'Foreign judges key to the success of Hong Kong's top court, chief justice says' *South China Morning Post* (26 Jun 2018) <https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2152512/foreign-judges-key-success-hong-kongs-top> accessed 13 Jul 2021.

[83]In neither case were the dissenters alone (both were part of 2 person 3:2 split): see *Bank of East Asia Ltd v Tsien Wui Marble Factory* (1999) 2 HKCFAR 349 (Bokhary PJ & Lord Nicholls NPJ dissenting) and *Next Magazine Publishing Ltd v Ma Ching Fat* (2003) 6 HKCFAR 63 (Bokhary PJ & Lord Cooke NPJ dissenting).

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written by an overseas member.[84] There is therefore essentially no daylight between the judicial positions of the local judges and the overseas judges, suggesting that in Hong Kong cultural competency is not particularly relevant in terms of substantive outcomes of the Court's decisions.

But judicial legitimacy goes not only to striking the appropriate balance between judicial objectivity and cultural competence. Whether speaking of an entire bench or an individual member, if there is insufficient linkage to the population being judged, there is a risk that judicial decisions become viewed as an unjustified imposition of outside preferences, standards, or morality. This is especially problematic in the post-colonial context.

> Colonial influences, memories, and relationships will often continue even after the severance of formal legal ties between countries … If a foreign judge is a citizen of a former colonial (or newly quasi-colonial) power, their actions may reflect the interests of that power or be perceived by local citizens as subject to those influences.[85]

While there is no evidence to suggest that the actions of the overseas judges in Hong Kong do in fact 'reflect the interests' of their home nations in this way, such a perception is often encouraged by those opposed to their presence for other reasons (see Part V, below). But a practice of having non-citizens decide cases on thorny constitutional issues is problematic for other reasons, particularly where there is no public consensus about whether a matter before the Court is primarily one of law or one of (socio-economic) policy. The legitimacy of a court is dependent at least in part on the population it purports to judge viewing judicial outcomes as inherently valid, even if occasionally disagreeing with their content. Though it is trite to say 'not only must justice be done, it must also be seen to be done', it is both a fundamental principle and a powerful symbolic argument against the use of overseas judges. Particularly in the face of a judicial decision that polarizes the community, that the community ultimately accepts the *validity* of the decision is vital. Decisions made by an apex court with the power of constitutional review may go to the very core of how a society operates. It is fair to argue that without strong justification, those decisions ought to be made by those drawn from or who have demonstrated a long-term commitment to that society.

Of course, Hong Kong law explicitly contemplates the possibility of overseas judges sitting on the Court of Final Appeal, whereas the law of Australia, Canada, and the UK does not.[86] But from a purely normative standpoint, the Central Authorities may fairly wonder why (Australian) Sir Anthony Mason has played such a large role in shaping the meaning of Article 158 and the interplay between the Court of Final Appeal and the Standing Committee,[87] when Justice Patrick Chan was not asked to assist in resolving legal issues surrounding the extinguishment of Native title rights in Australia.[88] Why should (Briton) Baroness Hale be asked to sit on some hypothetical future case regarding the relationship between the Chief Executive and the Legislative Council when the

[84]*Cheng Wai Tao & Ors v Poon Ka Man Jason* (2016) FACV17/015. The decision related to duties owed by a director of an incorporated company; Spigelman NPJ delivered the main judgment of the court concurred in separately by two of the permanent members to form the majority. The two remaining members (Tang PJ and Bokhary NPJ) delivered separate dissents. In *T v Commissioner of Police* [2014] HKCFA 71, Lord Neuberger NPJ wrote a concurring judgment alongside the main judgment of Fok PJ; Ma CJ and Ribeiro PJ dissented.

[85]Dixon & Jackson, 'Hybrid Constitutional Courts' (n 79) 320.

[86]Interestingly, none of these jurisdictions have explicit citizenship requirements for judges on their top courts. However, eligibility for appointment includes a certain length of local practice requirements for lawyers or previous experience working as a lower court judge in the same jurisdiction. Practically speaking this means only permanent residents or citizens will be eligible. See the High Court of Australia Act 1979, s 7 (Australia); the Supreme Court Act RSC 1985 c S-26, s 5 (Canada); the Constitutional Reform Act 2005, s 25 (United Kingdom).

[87]See for instance *Ng Ka Ling v Direector of Immigration* [1999] HKCFA 72*; Democratic Republic of the Congo & Ors v FG Hemisphere Associates* LLC [[2011] HKCFA 43 (in these cases of course, Mason NPJ's logic was helpful to the interests of the Central Authorities – but the point stands regarding appropriateness).

[88]*Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33.

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assistance of Chief Justice Geoffrey Ma was not sought in determining the legality of Boris Johnson's attempt to prorogue Parliament?[89] This is not only a relevant question for the sovereign, but for the *people*. If a case regarding same-sex marriage came before the Court of Final Appeal, Hong Kongers might legitimately ask why (Canadian) Justice Beverley McLachlin ought to be one of only five voices with the final say on the matter in Hong Kong. After all, she did not seek the aid of anyone from the Court of Final Appeal to help her answer a similar question during her tenure as Chief Justice of the Supreme Court of Canada.[90] Given that the jurisdictions from which Hong Kong invites the overseas judges do not return the favour, it is not unreasonable that some will perceive their continued use as an unwelcome colonial echo implying the need for 'supervision' to ensure the law in Hong Kong stays on track.[91]

I do not suggest that the overseas judges have approached or will approach any cases they hear during their tenure in Hong Kong with anything other than same level of commitment, respect for the rule of law, and intended objectivity they would bring in their home jurisdictions. But where overseas judges are perceived to have contributed to 'controversial' decisions, then the community's acceptance of those decisions and general faith in judicial neutrality overall may be threatened.[92] The New Zealand Law Commission has argued, for example, that the use of overseas judges can 'undermine a sense of national identity and independence, particularly a sense of "ownership" of the judicial system'.[93] Dixon & Jackson suggest there may be 'pushback' where decisions are seen as being imposed from the outside, potentially 'at least in the short run diminish[ing] support for the legal position being asserted.'[94] Take, for instance, *Pratt & Morgan v the Attorney General for Jamaica* in which two convicted murderers had capital sentences commuted by the Judicial Committee of the Privy Council.[95] In *Pratt*, the pair had been sentenced to death but had been on 'death row' for over fourteen years at the time of review. The Judicial Committee concluded that any delay between sentencing and execution that lasted for more than five years was a likely breach of the Jamaican Constitution's prohibition on cruel, inhumane, or degrading punishment.[96] Yet rather than being celebrated by the Jamaican population as upholding the values of their Constitution, the decision to commute 'caused uproar across the Caribbean and accusations of judicial imperialism.'[97]

[89] *R (Miller) v The Prime Minister* [2019] UKSC 41.

[90] *Reference re: Same-Sex Marriage* [2004] 3 SCR 698.

[91] Indeed, Lord Cooke NPJ may have unfortunately fed this perception when he suggested that one function of the overseas judges is to "give particular consideration to whether a proposed decision [of the Court] is in accord with generally accepted principles of the common law" (*Chen Li Hung v Ting Lei Miao* [2000] HKCFA 69 para 47). But this function appears to be taken as read, rather than based in fact. There is no evidence, for instance, that the cases in which the NPJ was drawn from the local rather than overseas panel veered away from accepted common law principles or modes of reasoning. No overseas NPJ has ever leaked that their local colleagues insufficiently grasped what the common law required absent their assistance. Young therefore sensibly concludes the role of the overseas NPJ is not in fact "to ensure uniformity with English laws and legal principles, but to have a continuity of international legal expertise of the highest calibre" (Simon NM Young, 'The Hong Kong Multinational Judge in Criminal Appeals' (2008) 26 Law in Context 130, 134).

[92] The use of overseas judges may also have unwelcome knock-on effects beyond the judiciary. Consider the implications of Sir Anthony Mason's reflections on his time sitting on Supreme Court of Fiji. He noted that during his tenure there was a growing tendency for counsel drawn from Australia or New Zealand to appear before the Court, which he considered might have been due to his presence and that of Lord Cooke (a New Zealander): see Anthony Mason, 'Reflections of an Itinerant Judge in the Asia-Pacific Region' (2000) 28 International Journal of Legal Information 311, 317. Mason separately observed that even after his tenure concluded, the practice of instructing foreign counsel before the Fijian Court continued: see Mason (n 76). The use of foreign barristers on an ad-hoc basis is expressly permitted in Hong Kong under section 27(4) of the Legal Practitioners Basis (Cap 159) and high-profile British barristers such as Lord Pannick QC frequently appear before the Court.

[93] Baird (n 80) 84.

[94] Rosalind Dixon & Vicki Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48 Wake Forest Law Review 149, 180.

[95] *Pratt & Morgan v the Attorney General for Jamaica* [1993] UKPC 1, cited in Dale (n 5) 644.

[96] Constitution of Jamaica 1962, s 13(6).

[97] Dale (n 5) 644.

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In Hong Kong, this risk is present in cases that touch on the fundamental rights of Hong Kong residents or on the exercise of Chinese sovereignty. Continued reliance on the overseas judges may detract from the perceived legitimacy of the Court's decisions and weaken societal commitment to the overall model of judicial decision-making that is at the heart of Hong Kong's high degree of autonomy under the 'one country, two systems' model. The people of Australia, the United Kingdom, and Canada (or from anywhere else an overseas judge in Hong Kong is ultimately drawn) would surely – and fairly – believe that decisions that lay at the heart of their societies and political systems are best left to members of those societies. By 'member' I mean only possessing the right of permanent residency, citizenship, or equivalent. I do not mean to imply any kind of ethno-cultural standard. As MacFarlane argues, 'an important symbol of independence is lost when foreign judges make judicial determinations on important social, cultural, or political matters.'[98] This contention is precisely why Singapore limits its overseas judges to commercial arbitration cases, even though they compose a minority of any given panel. It also explains why the (now defunct) treaty allowing appeals from Nauru's courts to the High Court of Australia expressly denied the application of the Treaty to issues dealing with the interpretation or effects of Nauru's constitution.[99]

Taken in the abstract, is there no principled basis for a Hong Kong delegate to the National People's Congress to suggest that '[overseas] judges should not take part in constitutional litigation' in Hong Kong?[100] Likewise, is it unfathomable that at an endorsement hearing for two new overseas judges, some Legislative Council members would question their general suitability to participate in the determination of final appeals that had some connection to the 'national interest'?[101] To have judges drawn from outside a society helping make decisions on critical questions of law in that society demands significant justification if it is to outweigh competing concerns of legitimacy.

Why use 'Overseas Judges' in Hong Kong?

Do capacity concerns justify the use of overseas judges on the Hong Kong Court of Final Appeal?

Capacity concerns often drive the choice to import appellate-level judges (or export judicial decision-making to a supranational body) in the small former British colonies or protectorates. Each had the common law imposed upon it as part of the colonial process, and part of the imposition of a foreign legal system involved importing those trained in it to administer it on the local population.[102] This made the use of overseas judges a long-term experience.[103] Boyd argues that for many former colonies the long-term use of overseas judges meant there were simply insufficient

[98]Peter MacFarlane, 'Some Challenges Facing Legal Strengthening Projects' (2006) 4 Journal of Commonwealth Law & Legal Education 103, 105.

[99]Dale (n 5) 649–650, 658.

[100]Eddie Lee, 'Beijing throws the book at Hong Kong's foreign judges' *South China Morning Post* (9 Mar 2017) <https://www.scmp.com/news/hong-kong/law-crime/article/2077521/experts-line-throw-book-hong-kongs-foreign-judges> accessed 13 Jul 2021.

[101]Pui-Yin Lo, 'Twilight of the Idolised: Backsliding in Hong Kong's Legal and Judicial Cultures', in Cora Chan & Fiona de Londras (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart Publishing 2020) 133–158.

[102]See generally Anna Dziedzic 'Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary' (Federalismi, Reflective Judiciary N 5, 9 Nov 2018) <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=37246> accessed 13 Jul 2021.

[103]Even the British 'Dominions' (including Canada, Australia, New Zealand, for instance) relied upon the supranational Judicial Committee of the Privy Council for large parts of their history. Australia maintained the right of appeal to the Privy Council from federal courts until 1968 (Privy Council (Limitations of Appeals) Act 1968) and the right of appeal from state courts until 1986 (Australia Act). Canada allowed criminal appeals to the Privy Council until 1933 (Criminal Procedure Act) and civil appeals until 1949 (Supreme Court Act). New Zealand did not fully abolish appeals to the Privy Council until 2003 (Supreme Court Act).

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numbers of high-quality local personnel to take on all the top roles in the judiciary when they achieved independence.[104] Overseas judges, she says, 'frequently [had] longer experience, impeccable track record[s], and access to better research facilities and capacity to access law reports.'[105] These were precisely the skills needed at the appellate level, and so the use of overseas judges remained a practical necessity in the immediate post-colonial period; imported judges were used to 'inf[use] both formal and informal knowledge' into newly independent legal systems.[106] Continued reliance on overseas judges, says Baird, allows the very small South Pacific states to 'overcome the very real limitations of a small pool of local legal talent.'[107] Even years after independence, very small states lacking indigenous legal capacity may import high quality legal talent as means of accessing 'judicial expertise … at limited cost.'[108]

But paradoxically, the use of overseas judges may also exacerbate capacity issues. Take Botswana, which though poor has a population of two and half million and a local LLB programme at the University of Botswana.[109] This suggests an ability to generate homegrown judicial talent to a far higher degree than the South Pacific microstates with populations in the tens of thousands. Yet there has been little progress since Botswana's independence in 1966 towards a localized apex court; as noted above it is still composed *entirely* of imported judges. If a perception has been created during the colonial period that judges are necessarily or automatically from elsewhere because they are of 'higher quality', then that may be internalized and continue even post-independence. In turn, this may stymie the drive within the local population to aim for a career on the bench; it may appear that doors into that career are simply not open for them. So while overseas judges may indeed bring much-needed expertise, their presence may also 'delay rather than hasten the development of domestic lawyers' capacity or willingness to sit as judges on their own country's courts.'[110]

The widespread failure of the colonial Government to ensure adequate Chinese appointments to the bench at all levels[111] surely impacted the optics of 'what a judge looked like' in Hong Kong and likely had an impact on local interest in judicial careers pre-1997. This legacy meant that the idea that overseas judges might be considered for the newly planned Court of Final Appeal did not necessarily appear as unusual at the time as it may now. Separately, as Justice Fok explains, the role of the Court of Final Appeal was not simply to be 'a second court of appeal reviewing again the decision of a trial court. Instead, it fulfils the role, at the apex of the court hierarchy, of resolving questions of law of general importance.'[112] Since that role had been played during the colonial period by the Privy Council, perhaps it was reasonable to expect that the new Court would continue to be supplemented by colleagues drawn from overseas.[113] On the other hand, such supplementation was not deemed necessary in other cases where the role of the Privy Council was superseded by a

[104]Susan Boyd, 'Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development' (2003) 77 Australian Law Journal 303, 306.

[105]ibid 307.

[106]Dixon & Jackson, 'Hybrid Constitutional Courts' (n 79) 289.

[107]Baird (n 80) 80.

[108]ibid 82.

[109]'Programmes – Bachelor of Laws (LLB)' (University of Botswana) <https://www.ub.bw/programmes/social-sciences/law/bachelor-laws-llb> accessed 13 Jul 2021.

[110]Dixon & Jackson, 'Hybrid Constitutional Courts' (n 79) 290.

[111]See Feng Lin, 'The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future' (Centre for Judicial Education and Research, City University of Hong Kong, Working Paper Series No 1, May 2016) 7 <https://www.cityu.edu.hk/cjer/lib/doc/paper/WK1_The_Expatriate_Judges_and_Rule_of_Law_in_HK_Its_Past_Present_and_Future.pdf> accessed 13 Jul 2021. Now available as a book chapter: Feng Lin, 'The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future', in Shimon Shetreet & Wayne McCormack (eds), The Culture of Judicial Independence in a Globalised World (Brill Nijhoff 2016).

[112]Fok (n 74) 23.

[113]Lee (n 54) 187.

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new domestic apex court (Canada, Australia, New Zealand etc) and thus the question of why it should be so in Hong Kong remains open.

In any event, even if capacity issues resulting from a long period of colonial rule over Hong Kong might have justified the *initial* use of overseas judges on the Court of Final Appeal, it is very hard to make the same argument 22 years later. Hong Kong is a highly developed city of over 7 million people with ample resources, both financial and intellectual. Not only are local judges extremely well-trained (either at home or abroad), thanks to the rise of global access to electronic legal resources every judge has at their fingertips every decision ever made in the common law world. Since 1997 Hong Kong has also seen the establishment of a third law school in the city, the Faculty of Law at the Chinese University of Hong Kong (established in 2006 as a School of Law), adding to the existing Faculty of Law at the University of Hong Kong (established as a Department of Law in 1969) and the Faculty of Law at City University of Hong Kong (established as a School of Law in 1987). All three law schools offer both undergraduate and graduate degrees in law, and all three are ranked in the top 50 on a global basis.[114] These world-class institutions graduate hundreds of highly trained students each year and though currently only one permanent member of the Court of Final Appeal is locally trained,[115] it is reasonable to expect that that this will change as increasing numbers of locally-trained barristers rise through the system.

The number of non-Chinese speaking expatriate judges *throughout* the legal system has rapidly declined since 1997 due to the replacement of retiring judges with local appointees; 'most of the newly recruited members of the Judiciary … are Chinese HKSAR permanent residents who often received their legal education in Hong Kong.'[116] All of the original members of the Court of Final Appeal have retired (though three[117] continue to serve post-retirement as non-permanent judges on the local panel); there have been no difficulties in replacing those members with local appointees. In sum, capacity reasons do not now justify the use of overseas judges on Hong Kong's Court of Final Appeal, if they ever did.

Can the overseas judges be justified as 'more independent' than their local counterparts?

Another argument put forth for the use of overseas judges elsewhere is that they are less likely to be swayed by local considerations, thus upholding the ideals of judicial independence. Dixon and Jackson note a court with overseas judges has 'the potential for greater relative independence and impartiality on the part of individual judges, and thus, of the bench as a whole.'[118] Boyd suggests that overseas judges bring with them not only 'respected experience, wisdom, and learning, but they are also seen to be above local political and cultural divisions.' Considering the small scale of Pacific island nations and their cultural emphasis on kinship and community, Boyd argues that the probability that a local judge will be swayed in his or her decisions by improper factors is increased.[119] She suggests that 'corruption … is a constant challenge in such societies, and the threat

[114]See for instance: 'World University Rankings 2019 by subject: law' (Times Higher Education World University Rankings) <https://www.timeshighereducation.com/world-university-rankings/2019/subject-ranking/law#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats> accessed 13 Jul 2021; see also the QS Rankings (Law, 2019): 'QS World University Rankings: Law & Legal Studies' (QS Top Universities) <https://www.topuniversities.com/university-rankings/university-subject-rankings/2019/law-legal-studies> accessed 13 Jul 2021.

[115]Andrew Cheung PJ: https://www.hkcfa.hk/en/about/who/judges/pjs/index_id_22.html. At the time of writing, Cheung PJ is also considered the favourite to succeed the current Chief Justice, Geoffrey Ma, when he retires in 2021: https://www.scmp.com/news/hong-kong/politics/article/3035619/hong-kongs-chief-justice-geoffrey-ma-set-announce.

[116]Lo, 'Twilight of the Idolised' (n 101).

[117]See the profiles for Justices Kemal Bokhary, Patrick Chan, and Robert Tang: 'Hong Kong Non-Permanent Judges' (Hong Kong Court of Final Appeal, 29 May 2021) <https://www.hkcfa.hk/en/about/who/judges/npjs/index.html> accessed 13 Jul 2021.

[118]Dixon & Jackson, 'Hybrid Constitutional Courts' (n 79) 289.

[119]Boyd (n 104) 307.

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of payback or retribution against a judge by an aggrieved party is a real danger.'[120] Overseas judges, she concludes, are less likely to be subject to such pressures because they are only temporary residents and have no local family members who could be pressured. Dale too argues that judges in both the expatriate and supranational models are more likely to 'remain truly independent of the concerns that might otherwise cloud the mind of a judge who is a citizen of that country', especially in small communities where judges may come into regular personal contact with litigants.[121] Powles makes a similar point, noting that in small South Pacific societies overseas judges are more easily able to maintain the "social distance" required of an arbitrator seeking to maintain the appearance of independence vis-à-vis litigants who appear before her.[122]

However, Baird contends that there is no clear evidence (at least in the context of the South Pacific) that the independence claim is accurate; she argues it is something that appears in large part to be taken as read rather than based on evidence.[123] Moreover, while Hong Kong is a relatively small jurisdiction, its population is on an entirely different scale than those of the South Pacific microstates – 7.5 million versus the 13 000 of Nauru or the Tonga population of 110 000. Judges in Hong Kong simply do not face anything like the same possibility of being caught up in small networks of kin that might call their neutrality into question. Singapore (5.7 million) and New Zealand (4.9 million) are both smaller jurisdictions than Hong Kong and do not have to resort to importing judges as full members of their top courts (indeed, New Zealand has actually exported its judges not only to the South Pacific micro-states, but Hong Kong as well).[124]

In fact, the expatriate model may pose a challenge to judicial independence since imported judges are frequently employed on short-term contracts rather than under conditions of life or long tenure. Under both the *Valente* principles[125] and the Beijing Statement of Principles on judicial independence,[126] security of tenure is critical in ensuring the judicial branch is protected from improper influence from the legislative or executive branches. Yet Dziedic's research shows that the typical overseas judge imported into a small South Pacific state is hired on a renewable three-year contract.[127] This raises the possibility of improper influence being exercised on an overseas judge not by members of the community, but rather the other branches of Government. Vanuatu's experience in using imported overseas judges on lucrative short-term contracts is perhaps instructive of the possible dangers inherent to the model. In 1995 one overseas judge (Robert Kent, an Australian) resigned after completing only half of his three-year appointment. He was reported to have believed that the Chief Judge of the Court of Appeal (also an overseas judge, Briton Charles Vaudin d'Imecourt) was insufficiently independent from the Government; Kent implied Vaudin d'Imecourt was overly concerned about having his USD300 000/year appointment renewed.[128] Though Kent's allegations were never conclusively proven and Vaudin d'Imecourt's tenure came

[120]ibid 307.

[121]Dale (n 5) 643, also citing David Simmons, 'Issues of Judicial Independence in the Caribbean Courtroom' (2001) 14 Commonwealth Judicial Journal 8, 13.

[122]Powles G, 'Law, Courts and Legal Services in Pacific Societies' in Powles G and Pulea M (eds), *Pacific Courts and Legal Systems* (The Institute of Pacific Studies of the University of the South Pacific 1988), 27.

[123]Baird (n 80) 83.

[124]Lord Cooke of Thorndon (dual British-New Zealand national), Sir Edward Jonathan Somers, Sir Johann Thomas Eichelbaum, Sir Ivor Lloyd Morgan Richardson, and Sir Thomas Munro Gault are all New Zealanders who have served on Hong Kong's Court of Final Appeal.

[125]*Valente v R*, [1985] 2 SCR 673. Though a Canadian case, the principles developed in *Valente* have been embraced as a common law standard. In addition to security of tenure, the principles include sufficient financial remuneration for judges and independence in the administration of the judicial branch.

[126]Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (19 Aug 1995), art 18(1).

[127]Anna Dziedzic, 'Foreign Judges on Constitutional Cases' (IACL-AIDC Blog, 13 Jun 2018,) <https://blog-iacl-aidc.org/blog/2018/6/13/foreign-judges-on-constitutional-courts> accessed 13 Jul 2021.

[128]Graham Hassall & Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge University Press 2002) 186, citing Solomon Star (23 June 1995).

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to an end two years later for other reasons,[129] the episode highlights a potentially problematic aspect of dependence on 'contractual' overseas judging. As Dale indicates, there is always the risk that a judge on a short-term contract might 'deliberately or subconsciously tailor judgment to find favour with the executive or legislative arms.'[130] This is true notwithstanding the fact that an overseas judge may nonetheless sit alongside local colleagues appointed to long or life tenure such that the tribunal in question may as a whole still be considered 'independent'.

As noted, Hong Kong's overseas judges are all hired on renewable three-year contracts and must be nominated by the JORC (over which the Chief Executive has considerable influence). However, no accusations of bias towards the state in order to ensure contract renewal have been levied at them (indeed, as I later show, just the reverse). The overseas judges have been drawn at the tail-end of long careers in wealthy jurisdictions during which they will have been well remunerated for many years. Each is also used sporadically (typically four weeks per year) rather than on a full-time basis for the duration of the three-year appointment. Together, these factors mean it is highly unlikely that an overseas judge in Hong Kong would meaningfully depend upon the compensation received and risk damaging carefully nurtured reputations by seeking to please the Government. While one cannot discount the possibility of a subconscious preference for the Government's position, the infrequency[131] with which the overseas judges depart from the reasoning of their local colleagues suggests this is unlikely. Questions regarding the neutrality or objectivity of the overseas judges in Hong Kong as compared to their local counterparts do not seem to be a legitimate ground of concern.

In fact, the overseas judges in Hong Kong help contribute to a *different* aspect of judicial independence: the autonomy of Hong Kong's legal system from that of the mainland under the 'one country, two systems' model.

The Overseas Judges as Symbolically Communicating the Separation between the 'Two Systems'

Overseas judges may sometimes be used in post-conflict scenarios as a stabilizing buffer between competing groups. Schwartz, for instance, suggests the use of judges with no connection to the conflict can mediate risks of 'ethnic bias or "victor's justice."'[132] On this account, their *symbolic* value is equally if not more important than the practical skills they bring. As Dixon & Jackson argue

> [E]ven the perception of increased independence or distance from domestic political pressures may be particularly valuable in some cases where key insiders lack trust in one another. This seems particularly likely, for example, in cases where states are emerging from a situation of violent civil conflict in which warring factions have become parties to a new constitutional settlement.[133]

While the transition to Chinese rule was peaceful and bloodless, the completely different approach to questions of law and justice – and in particular the role of the Court vis-à-vis other branches of the state – applied by the new sovereign in the majority of its territory have created an analogous need for symbolic reassurance regarding Hong Kong's judicial independence. This is in some ways

[129]After issuing warrants for the arrest of revolutionaries who had abducted the President, Vaudin d'Imecourt was found guilty of gross judicial misconduct by the Judicial Services Committee, fired by the acting Prime Minister, and denied re-entry into the country. Hassall & Saunders (n 128) 191; see also *Vaudin d'Imecourt v Manatawai* [1997] VUSC 53.

[130]Dale (n 5) 645.

[131]See nn 83–84 above.

[132]Alex Schwartz, 'International Judges on Constitutional Courts: Cautionary Evidence from post-Conflict Bosnia' (2019) 44 Law & Social Inquiry 1, 2.

[133]Dixon & Jackson, 'Constitutions Inside Out' (n 94) 171.

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similar to Dziedzic's contention that one of the roles the overseas judges play in the microstates of the South Pacific is to 'signal the distinction between [common law courts] and the law they dispense, and co-existing customary legal systems.'[134] The presence of the overseas judges signals, both domestically and internationally, that the courts of Hong Kong remain distinct from the courts of mainland China. While Hong Kong has never been a liberal democracy, its general adherence to certain principles of liberal constitutionalism – in particular the notion of judicial independence – is a key aspect of the 'one country, two systems' model. Though Hong Kong's commitment to the rule of law and neutral courts has often been exaggerated and venerated in an unjustified way,[135] it nonetheless is a governing principle held in deep regard by the population.[136]

But the importance of independent courts extends beyond the protection of civil liberties within Hong Kong. It is also what separates it from other Chinese cities in terms of its attractiveness as a financial centre. The international community needed to know that post-1997 the rule of law remained robust, that the courts of the region were independent from influence, and so Hong Kong would continue to be a safe place for business to be conducted. The presence of the overseas judges was, in part, a means to communicate that message:

> [The overseas judge model would] reassure the business community as well as enable Hong Kong to keep up with developments in the common law. It was also considered by some people that the participation of eminent overseas judges would enhance the court's prospects of independence.[137]

As Lin notes, the overseas '[judges] bear the greatest symbolic value of Hong Kong's preservation of the rule of law and judicial independence.'[138] Goodhart and others also argue that the initial reason for inviting overseas judges to sit on the Court was to not only to give people confidence in it, but to give people confidence in the judiciary as a whole.[139] Mushkat too says those chosen were perceived as a kind of 'international judicial link, ensuring the Court's true independence and membership of the highest standard.'[140] The judges themselves seem acutely aware of this. Justice Mason, for instance, has said it was important for the new Court to be 'be seen to conform to internationally accepted judicial standards,'[141] and that 'in the eyes of people elsewhere, particularly people who are looking at Hong Kong as an international financial centre, it probably gives a degree of reassurance that you have overseas judges of international reputation' on the Court.[142] Likewise, Chief Justice Ma reports that he is 'told constantly by people in business and commerce that the presence of

[134]Dziedzic, 'Foreign Judges on Pacific Courts' (n 102) 84.

[135]See eg Michael HK Ng, 'Rule of Law in Hong Kong History Demythologised: Student Umbrella Movement of 1919' (2016) 46 Hong Kong Law Journal 829; Stuart Hargreaves, 'From the "Fragrant Harbour" to "Occupy Central": Rule of Law Discourse & Hong Kong's Democratic Development' (2015) 9 Journal of Parliamentary & Political Law 519; Wai Man Sin & Yiu Wai Chu, 'Whose rule of law? Rethinking (post-)colonial legal culture in Hong Kong' (1998) 7 Social & Legal Studies 147.

[136]Yash Ghai, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law* (2nd edn, Hong Kong University Press 1999) 26.

[137]ibid 323–324, and specifically fn 18, citing conversations with Martin Lee, member of the Basic Law Drafting Committee.

[138]Feng Lin, 'The Expatriate Judges and Rule of Law in Hong Kong' (n 111) 22.

[139]Goodhart et al (n 56) 87.

[140]Roda Mushkat, *One Country, Two International Legal Personalities: the Case of Hong Kong* (Hong Kong University Press 1997) 157.

[141]Sir Anthony Mason, 'The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong' (2007) 37 Hong Kong Law Journal 299, 302.

[142]'One on One, Court of Final Appeal, Sir Anthony Mason' (Hong Kong Lawyer, Jul 2001), cited in Simon NM Young & Antonio Da Roza, 'The Judges', in Simon NM Young & Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2013) 264.

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these judges is a significant contributing factor to the confidence with which Hong Kong's legal system in particular and the rule of law in the city in general are held.'[143]

Thus, says Justice Fok, the overseas members act as a kind of 'canary in the coalmine' – they would not continue to take positions on the Court if they felt the other members were being subjected to inappropriate pressure or there was some other kind of systemic problem.[144] Scheppelle describes how a key shift towards illiberalism in Hungary under Viktor Orbán was the capture of the constitutional court so that it was 'no longer independent of the governing party'.[145] The ongoing presence of the overseas judges on the Court of Final Appeal is a symbolic message that such capture has not (yet) happened in Hong Kong. Current overseas judge (and former President of the UK Supreme Court) Lord Neuberger of Abbotsbury has spoken of how he and his colleagues would only continue to take positions on the Court of Final Appeal if they were confident in its independence:

> If I had any serious concerns about judicial independence or judicial impartiality in Hong Kong, I would not be sitting in the [Hong Kong Court of Final Appeal], and the same is I am sure true of the [other overseas judges]. They include a number of former and present members of the UK Supreme Court, a number of former members of the Australian High Court or State Supreme Courts, and I am sure that they adopt the same position as I do on this issue.[146]

This principle has precedent: all the overseas judges on the Fiji Court of Appeal resigned in 2006 following a coup, claiming the Chief Justice was improperly interfering in their work in favour of the new government.[147] Likewise, the resignation of Australian Geoffrey Eames as Chief Justice of Nauru in 2014 was interpreted externally as an important signal that the rule of law was under dire threat from an overbearing executive.[148] And it is here that we find the sole justification for the use of the overseas judges in Hong Kong: their communicative function regarding the status of the independence of the judiciary writ large. As Lin puts it, 'the day China becomes a rule of law state will be the day on which it will no longer be necessary for Hong Kong to have expatriate judges.'[149] Domestically, their continued presence informs Hong Kongers about the practical level of judicial autonomy promised under the 'one country, two systems' model – any move to formally limit their use would likely be interpreted as a significant encroachment. Externally, their presence reassures the outside world that Hong Kong's judicial system remains sufficiently separate from that of the mainland that Hong Kong remains an attractive and safe place do business.

[143]Lum (n 82).

[144]Fok (n 74) 26.

[145]Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545, 550.

[146]David Neuberger, 'Judges, Access to Justice, the Rule of Law and the Court of Final Appeal under "One Country Two Systems"' (Speech to University of Hong Kong, 13 Sep 2017) 22 <https://www.hkcfa.hk/filemanager/speech/en/upload/1195/Judges,%20Access%20to%20Justice,%20the%20Rule%20of%20Law%20and%20the%20Court%20of%20Final%20Appeal%20under%20"One%20Country%20Two%20Systems".pdf> accessed 13 Jul 2021.

[147]'Six remaining expatriate judges of Fiji Appeal Court resign their warrants' (Radio New Zealand, 4 Sep 2007) <https://www.rnz.co.nz/international/pacific-news/172432/six-remaining-expatriate-judges-of-fiji-appeal-court-resign-their-warrants> accessed 13 Jul 2021. While traditionally overseas judges in Fiji had been drawn exclusively from Australia and New Zealand, following this event the new government decided to invite judges from Malaysia to participate: 'Fiji appoints new judges as expats leave' *The Sydney Morning Herald* (5 Sep 2007) <https://www.smh.com.au/world/fiji-appoints-new-judges-as-expats-leave-20070905-xfg.html> accessed 13 Jul 2021.

[148]See Jane Lee, 'Nauru chief justice quits, citing rule of law breach' *The Sydney Morning Herald* (12 Mar 2014) <https://www.smh.com.au/politics/federal/nauru-chief-justice-quits-citing-rule-of-law-breach-20140312-34n3c.html> accessed 13 Jul 2021. See also Ben Doherty '"I don't take orders from the chief justice": How Nauru ousted its judicial leaders' *The Guardian* (17 May 2015) <https://www.theguardian.com/australia-news/2017/may/26/how-nauru-ousted-its-judicial-leaders> accessed 13 Jul 2021.

[149]Feng Lin, 'The Expatriate Judges and Rule of Law in Hong Kong' (n 111) 28.

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The Reduced Prominence of The Overseas Judges

The Historical Role of the 'Overseas Judges'

The first Chief Justice of the Court of Final Appeal, Andrew Li, developed a convention by which a member of the overseas panel would be asked to sit on every case, while the local panel would only be used to fill in when a permanent member was unavailable.[150] This practice continued under Li's successor, Geoffrey Ma, and has meant virtually all cases heard by the Court have had an overseas member as part of the bench.[151] Lo notes that 'the contributions of [the overseas judges] while adjudicating cases on fundamental rights and the Basic Law have been invaluable.'[152] Lo, and Young and Da Roza cite in particular the multiple contributions of Justice Sir Anthony Mason to the development of local constitutional jurisprudence.[153] Justice Fok declares that Justice Mason was the obvious choice to write the opinions on a number of important constitutional issues that had to be addressed in the early years of the Court, given his expertise and interest.[154] These cases included determining when the Court must request an Interpretation from the Standing Committee,[155] the question of 'legal certainty' within the proportionality test,[156] and the ability of the Court to engage in constitutional remedial interpretation.[157] In so doing, Justice Mason made significant and lasting contributions to the development of the law of Hong Kong. Dixon and Jackson also tap Lords Millet and Hoffmann as having made 'important contributions to the court's common law and commercial caseload.'[158]

Young and Da Roza found that between 1997 and 2010, approximately one-quarter of the majority judgements were written by the overseas member of the bench.[159] The prodigious work of the early overseas judges, they say, 'brought international influence to the Court.'[160] Dixon and Jackson agree, arguing that the reputation and efforts of the overseas judges has meant that decisions from the Court of Final Appeal have attracted attention elsewhere in the common law world.[161] Some of this influence may be seen in the positive citation of decisions of the Court of Final Appeal in England & Wales, Scotland, Australia, Canada, New Zealand, Malaysia, Singapore, the Eastern Caribbean territories, the Cayman Islands, Trinidad & Tobago, the Fiji Islands, and Tonga.[162] Lo identifies *Cheng v Tse Wai Chun*,[163] penned by overseas judge Lord Nicholls as 'the Court of Final Appeal judgment that has had the most positive impact in the common law

[150]Simon NM Young, Antonio Da Roza & Yash Ghai, 'Role of The Chief Justice', in Simon NM Young & Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2013) 231.

[151]Simon NM Young & Antonio Da Roza, 'Judges and judging in the Court of Final Appeal: a statistical picture' (2010) 8 Hong Kong Lawyer 23, 24. One brief interruption to the practice was due to the 2010 volcanic eruptions in Iceland, which greatly disrupted air travel; see Fok (n 74) 12.

[152]Pui-Yin Lo, 'An Internationalist, Consequentialist and Non-Progressive Court: Constitutional Adjudication in Hong Kong (1997–2009)' (2010) 2 City University of Hong Kong Law Review 215, 225.

[153]ibid 225; Young & Da Roza, 'Judges and judging in the Court of Final Appeal' (n 151) 24.

[154]Fok (n 74) 32.

[155]*Ng Ka Ling v Director of Immigration*, [1999] HKCFA 72.

[156]*Shum Kwok Sher v HKSAR*, [2002] 2 HKCFA 27.

[157]*HKSAR v Lam Kwong Wai* [2006] HKCFA 84.

[158]Dixon & Jackson, 'Hybrid Constitutional Courts' (n 79) 324.

[159]Young & Da Roza, 'The Judges' (n 142) 263.

[160]Young & Da Roza, 'Judges and judging in the Court of Final Appeal' (n 151) 28.

[161]Dixon & Jackson, 'Hybrid Constitutional Courts' (n 79) 324.

[162]Pui-Yin Lo, 'Impact of Jurisprudence Beyond Hong Kong', in Simon NM Young & Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2013) 580.

[163]*Cheng v Tse Wai Chen*, [2000] HKCFA 35. Prior to *Cheng*, the 'fair comment' defence to a defamation claim under Hong Kong law could be defeated by proving the defendant was motivated by malice to make the impugned statement. Nicholls NPJ brought forward the law of defamation in Hong Kong by (assuming the other elements of the fair comment defence are met) eliminating the relevance of motivation. Instead, "honesty of belief [becomes] the touchstone": providing the defendant honestly believed the comment she made on a matter of public interest, then she will be immune from any

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world.'[164] Unquestionably, the overseas judges have had a significant role in shaping Hong Kong's jurisprudence, particularly in the early years of the Court of Final Appeal.

Reducing the Prominence of the 'Overseas Judges': 2011–2019

My analysis[165] of the output of the Court of Final Appeal between 2011 and 2019 reveals a notable change in the role the overseas judges play. Not only has the percentage of lead judgments written by an overseas member dropped from the time period analyzed by Young and Da Roza (1997–2010), the overseas members also no longer appear to write individual opinions when the matter relates to human rights protections under the Basic Law or the relationship between Hong Kong and the Central Authorities.

In 2011, the Court issued 22 substantive decisions, seven of which had a lead opinion written (solely or jointly) by an overseas member (31.8 per cent). The seven opinions dealt with the beneficial ownership of portions of an estate,[166] unjust enrichment claims,[167] calculation of a 'disturbance payment',[168] the doctrine of state immunity,[169] the assessment of rateable value,[170] evidentiary standards,[171] and the doctrine of encroachment.[172] In 2012, the Court issued 26 substantive decisions, six of which had a lead opinion written (solely or jointly) by an overseas member (23.1 per cent). The six opinions dealt with the meaning of 'notifiable infectious disease' in the context of an insurance policy,[173] false trading in the securities market,[174] governing law and issue estoppel in a commercial context,[175] an industrial action,[176] statutory construction,[177] and Government rent payable on construction sites.[178]

defamation claim [at 75]. As Lo notes, this approach was soon incorporated into the law of defamation in England & Wales: Lo, 'Impact of Jurisprudence Beyond Hong Kong' (n 162) 584.

[164]Lo, 'Impact of Jurisprudence Beyond Hong Kong' (n 162) 580.

[165]Analysis is based on all reported decisions available on the Court of Final Appeal's own website (https://www.hkcfa.hk/en/work/cases/archive/index.html) and the archive at the Hong Kong Legal Institute (https://www.hklii.hk/eng/hk/cases/hkcfa/). For the purposes of statistical analysis, I have grouped cases heard together as a single matter as one, and grouped hearings purely on the matter of costs or remedies with the hearing on the substance. Decisions granting or denying leave to appeal or other procedural matters are not included.

[166]*Yung Shu Wu v Vivienne Sung Wu & Ors* [2011] HKCFA 8 (Lord Walker of Gestingthorpe NPJ wrote the judgment with which the rest of the Court agreed).

[167]*Yukio Takahashi and Anor v Cheng Zhen Shu & Ors* [2011] HKCFA 15 (Lord Hoffmann NPJ and Ribeiro NPJ each wrote separate concurring judgments with which the rest of the Court signalled agreement).

[168]*Lingrade Development Ltd v Secretary for the Environment, Transport and Works* [2011] HKCFA 16 (Lord Hoffmann NPJ wrote the judgment with which the rest of the Court agreed).

[169]*Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* [2011] HKCFA 41 (Sir Anthony Mason NPJ jointly wrote the majority judgment along with Chan and Ribeiro PJJ, with Bokhary PJ and Mortimer NPJ separately dissented).

[170]*The Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation* [2011 HKCFA 54 (Lord Millett NPJ wrote the main judgment with which the rest of the Court agreed. Bokhary & Ribeiro PJJ and Litton NPJ separately concurred).

[171]*Peter Gerardus van Weerdenburg v HKSAR* [2011] HKCFA 72 (Gault NPJ wrote the judgment with which Chan and Ribeiro PJJ agreed, Mortimer NPJ dissented in part with Bokhary PJ agreeing with that dissent).

[172]*Secretary for Justice v Chau Ka Chik Tso & Ors* [2011] HKCFA 86 (Lord Scott of Foscote NPJ and Ribeiro PJ wrote separate concurring judgments which the rest of the Court agreed).

[173]*New World Harbourview Hotel Co Ltd and Ors v Ace Insurance Ltd and Ors* [2012] HKCFA 21 (Sir Anthony Mason NPJ wrote the judgment with which the rest of the Court agreed).

[174]*Fu Kor Kuen Patrick and Anor v HKSAR* [2012] HKCFA 40 (Gleeson NPJ wrote the main judgment with which the rest of the Court agreed, Litton NPJ added a separate concurrence).

[175]*First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd and Anor* [2012] HKCFA 52 (Lord Collins of Mapesbury NPJ wrote the judgment with which the rest of the Court agreed).

[176]*Campbell Richard Blakeney-Williams and Ors v Cathay Pacific Airways Ltd and Ors* [2012] HKCFA 61 (Lord Neuberger of Abbotsbury NPJ wrote the main judgment with which the rest of the Court agreed, Ma CJ added a separate concurrence).

[177]*Cheuk Shu Yin v Yip So Wan & Anor* [2012] HKCFA 69 (Lord Hoffmann NPJ wrote the main judgement with which the rest of the Court agreed, Chan PJ and Litton NPJ concurred separately).

[178]*Best Origin Ltd v Commissioner of Rating and Valuation* [2012] HKCFA 69 (Lord Walker of Gestingthorpe NPJ wrote the main judgment with which the rest of the Court agreed, Bokhary NPJ separately concurred).

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In 2013, the Court issued 29 substantive decisions, seven of which had a lead opinion written (solely or jointly) by an overseas member (24.1 per cent). Those decisions considered negligence and the employment relationship,[179] insider trading,[180] rectification on grounds of mutual mistake,[181] obligations to produce original documents as part of a transaction,[182] judicial review of a decision taken by a professional regulated body,[183] voice identification evidence,[184] and the exercise of a put option.[185] In 2014, the Court issued 28 decisions, five of which had lead opinions written by an overseas member (17.8 per cent). Those five decisions dealt with a loss sustained in the context of a breach of copyright action,[186] tax assessments and objections thereto,[187] the expiry of applicable limitation periods,[188] the *mens rea* requirement of a money laundering offence,[189] and the termination of a fuel franchise by the Airport Authority.[190]

In 2015, the Court of Final Appeal issued 27 decisions, five of which had a lead judgment written (solely or jointly) by an overseas member (18.5 per cent). Those five opinions dealt with the enforceability of a contract in Hong Kong governed by Hong Kong law when it had been performed in the mainland partly in breach of Chinese law,[191] a winding up order,[192] the interpretation of a 'home-made' will,[193] statutory duties of an employer relating to health and safety,[194] and the admissibility of evidence.[195] In 2016, the Court of Final Appeal issued 27 decisions, four of which had a lead judgment written by an overseas member (14.8 per cent). The four opinions dealt with

[179] *Chung Yuen Yee v Sam Woo Bore Pile Foundation Ltd and Ors* [2013] HKCFA 33 (Lord Hoffmann NPJ wrote the judgment with which the rest of the Court agreed).

[180] *Securities and Futures Commission v William Tomita* [2013] HKCFA 34 (Lord Hoffmann NPJ wrote the judgment with which the rest of the Court agreed).

[181] *Kowloon Development Finance Ltd v Pendex Industries Ltd & Ors* [2013] HKCFA 35 (Hoffman NPJ wrotethe judgment with which the rest of the Court agreed).

[182] *De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2013] HKCFA 67 (Ribeiro PJ & Gleeson NPJ jointly wrote the lead opinion, Chan PJ and Litton NPJ each concurred separately, the Chief Justice agreed in part with Chan PJ and in part with Ribeiro PJ and Gleeson NPJ).

[183] *Messrs HLB Hobson Impey Cheng (A Firm) and Ors v The Hong Kong Institute of Public Accountants* [2013] HKCFA 68 (Gleeson NPJ wrote the judgment with which the rest of the Court agreed).

[184] *HKSAR v Yeung Ka Ho and Anor* [2013] HCFA 82 (Gault NPJ wrote the main judgment with which the rest of the Court agreed, Chan PJ separately concurred).

[185] *Pony HK World Ltd v Vand Petro-Chemicals (BVI) Co Ltd and Anor* [2013] HKCFA 103 (Lord Phillips of Worth Matravers NPJ wrote the judgement with which the rest of the Court agreed).

[186] *MGA Entertainment Inc (Formerly Known as ABC International Traders Inc, Doing Business as MGA Entertainment) v Toys & Trends (Hong Kong) Ltd and Ors* [2014] HKCFA 8 (Lord Clarke of Stone-cum-Ebony NPJ wrote the judgment with which the rest of the Court agreed).

[187] *Moulin Global Eyecare Trading Ltd (in liquidation) (formerly known as Moulin Optical Manufactory Ltd) v The Commissioner of Inland Revenue* [2014] HKCFA 22 (Lord Walker of Gestinghope NPJ wrote the main judgment which with a majority of the Court agreed, Tang PJ dissented in part).

[188] *Moulin Global Eyecare Trading Ltd (in liquidation) (formerly known as Moulin Optical Manufactory Ltd) v Olivia Lee Sin Mei* [2014] HKCFA 63 (Gummow NPJ wrote the judgment with which the rest of the Court agreed).

[189] *HKSAR v Pang Hung Fai* [2014] HKCFA 96 (Spigelman NPJ wrote the judgment with which the rest of the Court agreed).

[190] *Aviation Fuel Supply Company v Commissioner of Inland Revenue* [2014] HKCFA 106 (Hoffmann NPJ wrote the judgment with which the rest of the Court agreed).

[191] *Ryder Industries Ltd (Formerly Saitek Ltd) v Timely Electronics Co; Ryder Industries Ltd (Formerly Saitek Ltd) v Chan Sui Woo*, FACV12-13/2015 (Lord Mapesbury NPJ wrote the main judgment with which Ribeiro PJ, Tang PJ and Chan NPJ agreed, Ma CJ separately concurred).

[192] *Kam Leung Sui Kwan v Kam Kwan Lai & Ors*, FACV4/2015 (Ma CJ and Lord Millett NPJ delivered a joint judgment with which the rest of the Court agreed).

[193] *Chinachem Charitable Foundation Ltd. v the Secretary of Justice & Ors*, FACV9/2014 (Lord Walker NPJ wrote the judgment with which the rest of the Court agreed).

[194] *HKSAR v Gammon Construction Ltd.*, FACC10/2014 (Gleeson NPJ wrote the judgment with which the rest of the Court agreed).

[195] *HKSAR v Kong Wai Lun*, FACC5/2014 (Lord Phillips NPJ delivered the judgment with which the rest of the Court agreed).

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limitation rules applied to corporate law obligations,[196] shipping law,[197] the duties owed by a director,[198] and trademark infringement.[199]

In 2017, the Court of Final Appeal issued 22 decisions, five of which had a lead opinion written by an overseas member (22.7 per cent). The five opinions dealt with the calculation of licence fees paid to the Communications Authority,[200] the compensation payable due to the extinguishment of marine rights,[201] the meaning of 'manage' under a regulatory scheme related to hotels and guesthouses,[202] the liability of assessment of a utility provider,[203] and fiduciary duties in estate disbursements.[204] In 2018 the Court issued 23 decisions, five of which had lead opinions (solely or jointly) written by an overseas member (21.7 per cent). The five opinions dealt with the standards of corporation regulated by securities law,[205] whether the absolute privilege extended to false statements reported in open court extends to the individual who originally made them,[206] the obligation to maintain certain slopes,[207] the meaning of malice and qualified privilege under defamation law,[208] and the interpretation of an insurance policy.[209]

In 2019, the Court issued 18 decisions, three of which featured lead opinions written (solely or jointly) by an overseas member (16.7 per cent). These dealt with family trusts[210] and (on two separate occasions) the meaning of a computer-related provision of the criminal law.[211] Taken together, this means over the last nine years (2011–2019) the percentage of decisions of the Court of Final Appeal with a lead judgment written solely or in part by an overseas judge has declined to

[196]*HKSAR v Luk Kin Peter Joseph & Anor; HKSAR v Yu Oi Kee; HKSAR v Luk Kin Peter Joseph,* FACC8/2016, FACC7/2016, FACC6/2016 (Lord Hoffman NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[197]*Compania Sud Americana de Vapores S.A. v Hin-Pro International Logistics Ltd*, FACV1/2016 (Lord Phillips NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[198]*Cheng Wai Tao & Ors v Poon Ka Man Jason & Anor*, FACV17/2015 (Spigelman NPJ delivered and wrote the main judgment of the Court dismissing the appeal, Ribeiro PJ and Fok PJ jointly delivered a separate concurring judgment; Tang PJ delivered a dissenting judgment, Bokhary NPJ delivered a separate dissent agreeing with Tang PJ).

[199]*Twg Tea Co Pte Ltd. & Anor v Tsit Wing (Hong Kong) Co Ltd & Ors*, FACV2015 (Gummow NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[200]*PCCW-HKT Telephone Ltd & Anor v The Secretary of Justice for Commerce and Economic Development & Anor*, FACV11/2017 (Gummow NPJ delivered and wrote the main judgment of the Court with which Ma C, Ribeiro PJ, and Fok PJ agreed; Tang PJ wrote a separate concurring judgment).

[201]*Director of Lands v Penny's Bay Investment Co Ltd,* FACV1-9/2017 (Lord Neuberger NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[202]*HKSAR v Chui Shu Shing*, FACC19/2016 (French NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[203]*Commissioner of Rating and Valuation v CLP Power Hong Kong Ltd*, FACV7/2016 (Lord Walker NPJ wrote the main judgment with which the rest of the Court concurred).

[204]*Tang Ying Ip & Ors v Tang Ying Loi*, FACV9/2016 (Lord Millett NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[205]*Moody's Investors Service Hong Kong Ltd v Securities and Futures Commission*, FACV6/2018 (Lord Neuberger NPJ wrote the main judgment with which the rest of the Court concurred).

[206]*Chang Wa Shan v Esther Chan Pui Kwan*, FACV2-3/2018 (Lord Walker NPJ delivered and wrote the main judgment; Fok PJ delivered a separate concurring judgment; Ribeiro PJ and Stock NPJ agreed with Lord Walker NPJ and Fok PJ; Tang PJ agreed as to the result but on different grounds).

[207]*Building Authority v Appeal Tribunal (Buildings) & Anor,* FACV15/2017 (Tang PJ & Collins NPJ jointly wrote the main judgment with which the rest of the Court concurred).

[208]*Jonathan Lu & Ors v Paul Chan Mo-Po & Anor*, FACV13/2017(Lord Reed NPJ delivered the main judgment with which the rest of the Court concurred).

[209]*Lo Siu Wa v Employees Compensation Assistance Board & Anor*, FACV12/2017 (Lord Hoffman NPJ delivered and wrote the main judgment with which the rest of the Court concurred).

[210]*IQ EQ (NTC) Trustees Asia (Jersey) Ltd & Anor v Bruno Arboit and Roderick John Sutton & Anor,* FACV2/2019 (Ribeiro PJ, Fok PJ, and Lord Neuberger NPJ jointly wrote the judgment with which the rest of the Court agreed).

[211]*Secretary of Justice v Cheng Ka Yee & Ors*, FACC22/2018 (French NPJ wrote the judgment with which the rest of the Court agreed); *HKSAR v Chu Tsun Wai*, FACC20/2018 (Lord Hoffman NPJ wrote the judgment with which the rest of the Court agreed).

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21.6 per cent;[212] over the last five years (2015–2019) the figure stands at under 19 per cent.[213] This is a statistically relevant decline in relative output when compared with Young and Da Roza's analysis of the portion of lead opinions penned by an overseas judge between 1997–2010 (24 per cent). Moreover, the decisions that *are* penned by the overseas members no longer touch upon the most controversial constitutional questions faced by the Court. This is not to diminish the importance of the recent cases for which the overseas judges have taken the lead, but it is striking that not a single one of those opinions over the last five years deals with questions of the boundaries of human rights protections under the Basic Law or the relationship between the Region and the rest of China. Indeed, the above case analysis shows that no overseas member has (identifiably) penned such an opinion since Justice Sir Anthony Mason's contribution to *Democratic Republic of the Congo* in 2011.

Interestingly, this change coincides in part with the increasing use of completely unattributed unanimous opinions on the Court (that is, a decision with no identifiable author and attributed only to 'the Court'). In a separate paper I show that this new style of opinion delivery properly emerged in 2014 and was used 12 times between then and 2019.[214] Adding those opinions to the numbers of lead opinions written solely or in part by an overseas judge in those same years, and you get a number that exceeds what Young and Da Roza found in the Court's earlier period: 28 per cent.[215] It is striking that the emergence of decisions attributed only to 'the Court' beginning in 2014 generally tracks the decrease in individually penned judgments by the overseas members, though I do not claim that all (or even a majority) these unattributed opinions are in fact written by the overseas judges under cover of group identity. However, it is possible that the two processes are both responses to the tightening political climate in Hong Kong and associated threats to judicial independence. In the Part that follows I suggest that the best way to interpret the reduced prominence of the overseas judges is to understand it as a strategic attempt by the Court to minimize avenues for attacks on the legitimacy of its decisions whilst maintaining the signalling benefits the overseas judges bring. It is a strategy that at its core is aimed at preserving the independence of the Hong Kong judiciary under the 'one country, two systems' model.

Attacks on The Legitimacy of 'Overseas Judges' in Hong Kong

Critiques of National Origin

I explained in Part II there are valid concerns that can be raised about the importation of judges tasked with answering critical socio-legal questions in jurisdictions that do not need to for reasons of capacity. In Hong Kong, however, questions about the legitimacy of the overseas judges in Hong Kong appear to have largely been co-opted for political purposes rather than made out of genuine principle. The most notable early opposition came in the aftermath of *Cheng v Tse Wai Chun*.[216] *Cheng* dealt with two individuals charged with defamation for comments made during the course of a radio talk show they hosted. The plaintiff had a significant media profile, a 'celebrity solicitor' who also owned a travel agency. This combination of professions had led to him to be a legal advisor to several 'concern groups' formed to support a Hong Kong tour guide who had been arrested in the Philippines. After the plaintiff advised the guide to not seek monetary compensation due to his arrest, the defendants suggested on-air that this was out of a concern for the economic well-being of the travel industry rather than in the best interests of the tour guide. While Lord Nicholls's judgment was essentially apolitical itself, it nonetheless quickly became seen through the lens of competing political affiliations: the defendants hosted a talk show that expressed pan-democratic views,

[212]48 out of 222 total decisions.

[213]22 out of 117 total decisions.

[214]Stuart Hargreaves, ' 'the Court' Rises: the New Use of Depersonalized Opinions on Hong Kong's Court of Final Appeal' (2021) 51(1) Hong Kong Law Journal 141.

[215]60 out 140 total decisions.

[216]*Cheng v Tse Wai Chun* [2000] HKCFA 35.

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while the plaintiff was a high profile supporter of the government.[217] Cottrell describes how Lord Nicholls was 'excoriated' by pro-government commentators as someone with 'no roots and no understanding of Hong Kong' and that he had 'no accountability' for his decisions.[218] She cites a contemporary commentator in the popular press who criticized Lord Nicholls as a

> Parachute judge [without] any idea what Hong Kong Society is like; [who did] not know what language and [is] unable to listen to the local radio programmes; [who has] no real understanding of the issue and events surrounding Hong Kong society.[219]

Writing in 2013, Young and Da Roza concluded that these kinds of critiques had 'never reached an audible or sustained level.'[220] The following year political tensions in Hong Kong dramatically increased with the Occupy Central protests,[221] and similar language to that initially deployed after *Cheng* began to return in cases with some connection to Hong Kong's great political chasm. In 2017, Judge David Dufton sentenced seven officers to two years in prison for a serious assault on a pro-democracy protestor during the Occupy protests. Though refusing to say if he were speaking directly about Dufton, Legislative Councillor Wong Kwok-kin described some judges in Hong Kong as having 'white skin with a yellow heart'.[222] Thereafter there were calls on social media for Dufton to be physically attacked.[223] In 2018, Principal Magistrate Bina Chainrai sentenced a police officer to three months in prison for assaulting a bystander during the protests; pro-establishment protestors gathered outside the Court and chanted 'dismiss all foreign judges; we want Chinese ones!'[224]

In fact, neither Chainrai nor Dufton are 'imported' or 'overseas' judges in the sense considered in this article. Chainrai was born in India but moved to Hong Kong to study law when young; she is a long-term permanent resident. Dufton was born in the United Kingdom but is also a permanent resident, having lived in Hong Kong since 1982. Being a judge drawn from an ethnic minority is not the same thing as being an 'overseas judge', and of course neither sit on the Court of Final Appeal. But the abuse suffered by Chainrai and Dufton speak to the nature of the criticisms that can befall the overseas judges too: that their 'foreignness' makes their judicial decision-making inherently suspect. For instance, one Mainland scholar was reported in the press as saying that non-ethnic Chinese judges are unable to 'understand the "one country" connotation [in the "one country, two systems" model]' and that 'only local judges [can be] sensitive to Hong Kong's deteriorating social order under the impact of social movements.' Another complained that there was no rule about the ratio of foreign to local judges in Hong Kong, either unaware of the '4+1 model' on the Court of Final Appeal or likewise deeming any non-ethnically Chinese judge 'foreign'.[225] In 2017, Hong Kong's representative on the Standing Committee of the National People's

[217]ibid.

[218]Jill Cottrell, 'Fair Comment, Judges and Politics in Hong Kong' (2003) 27 Melbourne University Law Review 33, 46

[219]ibid 62, citing Ma Lik, 'A Judgment found wanting' *Hong Kong iMail* (5 Dec 2000).

[220]Young & Da Roza, 'The Judges' (n 142) 267.

[221]See generally Johannes Chan, 'Hong Kong's Umbrella Movement' (2014) 103 The Commonwealth Journal of International Affairs 571; Hung SCF 'The Occupy Central Campaign in 2014 Hong Kong' (2016) 2 Contemporary Chinese Political Economy and Strategic Relations 669; Hargreaves (n 135).

[222]Christy Leung & Tony Cheung, 'Hong Kong lawmaker brands British judge a "yellow heart" after seven policemen are jailed' *South China Morning Post* (17 Feb 2017) <https://www.scmp.com/news/hong-kong/law-crime/article/2071853/hong-kong-lawmaker-brands-british-judge-yellow-heart-after> accessed 13 Jul 2021. 'Yellow' in this context refers to the colour associated with the pro-democracy movement, while the pro-government side is associated with 'blue'.

[223]Cliff Buddle, 'Why criticizing Hong Kong's foreign judges for not understanding the city is ridiculous' *South China Morning Post* (13 Jan 2018) <https://www.scmp.com/week-asia/opinion/article/2128060/why-criticising-hong-kongs-foreign-judges-not-understanding-city> accessed 13 Jul 2021.

[224]ibid.

[225]Eddie Lee, 'Beijing throws the book at Hong Kong's foreign judges' *South China Morning Post* (9 Mar 2017) <https://www.scmp.com/news/hong-kong/law-crime/article/2077521/experts-line-throw-book-hong-kongs-foreign-judges> accessed 13 Jul 2021.

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Congress claimed that judges with dual nationality are untrustworthy because they necessarily have allegiance to a foreign sovereign power.[226] In the run up to the release of the National Security Law in 2020, some establishment figures called for barring the use of the overseas judges in national security cases (the model used in Macau),[227] while others went further and called for a prohibition on the use of *any* judge at any level with foreign nationality or 'dual allegiance' from hearing cases brought under the new law.[228]

The notion that the overseas judges on the Court of Final Appeal or that the non-ethnically Chinese judges on the lower courts are coming to their decisions in order to surreptitiously advance the interests of foreign powers is a serious attack not only on the character of any individual judge but on the judicial function itself. It implies decisions are reached out of naked political or personal interest rather than a fair evaluation of facts and law. In particular, there is simply no evidence to support a claim that non-ethnically Chinese or otherwise 'foreign' judges are unable to fully appreciate China's position within the 'one country, two systems' model. Indeed, if we consider *Democratic Republic of Congo*, there it was the *overseas* member who joined two of his local colleagues to form the majority arguing that Hong Kong could not adopt a doctrine of state immunity that differed from that adopted by the PRC and that they were obliged to seek an Interpretation from the Standing Committee on the matter before coming to a final conclusion.[229] Of course, Justice Mason was not subject to any criticism for having reached that conclusion, despite being Australian – as I have suggested, critiques of judges in Hong Kong that focus on national origin are typically made for partisan rather than principled reasons.

Increasing Opposition to the Role of the Independent Judiciary

This increase in opposition to erstwhile overseas judges should be understood not simply as a question of ongoing decolonization, but as part of a challenge to the role of the Hong Kong judiciary under the 'one country, two systems' model. Over the same five year period in which the prominence of the overseas judges has been reduced most sharply, there have been a series of indicators that suggest desire on the part of the Central Authorities to reign in the autonomy of Hong Kong's judicial system, reflecting the fears that animated the JLG into introducing the '4+1 model' in the first place. This is especially the case where it may touch on points on issues that Beijing sees as connected to its sovereignty, national security, and territorial integrity – what it calls its 'red lines'.

In 2014, the State Council issued a 'White Paper' that it said was an attempt to clarify the meaning of certain elements of the 'one country, two systems' model.[230] Issued in a period of tension over electoral reform and after plans for 'Occupy Central' had been announced by organizers, the White

[226]ibid. This is also inconsistent with the Basic Law, which requires of Hong Kong's senior public figures that only the Chief Executive, President of the Legislative Council, the Chief Justice of the Court of Final Appeal, and the Chief Judge of the High Court be Chinese citizens with no right of abode elsewhere; it is no secret that a huge percentage of Hong Kong's elite maintain dual nationality: see The Basic Law, arts 44, 71, and 90. There is also a stipulation that only twenty percent of the members of the Legislative Council may possess dual nationality, but there is no similar rule regarding the judiciary: see The Basic Law, art 67.

[227]Yew Lun Tian, 'China's Hong Kong law set to bar foreign judges from national security cases: sources' (Reuters, 26 May 2020) <https://www.reuters.com/article/us-china-parliament-hongkong-security/chinas-hong-kong-law-set-to-bar-foreign-judges-from-national-security-cases-sources-idUSKBN2321CW> accessed 13 Jul 2021. See also Kimmy Chung & Gary Cheung, 'Judges with 'dual allegiance' because of foreign nationality should not handle national security cases, Beijing says' *South China Morning Post* (24 Jun 2020) <https://www.scmp.com/news/hong-kong/politics/article/3090400/hong-kong-national-security-law-citys-leader-must-have/> accessed 13 Jul 2021.

[228]Chung & Cheung (n 227).

[229]*Democratic Republic of Congo v FG Hemisphere Associates* [2011] HKCFA 41. In this case, Mason NPJ joined with Chan and Ribeiro PJJ in the majority, with Bokhary & Mortimer NPJJ (both local judges) dissenting.

[230]The State Council, The People's Republic of China, 'The Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region' (10 Jun 2014) <http://english.www.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm> accessed 13 Jul 2021.

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Paper sought to emphasize that the high degree of autonomy promised to Hong Kong was not 'full' autonomy and that the Region still came under the supervision of the Central Authorities. One aspect was particularly notable for court watchers:

> Hong Kong must be governed by the Hong Kong people with patriots as the mainstay, as loyalty to one's country is the minimum political ethic for political figures. Under the policy of 'one country, two systems' all those who administrate Hong Kong, including the chief executive, principal officials, members of the Executive Council and Legislative Council, **judges of the courts at different levels and other judicial personnel**, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country's sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong [emphasis added].[231]

Even setting aside the question of how overseas judges could demonstrate patriotism to China, the inclusion of judges as 'administrators' whose job is to 'safeguard' a range of policy goals is a radically different understanding of the role judges have historically played in Hong Kong. While not legally binding, the White Paper is nonetheless an important marker of the Central Authorities' views; to the extent it implies that judges must take into account non-legal interests when coming to their conclusions, it suggests a diminishment of the judicial independence promised by the Basic Law.

In 2016, a number of 'localist' candidates won election to Legislative Council seats. While taking the oath of office, some of the intentionally misspoke the words in a way that was derogatory to China or held props and flags with anti-China slogans or calls for Hong Kong independence.[232] The Government began an action to bar them from taking office on the ground that they had not correctly taken the oath as required by law; Article 104 of the Basic Law states that various officials must swear to uphold the law, but the precise content of this oath and the procedural details is specified in subsidiary legislation.[233] Before the courts could resolve the issue, the Standing Committee issued a formal Interpretation of Article 104 that ensured that the oaths of office the candidates had taken would be found invalid and that they would be granted no opportunity to re-take.[234] This Interpretation was duly followed by the local courts and the candidates were barred from office.[235] The right of the Standing Committee to make final (and binding) Interpretations of Basic Law provisions is laid out in Article 158 of the Basic Law and is well-accepted.[236]

However, the Standing Committee chose to issue this particular Interpretation while the local courts were still seized of the matter, serving to sidestep the Hong Kong judiciary in order to assure the result. The Interpretation also served to effectively re-write elements of the subsidiary law rather than merely explain the meaning of a provision of the Basic Law. The rise of 'localism' in Hong Kong, of course, is considered to be a serious threat to Chinese sovereignty and territorial integrity. The decision to issue the Interpretation early shows that the Central Authorities are unwilling to

[231]ibid Part V.3.

[232]See Ellie Ng, 'Video: Democratic Lawmakers Stage Protests and Alter Oaths as New Term Kicks Off at Hong Kong Legislature' (Hong Kong Free Press, 12 Oct 2016) <https://www.hongkongfp.com/2016/10/12/breaking-democratic-lawmakers-stage-protests-alter-oaths-new-term-kicks-off-hong-kong-legislature/> accessed 13 Jul 2021; Stuart Hargreaves 'Grinding Down the Edges of the Free Expression Right in Hong Kong' (2019) 44 Brooklyn Journal of International Law 671.

[233]See the Basic Law, art 104; and the Oaths & Declarations Ordinance (Cap 11).

[234]National People's Congress, Standing Committee, 'Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress' (7 Nov 2016) <http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf.> accessed 13 Jul 2021.

[235]*Chief Exec of the H Special Admin Region (HKSAR) v. President of the Legislative Council* [2017] FAMV 7–10/2017 (CFA).

[236]Under Article 158 of the Basic Law, the Standing Committee has the final right of Interpretation over all elements of the Basic Law and once issued, all local courts are bound to follow those Interpretations. See *Lau Kong Yung v Director of Immigration* [1999] HKCFA 5.

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trust an independent judiciary to come to the 'right' decisions when it perceives the case to be related to a 'red line'. Though Article 19 of the Basic Law excludes from Hong Kong's independent judicial power matters of 'acts of state such as defence and foreign affairs', the procedural requirements of oath-taking surely did not fall within that category. However, the context meant the case tangentially touched on an issue that Beijing considers to be part of the core national interest and this explains the attempt to effectively narrow the scope of Hong Kong's independent judicial power through the pre-emptive issuance of the Interpretation.

In 2017, Hong Kong was finally connected to the PRC's high-speed rail network. This involved the construction of a multi-billion dollar line and a new terminal. Under the 'one country, two systems' model, Hong Kong maintains its own customs and immigration regime and thus there are the same kinds of checks and processes at the Hong Kong/mainland border that one would find on an international border. Forcing trains to stop at that border to have all passengers' passports checked, etceteras, would have greatly increased the overall journey time and so was considered inconsistent with the purpose of connecting Hong Kong to the network. The solution – known as the 'Co-Location Agreement' – was to allow mainland-bound passengers to pre-clear Chinese customs in a special area of the Hong Kong terminal. That area would be run and staffed by PRC personnel, under the jurisdiction of China.[237] The concept of a pre-clearance zone is not unusual; a number of Canadian airports, for instance, have such zones run by US customs officials that allow passengers to then board flights to US 'domestic' terminals with no passport or customs checks upon arrival.

In Canada, US criminal law does not apply in these zones and the Canadian courts have jurisdiction over any relevant matters that occur within them. The US agents exercise limited powers only for the purpose of customs and immigration. In contrast, not only do PRC agents exercise immigration powers within the defined portion of the terminal and on the trains themselves, the entirety of mainland criminal law also applies and the courts of Hong Kong have no jurisdiction whatsoever. Opponents of the Co-Location Agreement said it violated the Basic Law's prohibition on the application of general mainland laws within Hong Kong.[238] Supporters of the plan argued however that it was consistent with the 'one country, two systems' model on the ground that Hong Kong had voluntarily relinquished control over the relevant area and therefore the Basic Law's prohibition on the application of mainland laws within Hong Kong simply no longer applied to it.[239] While there may have been academic disagreement over the fundamental constitutionality of the agreement, the Standing Committee gave its approval in an official 'Decision',[240] thereby removing the jurisdiction of the local courts over the relevant areas. The Central Authorities had no compunction in reducing the scope of local judicial autonomy where it was deemed necessary in the service of an important national goal, in this case a purely economic one.

In 2019, angry with a lower court decision finding a regulation prohibiting the wearing of masks at public demonstrations to be unconstitutional,[241] a spokesperson for the Standing Committee said

[237]Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-Location) Ordinance (Cap 632).

[238]See eg Stephen Thomson, 'The New Constitutional Disorder: The Unlawful Application of Mainland Chinese Law to Hong Kong' (2018) 54 Texas International Law Journal 115.

[239]See eg Po Jen Yap & Zixin Jiang, 'Co-Location Is Constitutional' (2018) 48 Hong Kong Law Journal 37.

[240]Decision of the Standing Committee of the National People's Congress on Approving the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Agreement, adopted at the Thirty-first Session of the Standing Committee of the Twelfth National People's Congress on 27 Dec 2017 <https://www.thb.gov.hk/eng/policy/transport/policy/colocation/EN%20Decision%20(2%20Jan).pdf> accessed 13 Jul 2021.

[241]In response to increasing violent conflict between protestors and the police in 2019, the Government relied upon a colonial-era law to declare a situation of 'public danger' and enact what became popularly known as the 'anti-mask law' (Prohibition on Face Covering Regulation, made by the CEIC under s 2 of the Emergency Regulations Ordinance (Cap 231)). The law prohibited the wearing of masks or disguises that could prevent identification at a wide range of public order events, including lawful and peaceful protests. An initial constitutional challenge to the law was successful, with the Court of First Instance striking down large parts of the Regulation and also finding that the Government's reliance on the

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'whether Hong Kong's laws are consistent with the Basic Law can only be judged and decided by the NPCSC. No other authority has the right to make judgments and decisions', while a spokesperson for the State Council's Hong Kong & Macau Office criticized the ruling as having 'serious and negative socio-political impact.'[242] Both statements again suggest deep antipathy on the part of the Central Authorities to the role that an independent and neutral judiciary plays in Hong Kong. If the first statement is to be interpreted as meaning the Central Authorities intend to entirely eliminate the role of the Hong Kong courts in performing judicial review, then that would be radical restructuring of the 'one country, two systems' model and inconsistent with more than twenty years of judicial practice. An alternative reading however is that the spokesperson was merely 'reminding' the local courts that it is the NPCSC that has the *final* say on the interpretation of the Basic Law – again, this is uncontroversial and has long been accepted by the Hong Kong courts. Indeed, when the Court of Appeal upheld part of the lower court's finding on the anti-mask law,[243] no similar comments were made by official bodies regarding the inability of local courts to perform constitutional review. This suggests the second reading is probably more accurate, but the lack of official reassurance on this point remains troubling.

Beginning in June 2019 there were widespread protests in response to an attempt by the Government to introduce a law that would have permitted criminal suspects to be extradited to the Mainland.[244] They frequently involved violent clashes between demonstrators and the police and though they had begun in response to the extradition bill, after it was withdrawn the protestors expanded their goals in response to what they saw as an inadequate government response to a range of issues. Some called for increased autonomy for Hong Kong while an increasing number explicitly called for independence. This of course broached one of Beijing's 'red lines' and though the protests had subsided due to the COVID-19 pandemic, in mid-2020 the National People's Congress announced it would directly impose[245] a national security law on Hong Kong.[246] Unseen by the public and apparently even Hong Kong's own leader before adoption, it was promulgated and came into force on 30 June 2020.[247] At the time of writing (July 2020) the law has only just been released so it remains to be seen how it will be work in practice, but it creates four offences against national security and provides for a distinct process for their prosecution when compared to 'conventional' criminal offences. Certain 'complicated' categories of cases may involve suspects undergoing rendition to the Mainland, where they will be tried under Mainland law before Mainland judges.[248] While the majority of cases with national security aspects will still be heard within Hong Kong,[249] they will be heard before a judge from a select group chosen by the Chief

colonial-era law for its enactment was itself unconstitutional given the circumstances (*Leung Kwok Hung v Secretary for Justice and Another* [2019] HKCFI 2820).

[242]Tony Cheung, William Zheng & Gary Cheung, '"No authority has right to make judgments": China slams Hong Kong court's ruling on anti-mask law as unconstitutional' *South China Morning Post* (19 Nov 2019) <https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body> accessed 13 Jul 2021.

[243]*Leung Kwok Hung v Secretary for Justice and Another* [2020] HKCA 192.

[244]See generally 'Hong Kong protests' *South China Morning Post* <https://www.scmp.com/topics/hong-kong-protests> accessed 13 Jul 2021.

[245]Article 23 of the Basic Law obliges Hong Kong to introduce 'on its own' laws dealing with national security. An attempt to do so was made in 2003, but the Government backed down following massive domestic opposition.

[246]Natalie Wong, Gary Cheung & Tony Cheung, 'National Security Law: Commission Headed by Hong Kong Leader and Supervised by Beijing to Oversee New Legislation' *South China Morning Post* (20 Jun 2020) <https://www.scmp.com/news/hong-kong/politics/article/3089904/draft-hong-kongs-new-national-security-law-drawn-beijing> accessed 13 Jul 2021.

[247]Promulgation of National Law 2020, LN 136 of 2020 <https://www.gld.gov.hk/egazette/pdf/20202444e/es220202444136.pdf> accessed 13 Jul 2021. For unofficial English translation, see SCMP, 'Hong Kong National Security Law Full Text' (Scribd) <https://www.scribd.com/document/467553047/Hong-Kong-national-security-law-full-text#download&from_embed> accessed 13 Jul 2021.

[248]Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law).

[249]ibid art 45.

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Executive,[250] and in certain circumstances the right to a jury trial will be denied.[251] Whether this select group will include the overseas judges should any local case under the law reach the Court of Final Appeal is unclear. The law forbids the use of any judge who has previously 'made any statement' or 'behaved in any manner' endangering national security, but does not explicitly speak to the use of the overseas judges on cases heard under the law.[252]

Speaking before the bill was released, the Secretary of Justice stated she did not believe a ban on the overseas judges hearing cases under the new law was necessary.[253] But given the official version of the law was issued only in Chinese, with only an unofficial English translation provided 'for reference', it may be that the overseas judges are not considered capable anyway. Though some calls have been made to prevent *any* judge with dual nationality from hearing national security related cases,[254] this would present serious practical challenges since many judges in Hong Kong have dual nationality; as noted, only the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court are barred from obtaining a second passport.[255] In any event, given the reduced prominence of the overseas judges considered in this article I suspect that (if asked) the Chief Justice would simply not recommend the use of an overseas judge to sit on a panel hearing a national security case.

Taken together, these developments suggest the Central Authorities are deeply sceptical of the role that an independent judiciary plays in Hong Kong, and are willing to take steps necessary to side-line it in cases it deems of critical import to national security or sovereignty. Increasing attacks on overseas (or otherwise 'foreign') judges by establishment/pro-Beijing figures should be seen as part of this larger project to reign in the independence of the Court, and thus Hong Kong's judicial autonomy as a whole. As Tam has argued,

> Active participation of foreign legal practitioners in the judiciary enhances judicial independence under an authoritarian regime. The presence of a large number of foreign judges, who have a strong belief in the rule of law and/or linkage with prestigious judicial institutions in liberal democracies, has made it more difficult for Beijing to control the judiciary.[256]

Given Hong Kong's political environment, attacks on the legitimacy of the overseas judges are likely to increase in the coming years. If they achieve traction, those attacks may not only lead to calls for elimination of the role of the overseas judges on the Court but may damage the perception of judicial independence more broadly by creating the perception that its decisions are ideologically driven in simplistic ways.

It is true that judging is not simply a purely neutral, objective exercise; it is almost inevitably flawed and biased in systemic ways. Like many others, Hong Kong's legal system helps preserve and replicate existing structures of power in a society. But this is not the result of malign intent on the part of judges with improper motivations. Judges in Hong Kong – overseas or not – are products of their upbringing, ideology, life experience, and so on. They are not perfectly neutral judicial robots and it is right that both they and the system they represent are subject to critique. However, that common law judges tend to be drawn from an elite segment of society and are steeped in

[250]ibid art 44.

[251]ibid art 46.

[252]ibid art 44.

[253]Chris Lau & Gary Cheung, 'Hong Kong justice minister says there are no grounds to bar foreign judges from ruling on national security cases, but a special court could help' *South China Morning Post* (2 Jun 2020) <https://www.scmp.com/news/hong-kong/law-and-crime/article/3087060/hong-kong-justice-minister-says-there-are-no-grounds> accessed 13 Jul 2021.

[254]See fn 227 above.

[255]The Basic Law, art 90.

[256]Waikeung Tam, *Legal Mobilization Under Authoritarianism: the Case of Post-Colonial Hong Kong* (Cambridge University Press 2014) 53, cited in Lin, 'The Expatriate Judges and Rule of Law in Hong Kong (n 111) 23.

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certain ideologies is not the same as saying they inevitably issue decisions in accordance with the policy preferences of the ruling party.[257] That there is systemic inequity in the application of criminal justice in the common law world does not make it normatively equivalent to a justice system that obtains a 99.93 per cent conviction rate.[258]

Attempts to de-legitimize decision-making by judges based on their national origin serve a narrative says that non-Chinese judges are inherently unacceptable in Hong Kong not because they are an uncomfortable colonial echo or suggest a need for supervision where none is necessary, but because they must be serving a separate political master when reaching their decisions. It is then a short road from saying foreign judges in particular are unacceptable because they are necessarily biased to arguing that *all* judges – regardless of origin – serve only particular political interests when coming to decisions and so the concept of judicial independence is entirely meaningless. This narrative says that common law judges *do* arrive at their results purely out of political considerations or calculations; common law judging *is* just an ideological exercise and the idea of judicial independence is nothing more than a dangerous myth that serves a particular class interest. The courts should therefore strive to serve state (Party) goals rather than serve as independent check because the Party represents the interests of the people – and this, of course, is precisely what the 2014 White Paper implies.

In this way, critiques of the overseas judges in Hong Kong cloaked in facially valid concerns about legitimacy ultimately serve a broader project of reducing the scope or strength of Hong Kong's judicial autonomy by depriving it of public acceptance and support.

Conclusion

It bears repeating that the Hong Kong judiciary need not depend on outside assistance for successful decision-making in the way the microstates of the South Pacific might. Importing foreign judges for a few weeks at a time to opine on matters critical to the lives of Hong Kongers and the future of the SAR should give everyone pause. Hong Kong is a developed, wealthy jurisdiction with more than two decades of practice of constitutional review. Yet, one imported judge (on a bench of only five) has sat on virtually every substantive case that has come before the Court of Final Appeal since 1997. Moreover, those judges have been drawn exclusively from Hong Kong's former colonial ruler and what that ruler referred to for years as its 'White Dominions'. Those imported judges have indeed been all white, and all but two have been men. In this, they represent an uncomfortable colonial echo with particularly unwelcome racial overtones. This article has suggested that as a general principle, *especially* in developed jurisdictions lacking capacity concerns, judges – particularly those on an apex court dealing with critical matters of public import – should be drawn from the society they purport to judge. None of the traditional arguments made in favour of the use of imported judges in other common law jurisdictions seem relevant in Hong Kong. Absent those judges, the Court of Final Appeal does not lack capacity, quality, rigour, or creativity in its decision-making.

Yet these concerns are outweighed by the communicative role the overseas judges continue to play; their presence signals not only the Court of Final Appeal's independence, but that of the entire Hong Kong judiciary. Odd as their presence may be, so long as the overseas judges continue to be of the highest international quality and reputation, it will remain a reassuring one for those members of the public who continue to believe in the 'one country, two systems' model as promised under the

[257]Yongnian Zheng & Wei Shan, 'Xi Jinping's 'Rule of Law' with Chinese Characteristics' (The Asia Dialogue, 28 May 2015) <https://theasiadialogue.com/2015/05/28/xi-jinpings-rule-of-law-with-chinese-characteristics/> accessed 13 Jul 2021.

[258]Terrence McCoy, 'China scored 99.9 percent conviction rate last year' *The Washington Post* (11 Mar 2014) <https://www.washingtonpost.com/news/morning-mix/wp/2014/03/11/china-scored-99-9-percent-conviction-rate-last-year/> accessed 13 Jul 2021.

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Joint Declaration and given effect through the Basic Law – a high degree of autonomy for Hong Kong, including the right of final adjudication and an independent judicial system. The answer to the question of 'canaries or colonials' is then, perhaps unsatisfyingly, 'both'.

This article has argued that the Court itself recognizes this tension and this is the motivation behind a notable change in the role of the overseas judges over the last decade. The Court knows all too well that international confidence in the independence of not only their bench but of the Hong Kong judiciary as a whole depends in part on the symbolic role the overseas judges play. Thus, the rates at which overseas judges are *invited* to sit on the Court has not changed and each panel for a substantive case still has one overseas member, as has been the practice since the Court's establishment. However, their public prominence has been reduced, most notably in the last five years. They individually author relatively fewer decisions than they did in the Court's first decade, and appear to no longer pen opinions on 'sensitive' cases that relate to either fundamental rights or the relationship of Hong Kong to the rest of China. This article suggested that this reduced prominence is best understood as part of an effort by the Court to protect its institutional role by reducing avenues for partisan attack on the legitimacy of its decisions.

[POSTSCRIPT]

Subsequent to writing but prior to publication, in September 2020 overseas non-permanent judge James Spigelman announced his early resignation from the Court of Final Appeal. He did not provide specific reasons to the Hong Kong Government, but in a subsequent interview with the Australian Broadcasting Company he cited the newly introduced National Security Law.[259] Two months later the United Kingdom's Foreign Secretary announced an intention to review the practice of allowing UK judges to sit on the Court of Final Appeal in light of the National Security Law and the disqualification from the Legislative Council of a number of pan-democratic legislators.[260] In February 2021, the Court of Final Appeal for the first time considered some aspects of the National Security Law. The bench that heard it did not include a member drawn from the overseas panel.[261] In June 2021, Baroness Hale indicated she did not wish to be reappointed as an overseas non-permanent judge upon the expiry of her contract; the reason was uncertain.[262]

[259]'Veteran Australian judge James Spigelman resigns from Hong Kong's top court, citing national security law', (SCMP, 18 Sep 2020) <https://www.scmp.com/news/hong-kong/law-and-crime/article/3102051/veteran-australian-judge-james-spigelman-resigns-hong> accessed 16 Jul 2021.

[260]'Britain rebuked by Beijing and Hong Kong government after foreign minister says it will review arrangement for judges sitting on city's top court' (SCMP, 23 Nov 2020) <https://www.scmp.com/news/hong-kong/politics/article/3111069/britain-review-arrangements-judges-sitting-hong-kongs-top> accessed 16 Jul 2021.

[261]*HKSAR v Lai Chee Ying*, [2021] HKCFA 3.

[262]'Mixed reports on why foreign judge leaves CFA' (RTHK, 4 Jun 2021) <https://news.rthk.hk/rthk/en/component/k2/1594250-20210604.htm> accessed 16 Jul 2021.

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