

THE HONG KONG COURT OF FINAL APPEAL

HONG KONG JUDICIAL INSTITUTE

**“Sitting as Non-Permanent Judge in the Court of Final Appeal for
the past 16 years”**

by

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Introduction

1. When I came to think about this talk, it occurred to me, as has so often happened in the past, that I had been ill-advised to accept the invitation to speak. The invitation was, of course, to speak about the CFA.

2. No doubt the Chief Justice expects me to say that my colleagues, including the Chief Justice himself, are fine fellows and excellent judges. I say that unhesitatingly and without reservation. For you the audience, it would be more entertaining if I were to refuse to say that and instead regale you with some scandal affecting members of the Court. Unfortunately I am unaware of any such scandal.

3. My problem is that judges do not generally inspire excitement or riveting attention. Their image is associated with such chilling subjects as judicial independence. As I discovered, judicial independence can be chilling in another sense of that word.

4. At one of the first international conferences I attended as a judge many years ago, I participated in a working group on judicial independence with a judge from another continent. He told me that on his return home he was to sit on an important constitutional case which would decide the fate of the national government. His problem was that he had been told that if he decided against the government he would be killed. He certainly believed that the threat was real. To a judge confronted with that dilemma there is not much comforting advice that you can give. You can say that the making of the threat does not necessarily mean that it will be carried out. But that is at best cold comfort and in all likelihood no comfort at all. From recollection the threat was not carried out because the court's majority decision favoured the government. The court was subsequently reconstituted minus my friend. Being in the minority has some benefits. Survival is one of them.

5. I mention this incident not because I have received, or expect to receive, any death threat in Hong Kong but because it reveals how

fortunate we are as judges to be sitting in a jurisdiction such as Hong Kong where there is respect for the rule of law and where the making of threats of that kind is unthinkable.

6. My relationship with the CFA began in 1997 with a telephone call from Andrew Li to me at the Cambridge Law Faculty where I was the Arthur Goodhart Professor. Andrew invited me to join the Court. He explained to me what it would involve and his hopes for the Court. In that short conversation Andrew's dedication and his vision were as apparent as if we were together in the same room. I felt instinctively that it would be a great experience to work with him and his colleagues and so it proved. My service on the CFA and working with Andrew Li have been two highlights of my life.

7. My work on the CFA has been in many respects a continuation of my professional career in the law in Australia. Although I have participated in a variety of cases decided by the CFA in the 15 years I have been a NPJ, my principal participation has been in constitutional (including public law) cases. As counsel, even in my early days at the Bar, later as Solicitor-General and as a Justice of the High Court of Australia, I was engaged in constitutional work, in interpreting the

provisions of a written constitution. So, interpreting the Basic Law has for me been a progression along an established continuum.

8. At the same time, interpreting the Basic Law is a different exercise from interpreting the old established written constitutions in the common law jurisdictions of the United States, Canada and Australia. For one thing, the Basic Law is neither a national nor a federal constitution. For another it is unique – it has art.158 about which I shall have more to say later. And, more importantly, for a working judge, it is a new constitution.

9. It is both challenging and refreshing to interpret a constitutional text unadorned by the encrustations of past judicial decisions. In cases arising under older constitutions you find that the encrustations have almost obscured the text. That is not the case in Hong Kong. It has not been necessary to navigate a way through the reefs and shoals of past decisions. But in the course of time that will change.

10. The CFA goes about its work in much the same way as the High Court of Australia did when I was Chief Justice. Indeed I am not aware of any substantial difference. I have sat on appellate courts in Australia and others in Fiji and the Solomon Islands with judges from different jurisdictions, including Lord Cooke of Thorndon who was an original NPJ

of the CFA. And I have participated in arbitrations with retired judges and lawyers from various jurisdictions, including the United States. My experience has been that the common law tradition generates a marked similarity of approach across the jurisdictions; a principled approach to the judicial task which is based on impartiality, due process, and judicial method.

11. Although there are differences between the High Court of Australia and the CFA, they are not significant. The most noticeable difference relates to facilities. The High Court has an electronic transcript recording system covering all cases. It has a more comprehensive library than the CFA with a more extensive staff, as well as a research assistant who is capable of undertaking research assignments for the Justices. In addition, each Justice has two associates who are highly qualified law graduates capable of undertaking research assignments under the direction of the Justice as well as preparing memoranda, particularly on leave applications.

12. Compared with Hong Kong's judicial assistants, the High Court's associates more closely resemble the clerks of the US Supreme Court Justices and have a closer relationship with their Judge than do Hong Kong's judicial assistants. The associates have a room in the judge's

chambers and their contribution to the work of their judge is greater than it would otherwise be.

13. It is that contribution that makes High Court associate positions highly attractive to the best students in Australia's Law Schools. And that leads to an associateship having a high value for subsequent employment. There are mutually reinforcing tendencies at work. The Court secures high quality graduates for a limited period of time and they gain invaluable experience at the highest judicial level. One of my former associates was recently appointed a Justice of the High Court, another a Judge of the NSW Court of Appeal and a third Solicitor-General for Victoria. After graduation from law school I became an associate to a NSW Supreme Court Judge for a year. In that time I learned how cases were presented and decided and how judgments were written.

14. In my time on the High Court of Australia, members of the Court regarded it as important to maintain contact with the practising profession and the academic community. It is desirable for any judge, particularly a judge of a final court of appeal, to be aware of community views, particularly the views and perceptions of the legal community. In

Hong Kong, it is possible to replicate the close relationship that exists between the judges and the legal community in England.

15. Another difference between the High Court and the CFA was that, in Hong Kong, more use is made of comprehensive written submissions than in my time in the High Court of Australia, though the practice there now is as it is here. Comprehensive written submissions enable the judges to give closer attention to the issues before the hearing, a matter of particular importance to a judge from another jurisdiction such as myself. Comprehensive written submissions are an advantage because they enable the judges more readily, in advance of argument, to appreciate the dimensions of the issues, the impact of the arguments on those issues and any deficiency in the submissions.

16. But the primary purpose of submissions, both oral and written is to persuade. My criticism of written submissions – and it is not confined to Hong Kong – is that they are too diffuse and insufficiently crisp and punchy. They fail to provide telling examples which expose the critical question and the consequences which flow from the competing answers. The written submissions read as if their exclusive object is to set out the detail of the oral argument so that nothing is left out. I make a similar criticism of oral argument. All too often the argument centres on the

materials without a compelling focus on the critical questions and the possible consequences which might follow from them.

17. In other respects, differences between courts arise from the personalities of particular judges rather than from any difference in jurisdictional procedures. Some judges are more interventionist than others. Some talk too much, thereby impairing not only the development of the argument but also the concentration of their colleagues on the argument. The judge is best advised to allow argument to develop before engaging in hand-to-hand combat. After all the judge's first responsibility is to listen to and understand the argument. Unless the judge understands the argument, he cannot evaluate it.

18. In general, the High Court of Australia is more interventionist than is the CFA. Judicial interventions vary. Some are simply designed to elicit information or to identify a critical issue, or a facet of counsel's argument, or to satisfy a question lurking in the mind of the judge. Others are designed to point up a weakness in the argument presented or even to damage or destroy the argument presented.

19. Counsel are inclined to regard an intervention as being hostile in intent, even when it is designed to assist counsel's argument. Counsel

should appreciate that the judicial question, whether hostile or not, presents an opportunity to advance the argument. The art of persuasion – for persuasion is the essence of advocacy – is seen at its best in response to questions from the Bench and in the reply where the appellant’s counsel has the inestimable advantage of the last word. Very often a case is won or lost on answers given to questions from the Bench. So it is imperative that counsel take advantage of the opportunity presented by these questions.

20. The CFA judgments, in terms of clarity of style, compare favourably with those of other jurisdictions, a point made to me recently by an Australian judge. CFA judgments are also mercifully short, at least by comparison with some judgments of the High Court of Australia. The CFA judgments make much use of comparative law and cases decided in other jurisdictions. The use of comparative law and the brevity of CFA judgments – and the brevity is relative only - may decrease as the Hong Kong courts build up a corpus of Hong Kong jurisprudence. There is, of course, a strategic advantage in referring to authorities in other jurisdictions, particularly in Hong Kong, where external impressions of Hong Kong judicial decision-making may have an importance for Hong Kong’s reputation and standing in the international commercial world.

21. The CFA procedure relating to judgments is designed, if possible, to produce an agreed judgment, whether it be a judgment of the Court of a principal judgment, agreed to by other judges. In my view, it is the responsibility of a court, if it can, to deliver an agreed judgment, whatever form it takes, or, if not, a majority judgment. A judgment of the court or an agreed judgment, where possible, best reflects the collective responsibility of a collegiate court to adjudicate the case and declare the law and at the same time enhances the certainty of the law.

22. In Australia, for reasons which are not altogether clear, the question whether judgments should be joint (or agreed) or separate is a matter of current debate to which I have contributed. There has been support in Australia for the view that every judge should write his own reasoned judgment¹. It was at one time advocated by Sir Owen Dixon, Australia's finest judge, but ultimately he was responsible for a move to joint judgments². Although the High Court of Australia subsequently departed from that practice, in recent times it has placed much more emphasis on joint judgments. The principal argument against a joint or agreed judgment is that it allows a dominating judge to unduly influence

¹ Sir Frank Kitto, "Why write judgments?" (1992) 66 Australian Law Journal 787.

² P.Ayres, "Owen Dixon", Miegunyah Press, 2003, p.238.

the decision-making process³, an argument which, in my view, is exaggerated⁴. It is an argument which questions the integrity and competence of the colleagues of the dominating judge.

23. Judicial independence requires that we respect the entitlement of every judge to deliver his own judgment, if he is so minded, whether or not his individual judgment is a dissenting judgment or not. In the CFA, neither separate nor dissenting judgments have been as frequent as they have been in the High Court of Australia or in the Supreme Court of the United States. This is not the occasion to reflect on the possible reasons for this difference. It is, however, relevant to make the point that division within the Court in a particular case provides an obvious basis for questioning the correctness of the majority decision. I mention this fact not to deter or discourage dissent, because a judge is obliged to express his view of the case.

24. As you know, the practice of the CFA is to endeavour to finalise the judgments in the four weeks of the sitting in which the cases are heard. The object of the exercise is to ensure that the judgments are

³ J.D.Heydon, "Threats to Judicial Independence": The Enemy Within" (2013) 129 Law Quarterly Review 205.

⁴ Anthony Mason "Reflections on the High Court of Australia": Its Judges and Judgments" (2013) 37 Australian Bar Review 102 at 108-112. See also P.Heerey, "The Judicial Herd; Seduced by suave glittering phrases" (2013) 87 Australian Law Journal 460 2013; S.Gageler, "Why Write Judgments?", Sir Frank Kitto Memorial Lecture 2013 (forthcoming).

signed before the overseas NPJ departs from Hong Kong. Discussion at long distance is less satisfactory than “eyeball” or face to face discussion. One advantage of this self-imposed time limit is that CFA judgments are delivered promptly. A second advantage is that it promotes collegiality which is a prominent feature of the CFA *modus operandi*. A third advantage is that the judgments are considered and written while the issues and the arguments have not faded in our recollections. In other jurisdictions, where there is no operative time limit, there is the risk that the time of delivery of judgment is set by the judicial laggard when the recollection of the issues and the arguments is no longer crisp and clear. There is nothing more irritating for a judge who has already circulated a draft judgment than to receive many months later the draft judgment of a colleague. The colleague’s draft may require the judge who has circulated the early draft to revisit the case and engage in the laborious task of revisiting the materials.

25. My reference to the signing of judgments reminds me of my experience in the Supreme Court of Fiji in a case in which I was sitting with the Chief Justice of Fiji, Lord Cooke of Thorndon, Sir Gerard Brennan and Justice Toohey, both former colleagues of mine in Australia. Lord Cooke, formerly Sir Robin Cooke, President of the New Zealand Court of Appeal, was elevated to the House of Lords as Lord

Cooke of Thorndon, Thorndon being a suburb of Wellington with which he had been associated. His elevation had occasioned a change in his signature on judgments from plain “Robin Cooke” to “Cooke of Thorndon”. I drew this change to the attention of Sir Gerard and asked him “Do you think I should change my signature from ‘A. F. Mason’ to ‘Mason of Mosman’?”, Mosman being the suburb of Sydney in which I live. Sir Gerard’s reply was “No –they will think you are a second-hand car dealer”.

The CFA as a constitutional court

26. As you all know, the jurisdiction of the CFA replaced that of the Judicial Committee of the Privy Council. But it is a mistake to think of the CFA as if it were simply a successor to the Privy Council. The CFA is, as its name conveys, a court of final appeal for Hong Kong, as indeed was the Privy Council. But the CFA is also a constitutional court with a responsibility for interpreting the Basic Law, Hong Kong’s constitution, agreed upon by the PRC and the United Kingdom and enacted as a law by the National People’s Congress (NPC).

27. The CFA’s responsibility for interpreting the Basic Law is, of course, subject to art.158 of the Basic Law. The provisions of that article

vest the power of interpretation of the Basic Law in the Standing Committee of the NPC but delegate the exercise of the power in the adjudication of cases to the Hong Kong courts with the qualification that arises from the mandatory reference procedure applying to the CFA. In this respect the Basic Law draws a distinction between the power of final interpretation and the power of final adjudication.

28. This distinction is novel, at least to the mind of a common lawyer, if for no other reason than that to the Western lawyer final interpretation by the courts is an element in the rule of law. That proposition reflects, of course, the distinction which the common lawyer makes between interpretation on the one hand and legislation or amendment, on the other hand, a distinction which is in turn associated with the doctrine of the separation of powers.

29. Just what the Basic Law separation of power entails for Hong Kong has not yet been comprehensively considered by the CFA. It is not for me to predict what form that consideration may take. But caution suggests that it might be unwise to adopt an extreme version of the separation of powers. The theme of continuity is a very strong element in the Basic Law.

30. We know that, according to Chinese law, interpretation differs from the common law rules of interpretation and may generate outcomes that are inconsistent with common law outcomes. Moreover, Chinese interpretation may extend to what is known as legislative interpretation amounting to amendment, a concept foreign to the common law understanding of interpretation. So there is the distinct possibility that a Standing Committee interpretation of a Basic Law provision might differ from a CFA common law interpretation of that provision, whether or not legislative interpretation is involved. This possibility is reinforced when you recall that the Standing Committee has a large membership of whom lawyers are only a minority.

31. On the assumption that art 158 authorises Standing Committee interpretations that are legislative rather than interpretive in character, the character of a Standing Committee legislative interpretation could be seen in a different light. It is the imposition of an externally sourced interpretation in the strict sense that sits uncomfortably with our conception of the rule of law and the separation of powers. Legislative amendment of a constitution, pursuant to a power of amendment conferred by the constitution itself, stands in a different position.

32. We need to remember that the boundary line between interpretation and amendment has become blurred in recent times as the cases on s. 3 of the Human Rights Act 1998 (UK) have revealed⁵. The accepted criterion was: are the words (reasonably) capable of sustaining the meaning in question? This criterion has at times been given a broad application.

33. The scope for free standing Standing Committee interpretations is theoretically large. Under the first paragraph of art.158 it extends to all the provisions of the Basic Law. Interpretations under the mandatory reference procedure prescribed by art. 158 are more limited. The procedure extends to questions relating to provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region. These provisions are to be found in Chapters I and II of the Basic Law. The matters dealt with in Ch. II are very extensive. Whether they all, despite the heading to Ch. II, answer the description in the third paragraph of art. 158 may be a question for the future, as some of the provisions may have only a remote or indirect connection, if at all, with the relationship between the Central Authorities

⁵ See, for example, *Ghaidan v Godin – Mendoza* [2004] 2 AC 557; *Sheldrake v DPP* [2005] 1 AC 264 but cf. *R Wilkinson v IRC* [2005] 1 WLR 1718 at 1723; *R v Hansen* [2007] 3 NZLR 1.

and the Region. Take, for example, art.16 which vests executive power in the HKSAR, providing that the HKSAR shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of the Basic Law. Do all conceivable questions relating to the art.16 executive power necessarily concern the relationship between the Central Authorities and the Region?

34. Like all constitutions, the Basic Law is a political instrument. Nonetheless it requires legal answers. It creates a general framework of government, intended to have an enduring operation, outlining the extent and scope of the powers of the respective institutions of government and guaranteeing a variety of individual rights. As such, the provisions of the Basic Law should, generally speaking, receive a broad and generous interpretation, an interpretation that is flexible rather than rigid⁶. Such an interpretation should enable the Basic Law to apply to conditions and circumstances that may not have been foreseen either at the time when the Basic Law was enacted or when the Joint Declaration was made by the governments of the People's Republic of China and the United Kingdom.

⁶ See Chief Justice Ma, "The Interpretation of Hong Kong's Constitution: A Personal View", 8 April 2013, in the Common Law Lecture Series 2011-2013 p.85 at p.100.

35. What I have just said is the accepted common law approach to constitutional interpretation. For the CFA and, for that matter, the Hong Kong courts generally, the Basic Law is set in a context of common law concepts, rules and principles, particularly the common law rules and principles of constitutional and statutory interpretation, recognised and preserved by art.8 of the Basic Law subject, of course to the provisions of art.158 with all the consequences that its provisions entail.

The CFA as a general court of appeal

36. You will not be surprised to hear that my general experience has been that the CFA has generally dealt with counsel's argument with courtesy. This is to be expected but the expectation is not always fulfilled in courts of final appeal. Of course, courtesy may run dry if counsel are too repetitive or persist in presenting argument that is plainly unsustainable. Of equal importance is treating the judges of courts below with appropriate respect. If we put to one side exceptional cases, it does a dis-service to the law and the legal system to castigate a judge in the courts below for what the appellate court considers to be an error. Generally speaking, denunciation by a court of final appeal of a judge below may possibly have adverse consequences not only for that judge but for public confidence in the legal system itself.

37. The use of comparative law, which is a prominent feature of the CPA's work, has its own problems, partly because there is so much of it. There is no alternative to adopting a selective approach and that may involve the use of materials from a jurisdiction with which one is familiar. There is a particular hazard in using public law decisions from other jurisdictions because a judge cannot be sure that he is sufficiently aware of the background of concepts, principles, practices, understandings and history that may have influenced the making of those decisions, though not adverted to in the decision itself⁷.

38. Another category of problems which will beset the CFA in the future arises from the interaction between the provisions of the Basic Law and the common law. I refer particularly to the rights and freedoms guaranteed by Ch.III of the Basic Law. It is axiomatic that the common law must conform to the Basic Law, just as it must conform to the constitution in any jurisdiction. In other words, in developing the common law, the courts, most notably the CFA, will need to take account of the provisions of the Basic Law, just as it may have to take account of statutory provisions. The guarantees of freedom of expression and the right to privacy, for example, have the potential to influence significantly common law principles.

⁷ *Theophanous v The Herald & Weekly Times Ltd.* (1994) 182 CLR 104 at 196.

39. There has been a change in the application of the doctrine of precedent. In my earlier days a distinction was drawn between the binding force of a decision of a higher court and *dicta* of such a court. Now, however, some courts of final appeal, notably the High Court of Australia, take the view that lower courts should follow (as a matter of obligation) the seriously considered *dicta* of the court of final appeal⁸. I am not necessarily opposed to this view. It promotes certainty in the application of the law. It is, however, associated with another view, which may have less to recommend it, namely that courts below the level of the final court of appeal should confine themselves to applying the law as it exists, or as it is thought to exist, and leave the declaration of any change in the law to the final court of appeal.

40. An obligation to follow the considered *dicta* of a final court of appeal attaches great importance to the role of such a court in developing the law, a matter central to the grant of leave to appeal, and distinguishes the function of such a court from that of an intermediate court of appeal. Once that is accepted, it is but a short step to say that the considered *dicta* of a final court of appeal should be followed by courts below, at least when the *dicta* are supported by a majority of the

⁸ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

court. *Dicta* by less than a majority of the court may stand in a different position.

41. It follows also from the role of a court of final appeal, that it should, when the opportunity offers and argument is presented, express its view of a contentious question of law, even if it may be unnecessary to decide the question by reason of conclusions reached on other issues. To decline to answer such a contentious question does no service to the rule of law, which rests to a substantial extent on the ability of parties to shape their conduct and to enter into transactions on the basis that the applicable law is certain. Judicial minimalism has little to commend it when contentious questions of law arise for decision.

42. In conclusion, it remains for me to say that it has been a great honour and a great pleasure to serve as a NPJ of the CFA. I have enjoyed every minute of it or, to be more accurate, most minutes of it. And I have immense respect for my colleagues on the Court.
