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Foreign Judges on Domestic Courts

Keynote address – 3rd May 2021

Judges from other common law jurisdictions in the Hong Kong Court of Final Appeal

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1. Thank you, Dean Fu and Dr Dziedzic, for your welcoming remarks and thank you, Professor Young, for your introduction.

2. It is a great pleasure to deliver this keynote address today to open this workshop on "Foreign Judges on Domestic Courts". All the more so, since I do so jointly with Mr Justice William Gummow, a retired justice of the High Court of Australia and currently a non-permanent judge of the Hong Kong Court of Final Appeal.

3. The title of this workshop immediately raises interesting questions as to what we mean, in the context of domestic courts, when we refer to "foreign" judges? In this jurisdiction, where there is no nationality requirement for judicial appointment (save for the offices of Chief Justice of the Court of Final Appeal or Chief Judge of the High Court), seeking to define what one means by a "domestic" judge is rather subjective, since it may not be right to limit that description to judges who are "indigenous" or "local", to use two other subjective descriptions.

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

4. For my part, in speaking today about "foreign" judges on domestic courts, I will be referring to a particular type of judge, sitting on the Hong Kong Court of Final Appeal ("the CFA"). And you will have the pleasure also of hearing directly from one of those foreign judges sitting on the CFA, in the person of Mr Justice Gummow, who has recently sat with us hearing two appeals in the past fortnight.

5. This joint keynote speech will be followed by six further sessions over the course of the rest of this week in which participants will convene to present and comment on papers covering a diverse range of jurisdictions around the world in which foreign judges participate in the work of the domestic courts of another country. In tomorrow's session, Dr Anna Dziedzic, one of the co-organisers of this workshop with Professor Simon Young, will describe the comparative framework in which this subject may be studied and the contributors who follow will address aspects of the topic in the context of a variety of jurisdictions.

6. The phenomenon of the use of foreign judges on domestic courts is more widespread than perhaps some are aware and so this workshop is both relevant and timely. It is also of some particular utility that it is being hosted in this jurisdiction since, as my paper observes in its opening paragraph, it is not infrequently the case that some have expressed surprise when hearing about the participation in the CFA of overseas, or foreign, judges visiting from other common law jurisdictions.

7. And so it is to that court – and an abbreviated presentation of my paper – to which I now turn.

8. When it sits to hear substantive appeals, one of the five judges of the CFA is, with few exceptions, an overseas, or foreign, judge visiting from another common law jurisdiction. In all but 13 of the approximately 730 substantive appeals it has heard since its establishment, the Court has sat with one judge from another common law jurisdiction. How does this happen, why and to what end?

9. I begin with a review of the constitutional framework.

10. The CFA was established on 1 July 1997 and, from that date, replaced the Judicial Committee of the Privy Council in London as Hong Kong's highest appellate court. It hears civil and criminal appeals involving important questions of law, including in particular points of public and constitutional importance, or where leave to appeal has otherwise exceptionally been granted.

11. The CFA's jurisdiction and constitution is found in the Basic Law of the Hong Kong Special Administrative Region and in the Hong Kong Court of Final Appeal Ordinance (Cap. 484), its founding ordinance. The Basic Law, enacted by the National People's Congress in accordance with the Constitution of the People's Republic of China ("PRC"), prescribes the systems to be practised in the HKSAR in order to ensure the implementation of the basic policies of the PRC regarding Hong Kong.

12. The Basic Law prescribes (in Articles 8 and 18) the continuation of the previous legal system, namely the common law, rules of equity, ordinances, subordinate legislation and customary law. Article 81 of the Basic Law provides for the establishment of the CFA and that the judicial system previously practised in Hong Kong shall be maintained except for those changes

consequent upon the establishment of the CFA. Importantly, for this workshop, Article 82 of the Basic Law then stipulates:

> "The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal."

13. The first part of that article is arguably of greater importance, conferring on the CFA the power of final adjudication within the Region. It is that provision, coupled with the three separate references in the Basic Law (in Articles 2, 19 and 85) to exercise by the courts in Hong Kong of judicial power independently that articulates the power and duty of the courts to exercise judicial independence including the role of constitutional review of legislative and administrative acts. However, the latter part of Article 82, enabling judges from other common law jurisdictions to be invited to sit on the CFA, leads to one of the key features of the Court which has contributed to its standing since its establishment and which claims our attention at this workshop.

14. There are two other references to "other common law jurisdictions" in the Basic Law.

(1) First, Article 84 provides that the courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in the Basic Law "and may refer to precedents of other common law jurisdictions". This is a second reference to "other common law jurisdictions" in the Basic Law, expressly stating the power of the Hong Kong courts to draw on the jurisprudence of those jurisdictions.

(2) Secondly, Article 92 provides that judges and other members of the judiciary of the HKSAR "shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions." This is a third reference in the Basic Law to "other common law jurisdictions" and confirms the eligibility of individuals from those jurisdictions, who need not be Chinese nationals, to work as judges in the Hong Kong Judiciary.

15. Under its founding ordinance, the CFA is constituted by the Chief Justice and the permanent judges. To hear a substantive appeal, the Court sits as a bench of five.[2] In addition to the Chief Justice, the number of permanent judges appointed at any one time has not been more than three, so to constitute the full Court, at least one other non-permanent judge is required to sit. The CFA is therefore normally constituted by its four permanent members (the Chief Justice and its three permanent judges) and one non-permanent member (a non-permanent judge from another common law jurisdiction or a non-permanent Hong Kong judge).

16. To be eligible for appointment as an overseas non-permanent judge, the Ordinance provides that he or she must be: (i) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; (ii) a person who is ordinarily resident outside Hong Kong; and (iii) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.[3] Non-permanent judges hold office for terms of three years, and these terms may be extended by the Chief Executive on the recommendation of the Chief Justice.[4]

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[2] Overseas NPJs only sit in substantive appeals and not on the Appeal Committee, which hears applications for leave to appeal as a bench of three.

[3] *Ibid.*, s.12(4).

[4] *Ibid.*, s.14(4).

(1) Qualification requirement (i) is consistent with the continuity of the common law system in Hong Kong under the Basic Law.[5] That common law legal system is one of the features of Hong Kong's separate system reflected in the principle of "one country, two systems" under which the PRC resumed the exercise of sovereignty over Hong Kong in 1997.[6]

(2) Qualification requirements (ii) and (iii) mean that an overseas non-permanent judge will be "foreign" in the sense of non-local.

17. As constituted, each judge of the CFA has an equal say to that of the other members of the Court in the outcome of any appeal. The Court's founding ordinance provides that: "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."[7] So the judgment of an overseas non-permanent judge is but one voice out of five as far as the determination of an appeal is concerned.

18. The inclusion of visiting judges in the CFA is therefore a significant feature of Hong Kong's judicial system. The overseas judge, in substance a foreigner, has an equal say on all final appeals, including appeals by way of constitutional review of legislation and administrative action and in respect of fundamental human rights.

19. Although from other common law jurisdictions, the visiting overseas non-permanent judges are, nevertheless, Hong Kong judges upon their appointment.

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5 Basic Law, Articles 8 and 18.

6 Basic Law, Preamble. For the theme of continuity of the legal and judicial systems in Hong Kong, see also: Basic Law, Articles 19, 81, 86, 87, 91, 93 and 94; *HKSAR v Ma Wai Kwan, David* [1997] 1 HKLRD 761 at 774E, 790D and 800J; and *Secretary for Justice v Lau Kwok Fai* (2005) 8 HKCFAR 304 at [35].

7 (Cap.484), s.16(5).

This is an important feature of their appointment and is underscored by provisions in the Basic Law. Article 88 provides that the appointment of judges of the courts of the HKSAR – and this includes the CFA's non-permanent judges from other common law jurisdictions – shall be by the Chief Executive "on the recommendation of an independent commission", namely the Judicial Officers Recommendation Commission.[8] The Basic Law also requires the Chief Executive, when acting in accordance with a recommendation of the Commission[9] to make the appointment, (i) to obtain the endorsement of the Legislative Council for that appointment and (ii) to report the appointment to the Standing Committee of the National People's Congress of the PRC.[10]

20. That they are Hong Kong judges is also reinforced by the fact that, upon taking up appointment, in practice on the first occasion on which the overseas non-permanent judge comes to Hong Kong to sit, he or she will attend before the Chief Executive to take the same judicial oath taken by all Hong Kong judges "to uphold the Basic Law", to "bear allegiance to the Hong Kong Special Administrative Region" and to serve it "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".[11] This judicial oath is closely similar to judicial oaths taken by judges in other common law jurisdictions and there is nothing incompatible between it and the allegiance owed by a non-Chinese national to his or her foreign sovereign.

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[8] The Judicial Officers Recommendation Commission Ordinance (Cap.92).

[9] This independent commission carries out the functions stipulated in Article 88 of the Basic Law, which provides: "Judges of the courts of the Hong Kong Special Administrative Region shall be 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."

[10] Basic Law, Article 90; see also (Cap.484), s.7A.

[11] Oaths and Declarations Ordinance (Cap.11) s.17 and Schedule 3. The full text of the judicial oath (Schedule 2, Part V) 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."

21. So it bears emphasising that the non-permanent judge, although he or she has acquired that status because of their pre-eminence in another common law jurisdiction, is appointed to be a Hong Kong judge and to discharge a constitutional function as such.

22. Like all other judges in Hong Kong, a non-permanent judge of the CFA may only be removed by the Chief Executive on the recommendation of an independent tribunal consisting of other judges.[12] However, unlike the Chief Justice and permanent judges of the CFA, there is no retirement age for the non-permanent judges.[13] This one difference for the non-permanent judges of the CFA is a reflection of the fact that, save for the two serving UK Supreme Court judges included in the panel, the overseas non-permanent judges are all judges who have reached the statutory retirement ages in their "home" jurisdictions and helps to preserve continuity in the panel of overseas non-permanent judges.

23. There are currently 14 judges on the list of overseas non-permanent judges: ten are from the UK, three from Australia and one from Canada. They are: Lord Hoffmann, Lord Millett, Lord Neuberger of Abbotsbury, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury, Lord Phillips of Worth Matravers, Lord Reed of Allermuir, Baroness Hale of Richmond, Lord Sumption and Lord Hodge from the UK; Justices Murray Gleeson, William Gummow and Robert French from Australia; and Justice Beverley McLachlin from Canada.

24. These judges (as well as the 14 former CFA judges from the UK, Australia and New Zealand) are so well known to most law students and practitioners in any common law jurisdiction that they need little, if any,

[12] Basic Law, Articles 89 and 90; (Cap.484) s.14(8).
[13] (Cap.484), s.14(3).

introduction. Their biographies are published on the CFA's website.[14] They are all very eminent jurists who have made significant contributions to the law of their respective jurisdictions. Consistent with the theme of continuity reflected in the Basic Law, a panel of any five of those judges would certainly be comparable to a panel of members of the Judicial Committee of the Privy Council as at the time of the transfer of sovereignty of Hong Kong on 1 July 1997.

25. That historical context, which helps partly to explain the choice of jurisdictions from which our overseas judges are chosen, is also reflected in the fact that a number of the UK judges had practised in Hong Kong before 1997 on an *ad hoc* basis as members of the English Bar[15] and, to that extent, had some experience of legal practice in this jurisdiction. Similarly, many members of the Hong Kong Bar were admitted by reason of their call to the Bar in England and their English legal qualifications. This, of course, is a feature that is of diminishing relevance but informs the context of the strong interconnection of the legal professions in the two jurisdictions that has been continued by the participation of the UK non-permanent judges in the work of the Court.

26. But it would be wrong not to emphasise that the choice of jurisdictions from which our overseas judges are chosen is principally driven by the quality of the individual judges in question. They are, to put it simply, among the finest common law judges anywhere and each would be an adornment to any court on which they were to sit.

[14] https://www.hkcfa.hk/en/about/who/judges/npjs/index.html and https://www.hkcfa.hk/en/about/who/judges/former/index.html.

[15] Among the overseas non-permanent judges from England, Lord Scott of Foscote, Lord Hoffmann, Lord Millett, Lord Clarke of Stone-cum-Ebony, and Lord Sumption were admitted to appear in Hong Kong courts when they were practising Queen's Counsel.

27. As to the reasons for their inclusion in the Court, in addition to having the participation of a judge who might have sat as a member of the Privy Council, there are perhaps four particular aspects of the role of the overseas non-permanent judge on the CFA that address the question of why it was thought they should be included in the Court.

28. The first aspect is the dimension of judicial experience at the level of a final appellate court. Prior to 1997, there were no Hong Kong judges who had experience of sitting in any court here other than an intermediate court of appeal.[16] The role and function of the CFA as a final appellate court, especially in a jurisdiction where the courts are charged with a duty of constitutional review of laws,[17] is different to that of an intermediate court of appeal. It is not simply 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 and establishing precedents for the lower courts to follow.[18] This was not a capacity in which any Hong Kong judge had prior experience when the CFA was originally established and commenced operation. In contrast, the overseas non-permanent judges sitting on the Court bring a wealth of experience in this respect. This was particularly important in the early years of the Court's existence, when it was building up its initial body of jurisprudence, in particular in constitutional law.

29. The second aspect is the practical ability that the Chief Justice has of assigning cases to particular non-permanent judges, in whose fields of specialty a particular case may lie. The panel of overseas non-permanent judges consists

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[16] The first Chief Justice (Andrew Li Kwok-Nang, Chief Justice from 1997-2010) had deputised in the High Court at first instance and the first three permanent judges (Justices Litton, Ching and Bokhary) had sat as members of the Court of Appeal in Hong Kong at a time when there was no final appellate court sitting within the jurisdiction and before the development of any jurisprudence of such a court.

[17] *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4 at 25F-J.

[18] *Solicitor v Law Society of Hong Kong & Secretary for Justice (Intervener)* (2003) 6 HKCFAR 570 at [27]-[30]; *HKSAR v Cheng Chee Tock Theodore* (2015) 18 HKCFAR 292 at [12]-[17], [31]-[33].

of judges who, both in practice as advocates and on the bench, have specialised in various areas of the law. It is no exaggeration to say that their expertise is recognised worldwide and their judgments are regularly cited as definitive expositions of the common law in diverse fields of law. The panel of overseas non-permanent judges therefore provides a deep pool of specialist expertise on which the Chief Justice can draw when assigning particular overseas judges to particular sitting sessions of the Court during the year and also when the Appeal Committee grants leave to appeal and fixes hearing dates for specific cases in those particular sessions.[19]

30. The third aspect, which very much follows from the second, is the international dimension that the overseas non-permanent judge brings to the Court's deliberations and eventual judgment. As already noted, the Basic Law permits the courts of the HKSAR to refer to precedents of other common law jurisdictions, continuing the previous practice. Having experienced judges from some of those jurisdictions to whose precedents reference is made is an obvious and practical advantage. As is illustrated in my paper, for example, there are occasions when the CFA has benefitted specifically from the presence of an Australian non-permanent judge when considering references to particular precedents from that jurisdiction. The common law has, of course, developed in different ways in different common law jurisdictions and, as noted in my paper, the common law in Hong Kong has sometimes developed in line with one jurisdiction rather than another.[20] It has also, on occasion, taken its own path and developed the common law beyond its existing state.[21] But the participation of the CFA's overseas judges helps to ensure that, where appropriate, the Court's jurisprudence is considered in the context of comparative common law.

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[19] *Tsit Wing (Hong Kong) Co Ltd v TWG Tea Co Pte Ltd* [2016] 2 HKC 157 at [4].

[20] See, e.g., the cases referred to below at [45] et seq.

[21] See, e. g. *Cheng & Another v Tse Wai Chun* (2000) 3 HKCFAR 339 concerning the defence of fair comment in the law of defamation, and *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 concerning the doctrine of joint criminal enterprise.

31. The fourth aspect is the demonstration of confidence in the rule of law in Hong Kong and the independence of the Hong Kong Judiciary. Both as a matter of substance and of public perception, this is a critically important role played by the overseas non-permanent judges. By their participation in the work of the CFA, and also their public statements about their own experiences as Hong Kong judges, the overseas non-permanent judges provide a valuable external affirmation of the health of the rule of law in Hong Kong and the independence both of the Court and the Hong Kong Judiciary. It is perfectly reasonable to ask whether any of these eminent serving[22] and retired overseas judges would have sat, or continue to sit, in a court in Hong Kong if they thought the rule of law was in any way compromised or the judges were subject to improper interference.

32. What then are the principal benefits that have accrued to the Court from the participation of its foreign judges?

33. Given their quality as judges of the highest calibre, the participation of the individuals making up the panel of overseas non-permanent judges on any court would be a significant benefit. More particularly, though, the standing of any court and its jurisprudence is primarily, if not solely, to be measured by the quality of its judgments and it is in this respect that the overseas non-permanent judges make their most direct contribution to the work of the Court. There are two ways in which they do so: first and foremost, in writing a judgment; and secondly, in collegiate discussions contributing to a judgment written by another member of the Court.

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[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.

34. The first and most direct way in which an overseas non-permanent judge influences the work of the CFA is in writing a leading or concurring judgment or in contributing to a joint judgment of the Court as a whole. This helps enhance the standing of the Court both within and outside this jurisdiction. The judgments which the overseas non-permanent judges have written or to which they have contributed are significant and establish important binding precedents on the courts of Hong Kong in all areas of the law. As shown by the examples referred to in my paper, their judgments have also been cited and applied in final appellate courts in other common law jurisdictions.[23]

35. The second way in which an overseas non-permanent judge influences the jurisprudence of the Court, that is by way of collegiate discussions leading to the Court's decisions, is subtler but nevertheless very real. This is an indirect way in which the overseas non-permanent judges shape the eventual judgment or judgments that decide a particular appeal. The CFA has been described, accurately, by its first Chief Justice, Andrew Li, as a "collegiate" court[24] and this involves extensive discussion of a case before, during and after a hearing amongst the participating judges. The collegiality and practice of the CFA also

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[23] See, by way of example, in:

(A) The UK: *Joseph v Spiller* [2011] 1 AC 852 citing Lord Nicholls' judgment in *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339; *Williams v Central Bank of Nigeria* [2014] AC 1189 citing Lord Hoffmann's judgment in *Peconic Industrial Development Ltd v Lau Kwok Fai* (2009) 12 HKCFAR 139; *Bilta (UK) Ltd (In Liquidation) v Nazir* [2016] AC 1 citing Lord Walker's judgment in *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218; *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 citing Lord Millett's judgment (and others) in *Polyset Ltd v Panhandat Ltd* (2002) 5 HKCFAR 234;

(B) Australia: *Channel Seven Adelaide v Manock* (2007) 232 CLR 245 citing Lord Nicholls' judgment in *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339; *Momcilovic v The Queen* (2011) 245 CLR 1 citing Sir Anthony Mason's judgment in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574;

(C) New Zealand: *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] 2 NZLR 289 citing Sir Anthony Mason's judgment in *Shiu Wing Ltd v Commissioner of Estate Duty* (2000) 3 HKCFAR 215; *Trends Publishing International Ltd v Advicewise People Ltd* [2018] 1 NZLR 903 citing Lord Millett's judgment in *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* (2001) 4 HKCFAR 358; *Craig v Williams* [2019] 1 NZLR 457 citing Lord Reed's judgment in *Jonathan Lu v Paul Chan Mo Po* (2018) 21 HKCFAR 94; and

(D) Canada: *R v Boulanger* [2006] 2 SCR 49 citing Sir Anthony Mason's judgment in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381; *WIC Radio Ltd v Simpson* [2008] 2 SCR 420 citing Lord Nicholls' judgment in *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339.

[24] *Hong Kong's Court of Final Appeal* (CUP, 2014) at p.260.

reflects what is now the established practice in the High Court of Australia (as Mr Justice Gummow describes in his paper). Even if they are not writing, the overseas non-permanent judges all contribute to a greater or lesser extent in each appeal.

36. In addition to the benefits from the work undertaken by the overseas non-permanent judges within the CFA, they also contribute positively to the standing of the Court and the independence of the Judiciary. This they have done through various speaking engagements and articles about their experiences as judges of the CFA. It is also an inevitable by-product of their continuing judicial careers here in Hong Kong that, in discussions on matters of law with their colleagues and legal connections in their home jurisdictions, they are likely to refer to any relevant decisions of the CFA and thereby propagate the jurisprudence of the Court in those wider legal circles.

37. The inclusion of foreign judges in the CFA has, it is generally acknowledged, been highly successful and it has been to Hong Kong's great advantage to have had distinguished visiting judges from overseas participating in the work of the Court. The contribution of those judges, collectively, to the continuing development of the law of Hong Kong since 1997 can fairly be described as immense. In the 23 years since its establishment, the CFA has, as I have already mentioned, heard over 730 final appeals and an overseas non-permanent judge has sat in all but 13 of those appeals. Undoubtedly, the standing of the Court has been, and continues to be, raised by their participation. From a Hong Kong judge's point of view, it is a privilege and a pleasure to sit with them and they have our full respect, admiration and gratitude. It would be a loss to the CFA, and to the Hong Kong Judiciary, if they were no longer to participate.

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