

USALI Perspectives

A Reputation Tarnished: Reflections on the Resignation of Overseas Judges from Hong Kong's Court of Final Appeal

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Hong Kong has been privileged to have a panel of eminent overseas judges to serve as non-permanent judges of its Court of Final Appeal (CFA). The willingness of overseas judges to serve on the CFA was seen as a vote of confidence in the constitutional model of “One Country, Two Systems” (OCTS), in which a common law legal system and its values were to be preserved within a socialist sovereign. Until recently, this distinguished group included Lord Reed

and Lord Hodge, the president and vice president of the UK Supreme Court.

On July 1, 2020, the National People's Congress enacted the [National Security Law](#) (NSL) for Hong Kong without any effective public consultation. The NSL introduced sweeping criminal offenses, including subversion, secession, and “collusion” with foreign forces. On July 17, 2020, [Lord Reed expressed concerns](#) regarding the NSL but indicated that he would wait to see how it was applied in practice. Even when Lady Hale, former

president of the UK Supreme Court, declined (in August 2021) to be re-appointed to the CFA, Lord Reed **maintained his view** that “the judiciary in Hong Kong continues to act largely independent of the government and their decisions continue to be consistent with the rule of law.”

Yet seven months later, on March 30, 2022, **Lord Reed and Lord Hodge both tendered their resignations** from Hong Kong’s CFA with immediate effect. While noting that “judges in Hong Kong continue to be internationally respected for their commitment to the rule of law,” they assessed that the continued participation of judges of the UK Supreme Court would appear to “endorse an administration which has departed from values of political freedom, and freedom of expression.” This is the first time that overseas judges have expressly cited the NSL as a reason for resigning from the CFA.

The government of the Hong Kong Special Administrative Region (HKSAR) **vehemently refuted the accusation** as “unfounded” and “biased” and blamed British politicians for putting “undue political pressure” on the judges. Lord Reed rebutted these claims in **subsequent remarks to a committee of the UK House of Lords on April 6, 2020**, stating that he would have resigned from the court even if he were not a serving justice of the UK Supreme

Court. Meanwhile, the remaining overseas judges, including some former chief justices of the UK, Australia, and Canada, have expressed their willingness to continue to serve on the CFA.

Distinction between the Judiciary and the Government

In his latest statement, Lord Reed drew a distinction between the Hong Kong judiciary and the local government. While he expressed continued support for the judiciary, he said judicial independence is under threat if the government does not support fundamental rights. As a matter of principle, it is understandable that an overseas judge would not wish to lend support to an authoritarian regime. The question is whether Hong Kong has reached this state. While this is necessarily a matter of individual assessment, there are sufficient grounds for the two resigning judges to make this assessment.

First, a large number of opposition politicians and activists have been arrested and denied bail. The authorities have pursued their prosecution rigorously, using an array of offenses under the NSL and the Public Order Ordinance, as well as some archaic offenses under the Crimes Ordinance. Between August 2021 and March 2022, defendants have been prosecuted and convicted of incitement

to secession (HKSAR v Ma Chun Man [2021] HKDC 1325); uttering seditious words (HKSAR v Tam Tak Chi [2022] HKDC 208); and incitement to participate in an unauthorized assembly (HKSAR v Chow Hang Tung [2022] HKMagC 1) for entirely peaceful acts. [Speech therapists who published cartoon books](#) for children about activist sheep have been charged (although not yet convicted) with sedition and denied bail. Even members of the public have been [arrested and accused of sedition for clapping their hands in court](#). Fearing prosecution, numerous media and civil society organizations have disbanded, noting that the line between what is legal and what is not is now blurred and constantly moving.

Lord Reed's statement may have been carefully crafted to send a warning message to the judiciary, whose record since the enactment of the NSL is far from encouraging. For example, Hong Kong's CFA affirmed the reversal of the presumption of bail and set a high threshold for granting bail in NSL cases, resulting in a large number of accused being held for lengthy periods of pre-trial custody. The Court of Appeal also downplayed the significance of jury trial to no more than a mode of trial and accepted, without question, a certificate of the secretary for justice demanding a trial without jury ([HKSAR v Tong Ying Kit \[2021\] HKCA 912](#)). At the trial court level, chanting a slogan has been

held to constitute incitement to secession, while holding a banner at the beginning of an unauthorized but peaceful demonstration was sufficient to support a charge of organizing an unauthorized assembly (HKSAR v Lai Chee Ying [2021] HKDC 398). Local judges have also imposed heavy custodial sentences even when there was no violence or threat of violence.

In this environment, it is entirely fair to question the continued role of overseas judges on Hong Kong's CFA. In recent years, the CFA has generally issued collective and impersonalized judgments of the court, which make it difficult for the public to appreciate the broad range of discussions among the members of the court. It is unnecessary, and indeed unhealthy for the development of the law, to strive for unanimity for the sake of unanimity. If overseas judges remain on the CFA then they should not hesitate to deliver a separate or even dissenting opinion whenever appropriate, in order to dispel any suggestion of endorsing authoritarian restrictions on civil liberties and the right to fair trial.

Impact of the Resignations

In the short term, the willingness of the remaining overseas judges to continue to serve on the CFA may have mitigated the impact of the resignations. Some of them probably did so to avoid the damage to the judiciary that could have

been caused by resignations *en masse*. The litmus test is whether these remaining judges will accept further appointments upon the expiry of their current terms. In any event, the reputation of Hong Kong's legal system is tarnished and it will become increasingly difficult to recruit overseas judges of similar stature to join the CFA, as well as to recruit local judges at all levels.

While it is unnecessary to exaggerate the negative effect of the resignations, it

is equally naïve to deny its impact. Hong Kong's judiciary rightly responded by reiterating its continued commitment to the rule of law and judicial independence. However, when the local government adopts a defensive response and when prosecutors are prepared to rigorously pursue every conceivable violation of the NSL, the judiciary is in a precarious position. The resignations serve as a timely reminder that respect for the rule of law is judged not by what is said, but by what is done.



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