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Session C2: Independence of the Judiciary and Legal Profession

Demonstrating judicial independence in increasingly politicised times

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Introduction

1. At Hong Kong’s Ceremonial Opening of the Legal Year in January 1997, held less than six months before the transfer of sovereignty over Hong Kong by the United Kingdom to the People’s Republic of China (“PRC”), the Acting Chief Justice of Hong Kong² concluded his speech with this stirring warranty:

“Let me finally assure all of the people of Hong Kong that they have an independent, capable and hard-working judiciary, versed in the common law and that they have a judiciary which will, without fear or favour, administer that law in the coming years.”

2. This year, in which the twentieth anniversary of the Handover falls, is a timely occasion on which to reflect on the subject of judicial independence in Hong Kong.

3. The resumption of sovereignty over Hong Kong by the PRC under the principle of “one country, two systems” gives rise to interesting contrasts

¹ Permanent Judge of the Hong Kong Court of Final Appeal.

² Noel Power Ag CJ, later Sir Noel Power.

between the two systems. Perhaps nowhere are those contrasts more apparent than in relation to the legal systems of the PRC and Hong Kong.

4. Given Hong Kong's unique position as a common law system operating within the sovereign territory of a country governed under the Communist Party of China's ideology of socialism with Chinese characteristics, the preservation and protection of judicial independence in Hong Kong are matters of great importance and present interesting challenges.

5. In January this year, in relation to judicial independence, we in Hong Kong were reminded of a stark difference in the two systems when the President of the Supreme People's Court was reported to have told provincial judges in the PRC to reject what he called "erroneous" Western ideas of judicial independence and the separation of powers.³ That he made those remarks is understandable given the Constitution of the PRC, under which the National People's Congress ("NPC") is the highest organ of state power,⁴ to which the Supreme People's Court is responsible.⁵

6. For my part, I believe judicial independence is firmly established in Hong Kong and that, whilst questions are raised from time to time concerning the rule of law in Hong Kong – and there is a need to remain vigilant to protect it – the assertion of the Acting Chief Justice made in early 1997 is still true today.

Demonstrating judicial independence

7. When a judge makes a pronouncement that the judiciary of which he is a member is independent, it is likely to elicit a response akin to that famously

³ <http://www.scmp.com/news/china/policies-politics/article/2062829/lawyers-urge-chinas-top-judge-quit-over-controversial>.

⁴ Constitution of the PRC, Articles 57 and 67.

⁵ Constitution of the PRC, Article 128.

delivered by Mandy Rice-Davies.⁶ So how does one, from within a judicial system convincingly demonstrate judicial independence to outsiders?

8. I believe that can be done by reference to the following matters:

- (1) The constitutional arrangements under which the judiciary operates;
- (2) The source and background of judicial officers;
- (3) The reasoned judgments of the courts;
- (4) The response of government institutions and private parties to those judgments;
- (5) The reactions of others in the face of perceived threats to judicial independence.

9. The specifics of each of these matters will differ from country to country, and I will confine myself to addressing them from the perspective of Hong Kong, but there is clearly much common ground between the jurisdictions represented at this Conference in respect of them.

The constitutional arrangements

10. The constitutional arrangements for Hong Kong are set out in the Basic Law of the Hong Kong Special Administrative Region. That Law was enacted

⁶ While giving evidence at the trial of Stephen Ward, charged with living off the immoral earnings of Christine Keeler and Rice-Davies, it was suggested to Ms Rice-Davies by defence counsel that Lord Astor (with whom it was alleged she had been intimate) denied an affair or having even met her, to which she replied, “Well (giggle) he would, wouldn’t he?”: https://en.wikipedia.org/wiki/Mandy_Rice-Davies.

by the NPC to give effect to the Joint Declaration, the 1984 agreement between the UK and the PRC setting out the terms of China's resumption of sovereignty over Hong Kong.

11. The concept of judicial independence is expressly enshrined in the Basic Law. Under Article 2, the NPC authorises the Special Administrative Region "to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law." The Basic Law then vests in the Region independent judicial power, including that of final adjudication, in two further articles.⁷

12. The judicial system previously practised in Hong Kong is maintained, except for those changes consequent upon the establishment of the Court of Final Appeal ("CFA").⁸ The CFA was established as the final appellate court of the Region, replacing the Privy Council in that role, with the power of final adjudication.⁹

13. Thus, the Basic Law expressly provides that the courts of the Region "shall exercise judicial power independently, free from any interference" and that "[m]embers of the judiciary shall be immune from legal action in the performance of their judicial functions."¹⁰

14. Other articles of the Basic Law make provision for the following matters in respect of the judiciary:

⁷ Basic Law, Articles 19 & 85.

⁸ Basic Law, Article 81.

⁹ Basic Law, Articles 81 & 82.

¹⁰ Basic Law, Article 85.

- (1) Judges in Hong Kong are appointed by the Chief Executive “on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors”.¹¹ This is the Judicial Officers Recommendation Commission, established under its own ordinance,¹² whose deliberations are independent and confidential.
- (2) Judges have security of tenure since they may only be removed for inability to discharge their duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal consisting of other judges.¹³
- (3) Judges shall be chosen “on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions”.¹⁴
- (4) Judges take an oath to uphold the Basic Law and swear allegiance to the Hong Kong Special Administrative Region,¹⁵ which includes a solemn oath to “safeguard the law and administer justice without fear or favour, self-interest or deceit”.¹⁶

15. Finally, in this respect, I would mention the application in Hong Kong of the provisions of the International Covenant on Civil and Political Rights

¹¹ Basic Law, Article 88.

¹² The Judicial Officers Recommendation Commission Ordinance (Cap.92).

¹³ Basic Law, Article 89.

¹⁴ Basic Law, Article 92.

¹⁵ Basic Law, Article 104.

¹⁶ The full text of the judicial oath reads: “I swear that, in the Office of a Judge of the Judiciary of the Hong Kong Special Administrative Region of the People’s Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.”

(“ICCPR”). The rights under the ICCPR are embedded in the laws of Hong Kong at a constitutional level and also in its domestic law, being given constitutional protection under Article 39 of the Basic Law and applied in Hong Kong through the Hong Kong Bill of Rights Ordinance (Cap.383). Amongst those rights are the rights under ICCPR Article 14 requiring adjudicative processes to be fair and impartial and observably so.

16. All these provisions are consistent with an institutionally independent judicial system. What of the source of the personnel making up that judiciary?

The source and background of judicial officers

17. The recruitment of judges in Hong Kong is by way of open recruitment exercises. Applications are then considered by the Judicial Officers Recommendation Commission. The basic threshold qualification for appointment as judges is a relevant period of practice as a barrister or solicitor or advocate in a court in Hong Kong or any other common law jurisdiction having unlimited jurisdiction either in civil or criminal matters: 10 years for the High Court¹⁷ and 5 years for the District Court.¹⁸

18. Hong Kong’s legal profession is a split profession, consisting of barristers and solicitors. Prior to the establishment of law faculties at the tertiary institutions in the 1970s, the great majority of Hong Kong lawyers qualified in England and Wales before admission in Hong Kong. Those lawyers were therefore trained in the principles on which the two branches of the profession are based in that jurisdiction. This carried through to the newly formed law faculties so that lawyers trained locally in Hong Kong were also

¹⁷ High Court Ordinance (Cap.4), s.9(1) and (1A).

¹⁸ District Court Ordinance (Cap.336), s.5.

trained and instructed in the ethics and independence of the two branches of the profession. Consequently, judges in Hong Kong are recruited from amongst members of an independent profession. This is particularly the case for the Bar, the source of virtually all judges in the High Court and above.¹⁹

19. One very important exception to judges being recruited from amongst practising lawyers in Hong Kong is the result of a feature of the CFA, which if not unique is highly unusual amongst final appellate courts in common law jurisdictions. That is the inclusion, in the CFA, of a judge from another common law jurisdiction. One such judge sits as a member of the 5-judge court in every substantive appeal now heard by that court and that judge has an equal voice amongst the five on each appeal.²⁰ The overseas judge, in substance a foreigner, therefore has an equal say on all final appeals, including appeals by way of constitutional review of legislation and administrative action.

20. In the case of the CFA, the judges who make up the panel of overseas judges²¹ are all eminent serving²² and retired judges from Australia, the UK and New Zealand. Their participation in that court provides a real, tangible endorsement of judicial independence in Hong Kong since it is reasonable to believe that judges of such eminence would simply not sit on a court in a jurisdiction where there was any doubt as to the independence of the judicial system.

¹⁹ Only two substantive judges currently sitting in the Court of First Instance of the High Court or above were appointed to the bench from the solicitors' branch of the profession.

²⁰ Hong Kong Court of Final Appeal Ordinance (Cap.484), s.16(5): "The judgment or order which is that of the majority of the judges sitting shall be deemed to be the judgment or order of the Court."

²¹ See, at <http://www.hkcfa.hk/en/about/who/judges/npjs/index.html>, the current panel of overseas non-permanent judges.

²² From 1997, it has been, by agreement with the Lord Chancellor, a convention that two serving Law Lords (and now two members of the UK Supreme Court), would be available to sit as NPJs: *Hong Kong's Court of Final Appeal*, edited by Simon N.M. Young and Yash Ghai (CUP, 2014), at p.231.

The reasoned judgments of the courts

21. However, the proof of the pudding is not just in the ingredients but, rather, in its eating. And in this regard, it is by reference to the judgments of the courts that one may find the truest litmus test of judicial independence.

22. The practice of requiring judges to hear cases in public and to give reasons for their judgments means that there is a means of verifying objectively whether any particular result does or does not appear to be the product of an independent judicial process. In Hong Kong, court hearings are almost invariably open to the public²³ and judgments are made publicly available.²⁴

23. A tradition and requirement that judges explain, in any given case, the thought process by which they arrive at findings of fact or the legal principles which they apply to those facts and which lead to their conclusions on the stated issues before them is a discipline which serves to engender confidence that the decision will pass muster as objectively transparent, fair and independent.

24. So too are the principles, applicable also in Hong Kong, requiring judges to recuse themselves – or permitting parties to apply for judges to do so – in the case of actual or apparent bias.²⁵

25. The fact that Hong Kong judgments are cited in judgments in final appellate courts elsewhere is also, at the very least, an indication of confidence in the independence of our judicial system.²⁶

²³ The exceptions to this rule being cases of a sensitive nature, such as certain matrimonial proceedings (in particular those concerning children) or Mareva injunctions or Anton Piller orders.

²⁴ See, at <http://www.hklii.hk/eng/>, a collection of databases of Hong Kong judgments.

²⁵ See, at http://www.judiciary.gov.hk/en/publications/gjc_e.pdf, the *Guide to Judicial Conduct* (October 2004), generally at Part D.

²⁶ See, e.g., *Joseph v Spiller* [2011] 1 AC 852 citing *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339; *Bilta (UK) Ltd (In Liquidation) v Nazir* [2016] AC 1 citing *Moulin Global Eyecare Trading Ltd v Inland Revenue*

The response to those judgments

26. Another important litmus test of the independence of the judiciary is the response to the judgments of the courts. Such response will be from parties to the judgments, whether government institutions or private parties, and from the public at large. As a general rule, judgments which are the product of an observably fair and independent process are far more likely to be respected and supported and, in this sense, respect and support for court decisions therefore provides some indication of the existence of an independent judiciary.

27. There is generally a healthy respect for court decisions and court orders in Hong Kong: money judgments and fines are paid, declarations of rights respected, sentences served, injunctions obeyed, and so on. Where parties are disappointed with a first instance decision, appellate procedures exist to permit a review of the case.

28. But in Hong Kong, as well as elsewhere, there has lately been an increasing tendency for public commentaries to point to the outcome of particular court proceedings as demonstrating either the existence or absence of the rule of law and, by implication, judicial independence. As a recent example of this phenomenon in the UK, the legal proceedings over the use of the Royal Prerogative to serve notice under Article 50 of the Treaty of Lisbon led to outrageous press commentaries and absurd headlines branding judges “Enemies of the People”. And more recently, in the US, we have seen a frustrated

Commissioner (2014) 17 HKCFAR 218; *Momcilovic v The Queen* (2011) 245 CLR 1 citing *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 citing *Shiu Wing Ltd v Commissioner of Estate Duty* (2000) 3 HKCFAR 215; *Clayton v Clayton (Vaughan Road Property Trust)* [2016] 1 NZLR 551 citing *Kan Lai Kwan v Poon Lok To Otto* (2014) 17 HKCFAR 414; *R v Boulanger* [2006] 2 SCR 49 citing *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381.

President very publicly criticise a “so-called judge” simply because his decision was contrary to the Government’s case.

29. In Hong Kong, we have seen a similar phenomenon in relation to recent court decisions relating to prosecutions arising out of the Occupy Protests in 2014. Some have been in favour of the outcomes and some have criticised them. Different people will, of course, have different points of view. However, it is disheartening when one sees a commentator saying that a particular result is, or is not, consistent with the rule of law simply because he or she disagrees with the particular outcome. That sort of comment has a tendency to give the public a false impression as to what the rule of law means. In *The Rule of Law*, Lord Bingham refers to the US Supreme Court case of *Bush v Gore*, which decided who won the presidential election in 2000 and in which the rule of law was invoked by both sides. Lord Bingham refers to one academic’s commentary recognising “a widespread impression that utterance of those magic words meant little more than ‘Hooray for our side’.”²⁷

30. This tendency to politicise legal issues poses a significant challenge to the maintenance of confidence in judicial independence and, for this reason, it is encouraging to see statements from government ministers and professional bodies urging fair, responsible and rational discussion of court decisions within the limits prescribed by the law and condemning criticism that goes beyond the bounds of such discussion.²⁸

²⁷ *The Rule of Law*, Tom Bingham (Allen Lane, 2010) at p.5.

²⁸ See, e.g., the statements of the Secretary for Justice and Hong Kong Bar Association respectively in response to criticism of a judge in a recent case involving seven policemen. See: http://www.doj.gov.hk/eng/public/pr/20170217_pr2.html; and <http://www.hkba.org/sites/default/files/20170220%20-%20Statement%20of%20HKBA%20in%20Response%20to%20Personal%20Attacks%20on%20Judge%20%28E%20Web%29.pdf>.

31. In other jurisdictions, we see also the need for others to speak out in answer to unreasonable accusations regarding an absence of or departures from judicial independence. Thus, in the UK after the Divisional Court's decision in the "Brexit" litigation, abuse of the judges and their decision led the Chair of the Bar Council of England and Wales to issue a vigorous defence of the vital role of the judiciary in upholding the rule of law.²⁹

Reactions to perceived threats

32. A final matter by which to gauge the existence or otherwise of judicial independence is to consider the relevant reactions of others in the face of perceived interference with that independence.

33. Since 1997, there have from time to time been events which have caused concerns over such perceived interference in Hong Kong. I shall address two of particular concern: the first is a type of event, namely interpretations of the Basic Law issued by the Standing Committee of the NPC; the second is the White Paper issued in 2014 by the Information Office of the State Council of the PRC on the Practice of the "One Country, Two Systems" Policy in the Hong Kong Special Administrative Region.

²⁹ She stated as follows:

"It is the judiciary's role to ensure the rule of law underpins our democratic system. Without it fulfilling this vital role, the people would have very limited scope to hold the Government in power to account.

The judiciary of England & Wales is the envy of the world because it is independent of Government or any other influence. When we speak to lawyers in other jurisdictions, it is our judiciary that they particularly praise for its professionalism and independence.

Publicly criticising individual members of the judiciary over a particular judgement or suggesting that they are motivated by their individual views, political or otherwise, is wrong, and serves only to undermine their vital role in the administration of justice. It also does no favours to our global reputation.

None of the parties suggested that the Court did not have jurisdiction to decide the point in issue. They are simply doing their job – impartially ruling on a dispute between parties, one of whom happens to be the Government in this instance. The right to appeal is there to challenge the Court's decision if a party feels they have grounds to do so. Whilst acknowledging that this question is one of potentially significant constitutional importance, the independent role of the Court should be respected, particularly by those who disagree with the outcome."

See: <http://www.barcouncil.org.uk/media-centre/news-and-press-releases/2016/november/bar-council-judiciary-must-ensure-rule-of-law-underpins-our-democracy/>.

34. Interpretation of provisions of the Basic Law is a matter generally for the Hong Kong courts. They are authorised to interpret “on their own, in adjudicating cases, the provisions of [the Basic Law] which are within the limits of the autonomy of the Region”.³⁰ However, Article 158(1) of the Basic Law stipulates that: “The power of interpretation of this Law shall be vested in the Standing Committee of the National People’s Congress.” And Article 158(3) of the Basic Law specifically requires the CFA to make a reference to the Standing Committee of the NPC seeking an interpretation of certain excluded provisions which fall outside the limits of the autonomy of the Region³¹ where the interpretation of such provisions would affect the case before it.

35. Since 1997, there have been five interpretations of the Basic Law by the Standing Committee of the NPC. Three of those³² have related to particular legal proceedings: the first, in 1999, in effect reversed the decision of the CFA in relation to proceedings concerning the acquisition of right of abode in Hong Kong;³³ the second, in 2011, was a reference by the CFA in proceedings before it concerning the doctrine of sovereign immunity to be applied in the Region after the resumption of sovereignty by the PRC;³⁴ and the third, in 2016, was given contemporaneously with ongoing court proceedings over the validity of oaths taken by certain legislative councillors.³⁵ These interpretations, in particular the first and third, led to concerns and protests that these acts amounted to an interference with judicial independence.

³⁰ Basic Law, Article 158(2).

³¹ Namely, those provisions “concerning affairs which are the responsibility of the Central People’s Government, or concerning the relationship between the Central Authorities and the Region”: Basic Law, Article 158(3).

³² Chronologically, these were the first, fourth and fifth of the five interpretations issued by the Standing Committee.

³³ *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4; the effect of the interpretation was considered in the subsequent case of *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300.

³⁴ *Democratic Republic of the Congo v F.G. Hemisphere Associates LLC (No.1)* (2011) 14 HKCFAR 95.

³⁵ http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=106799.

36. However, much comfort that judicial independence remains intact notwithstanding these interpretations can be taken from the views of Sir Anthony Mason, a former Chief Justice of the High Court of Australia and Non-Permanent Judge of the CFA, in an article written by him in the *Sydney Law Review*³⁶ after judgment in the case in which the Court referred a question of interpretation of the Basic Law to the Standing Committee of the NPC pursuant to Article 158(3) of the Basic Law. Sir Anthony referred to the distinction drawn in the Basic Law between the power of final adjudication and that of final interpretation and commented that this approach marked a departure from the traditional separation of powers integral to the rule of law. Nevertheless, his conclusion was that despite the tensions inherent, Article 158 is an ingenious link between two legal systems and debate on the rule of law in Hong Kong must proceed from the centrality of Article 158.

37. The State Council's White Paper published in 2014 prior to the Occupy Protests later that year caused controversy by suggesting that judges in Hong Kong were "administrators" and that they should be "patriotic". These statements were perceived by some to amount to a direction to judges as to how to act and therefore a direct interference in judicial independence.

38. Again, however, comfort that this was not to be understood from the White Paper is derived from the views of no less than Lord Neuberger of Abbotsbury, President of the UK Supreme Court and also a Non-Permanent Judge of the CFA. At an address to journalists in August 2014,³⁷ whilst clarifying that he was not taking sides on a political issue, Lord Neuberger

³⁶ *The Rule of Law in the Shadow of the Giant* (2011) 33(4) *Sydney Law Review* 623.

³⁷ Lord Neuberger at the Hong Kong Foreign Correspondents' Club, *The Third and Fourth Estates: Judges, Journalists and Open Justice*, 26 August 2014; see: <http://www.hkcfa.hk/filemanager/speech/en/upload/169/The%20Third%20and%20Fourth%20Estates%20-%20Judges,%20Journalists%20and%20Open%20Justice.pdf>.

wondered “whether there was anything to worry about in the White Paper”. He reasoned that one would include judges in the generic description of “the administration” and it was part of the judicial oath “to administer justice without fear or favour”. Similarly, patriotism was inherent in the oath of allegiance taken by judges both in the UK and in Hong Kong and was not inconsistent with judicial independence.

39. Statements of eminent judges such as Sir Anthony Mason and Lord Neuberger must, I would suggest, carry significant weight in the face of concerns over interference with judicial independence. Would judges of their stature, who have actually sat as members of a Hong Kong court, defend a system that was not independent?

Conclusion

40. In conclusion, I believe that the independence of the judiciary in Hong Kong is intact and is supported by an independent legal profession. Eternal vigilance is undoubtedly necessary to protect this essential attribute of any rule of law based system; particularly for us in Hong Kong, in view of the unique constitutional arrangements of “one country, two systems”.

41. This is no easy task. I leave you with one example of how easy it is to confuse the role of judges in the context of highly politicised proceedings. At the conclusion of the hearing of the “Brexit” litigation before the UK Supreme Court, Mr James Eadie QC, counsel for the UK Government, made this submission to the court:

“ ... if you declare the exercise of the prerogative unlawful, positively unlawful in that way, you are not just leaving the matter in the usual way to the executive and to

Parliament to sort out, you are in effect, and this is the only thing that could be done, requiring primary legislation. So in order to withdraw to give affect to the referendum
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42. This elicited the following interjection from Lord Neuberger:

“Well, we are not requiring it. We are saying the law of this country requires it.”

43. An understandable slip of the tongue at the end of a long and complicated case. But it is critically important in these times of increasingly politicised litigation, where even members of the executive seek to court populist support by casting doubt on court decisions, that the role of judges is understood and that the public are reminded of that role and its limits. Otherwise judges risk being politicised and their proper function compromised.

³⁸ <https://www.supremecourt.uk/docs/draft-transcript-thursday-161208.pdf>, at p.202.