



LENDING PRESTIGE TO PERSECUTION:

HOW FOREIGN JUDGES ARE UNDERMINING HONG
KONG'S FREEDOMS AND WHY THEY SHOULD QUIT

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FREEDOMHK

THE COMMITTEE FOR FREEDOM
IN HONG KONG FOUNDATION

About us

The Committee for Freedom in Hong Kong Foundation (CFHK Foundation) presses for political and economic consequences for China's failure to keep its promises to respect Hong Kong's freedoms. We argue for the rule of law, freedom of expression and the release of political prisoners.

We focus on adherence to the law in a free and open environment and the competition between authoritarian and democratic values. Hong Kong is important in its own right as well as in the context of relations between China and the rest of the world. The CFHK Foundation is a transatlantic non-governmental organisation with offices in the United Kingdom and the United States.

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Executive Summary

A vestige of British colonial rule allows common law judges from outside of Hong Kong to serve on the Hong Kong Court of Final Appeal. There are currently nine foreign non-permanent judges (“NPJs”) serving on the court from Australia, Canada, and the United Kingdom.

Historically, under the Basic Law, the presence of overseas NPJs has benefited the Hong Kong judiciary and the standing of the Court. Since the introduction of the National Security Law and Article 23 legislation in Hong Kong, however, the legal system in Hong Kong has been reshaped to serve the Chinese Communist Party’s authoritarian regime. At this point, the overseas NPJs provide little if any benefit to the remaining vestiges of the city’s rights-based order. Instead, the Hong Kong authorities are using the prestige of the retired judges who sit on the Court of Final Appeal to legitimise their human rights abuses and the undermining of Hong Kong’s rule of law.

This report makes the case for why the overseas NPJs should resign. These judges purport to be committed to constitutionalism and human rights, but as Hong Kong’s authoritarian regime and court system have systematically infringed on the rights of Hongkongers in recent years, they are now merely lending their and their nations’ reputations to legitimise the crackdown.

Hong Kong’s judiciary is no longer independent from the government.

Hong Kong’s judiciary is no longer truly independent. Beijing exerts strong influence over the judiciary through multiple channels. Most directly, it retains the power to “interpret” the Basic Law and National Security Law, allowing it to overturn “final” decisions of the Court of Final Appeal. Beijing has repeatedly used this power to interfere with court rulings. Additionally, the Beijing-appointed Chief Executive has authority over judicial appointments and promotions, a power that has been used to ensure that the Courts reward those who support the regime and sideline those who do not. Finally, the city’s Legislative Council retains the authority to restrict the authority of the courts, and since an election “reform” in 2021 that gave Beijing unfettered power over the Legislative Council, that power now effectively rests with Beijing as well.

Faced with the reality of Beijing’s power over the judiciary, the Court of Final Appeal has shown itself to be highly reluctant to challenge government abuses of the law, particularly with respect to the crackdown on civil liberties and vast numbers of political prosecutions of dissidents. The Court is selective in the cases it chooses to hear, typically refusing to hear appeals from political dissidents while granting many government requests for leave to appeal. And when the Court hears these government appeals, with very few exceptions it has ruled in the government’s favour.

Some overseas judges have ruled unjustly against political dissidents.

Some overseas NPJs have also directly participated in political cases and ruled against political dissidents. These rulings are particularly problematic as they are used by the government to provide legitimacy to the crackdown.

In one notable case, Judge Gleeson and four colleagues voted to reimpose human rights activist leader Chow Hang-tung's conviction for inciting an unauthorised assembly. The unauthorised assembly was the annual candlelight vigil for victims of the 1989 Tiananmen Square Massacre, a tradition long practiced in Hong Kong but banned since 2020. The charges and conviction were a clear instance of political persecution against a respected human rights leader, intended only to imprison and silence her, with irregularities and problematic evidence presented throughout the trial. Judge Gleeson voted to reimpose the conviction anyway. Chow is now serving a 15-month sentence in the case (while also awaiting trial in a separate case for subversion under the National Security Law).

Lord Hoffmann, an active member of the House of Lords, was instrumental in reinstating the conviction of a man only accused of filming others who were following a police officer. A panel of the Court including Lord Hoffmann ruled that a person can be convicted of unlawful assembly without ever intending to take part in the unlawful assembly. This case showed the blurred boundaries between "unlawful" participants in a disturbance and those merely seeking to document events. The defendant had been filming protests since June 2019 in hopes that the footage would be used by news sites and included in documentaries. Thanks to Lord Hoffmann and his colleagues' ruling, the defendant was sentenced to three months' imprisonment.

Altogether, the overseas NPJs have directly ruled against political defendants at least five times. For reasons discussed further in this report, each of these instances has been problematic both legally and ethically. They represent the starkest examples of how the government uses their presence on the Court to further its crackdown.

There are irreconcilable conflicts between serving both in the House of Lords and on the Court of Final Appeal

An additional issue exists with respect to the four overseas NPJs who are members of the House of Lords in the United Kingdom: These dual roles pose conflicts that are difficult if not impossible to reconcile.

British Lords take an oath of allegiance to the Crown and must consider legislation that comes through the chamber in accordance with that oath. When they take up positions in Hong Kong as overseas NPJs, they must also take an oath of allegiance to Hong Kong. While historically these dual oaths posed little concern, the interests of China and the UK are increasingly in conflict. It has thus become difficult to reconcile allegiance to the Crown via the House of Lords with allegiance to the Hong Kong government.

These conflicts are not hypothetical, as issues of China's (and by extension, Hong Kong's) contentious relationship with the UK frequently come up in the House of Lords. In January 2021, for example, the National Security and Investment Act had its first reading in the House of Lords, and the parliamentary debate repeatedly referenced the risks Chinese firms and capital posed to the UK. In another problematic instance, on November 17, 2022, the House of Lords held a debate on the question of "what assessment His Majesty's Government have made of allegations of human rights abuses in China." The debate repeatedly invoked the

ongoing human rights abuses in Hong Kong—some of which the Lords who are Overseas NPJs had directly participated in.

Finally, these conflicts have presented themselves via recently revised requirements in the House of Lords to disclose remuneration from foreign governments. During the chamber's debate over the rule change in 2021, Lord Neuberger stood to oppose the new disclosure rule. He noted how it might affect his role as an international arbitration lawyer but did not disclose the more notable and potentially controversial effect the rule would have on him: requiring him to disclose his salary and benefits from the Hong Kong government.

The new disclosure rule took effect in October 2021, but would not apply to Lords who were on a leave of absence. Lord Collins took leave of absence in September 2021, Lord Phillips took a leave of absence in December 2021, and Lord Neuberger took a leave of absence in January 2022—in each case before they were required to declare their financial benefits from the Court of Final Appeal. Lord Hoffmann has not taken a leave of absence, but nonetheless has still failed to register his financial remuneration from the Hong Kong government in apparent violation of the rule.

Recommendations

Based on these findings, the Committee for Freedom in Hong Kong Foundation recommends:

Overseas non-permanent judges

1. The remaining overseas NPJs should step down from the Hong Kong Court of Final Appeal due to the severe erosion of human rights, judicial independence, and rule of law in Hong Kong. They would be following in the footsteps of their three colleagues who stepped down in 2022 due to concerns that their presence on the court was legitimising Hong Kong's authoritarian regime.

Common law governments

2. The governments of the United Kingdom, Canada, Australia, and New Zealand should actively discourage their citizens from taking positions on the Hong Kong courts. Any citizens who do take positions on these courts should be restricted from serving in public positions and commissions in their home countries due to the potential for conflicts of interest.

House of Lords

3. In line with the House of Lords' existing Code of Conduct, judges who are members of the House of Lords should declare their financial interests from the Hong Kong Court of Final Appeal including specified salary ranges. Peers who fail properly to declare their interest as required by the current Code should be subject to parliamentary sanctions.
4. The House of Lords should also revise its Code of Conduct to require its members who take a leave of absence to continue to register all foreign government financial interests with the specified salary ranges.

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I. Introduction

On November 23, 2020, Lord David Neuberger of Abbotsbury joined human rights dignitaries of the International Bar Association's High-Level Panel of Legal Experts on Media Freedom—a group he had created—for an online video event celebrating the launch of the Panel's latest report¹. Neuberger is the former President of the UK Supreme Court, and currently sits as an overseas Non-Permanent Judge (“NPJ”) on the Hong Kong Court of Final Appeal (“CFA”).

The judge sat quietly while speaker after speaker stressed the critical importance of human rights and media freedom. Then, as the esteemed founder of the panel, Lord Neuberger offered closing remarks. He said:

“Journalists, alas, are more at risk than they have been at a long time. And at a time when freedom of speech and freedom of expression could not be more important and more valuable, it is therefore vital that we take steps - not merely talk about it, but take steps - to ensure that freedom of expression is maintained and journalists are free to carry on their trade, and the public are free to know what’s going on, because that is what journalists are there for².”

Just one month later, on December 31, 2020, Lord Neuberger's colleagues on the Hong Kong CFA revoked Jimmy Lai's bail and ordered him to prison³. Lai, the founder of pro-democracy newspaper Apple Daily, was charged under Hong Kong's national security and sedition laws in a case stemming from the dissenting political views expressed in his media outlet⁴.

Since that day, Jimmy Lai hasn't seen freedom—and he may never see it again. Many of Lai's media colleagues were imprisoned alongside him, awaiting prosecution in

¹ <https://www.ibanet.org/Safe-Refuge-report-launch-2020#video>

² *Id.*, at 1:00:25-1:00:59.

³ <https://www.reuters.com/world/china/hong-kongs-top-court-puts-media-tycoon-jimmy-lai-back-custody-2020-12-31/>

⁴ <https://www.amnesty.org/en/latest/news/2023/12/hong-kong-jimmy-lais-sham-trial-a-further-attack-on-press-freedom/>

Hong Kong's courts. Most independent media outlets in the city have been forced to close,⁵ and countless journalists and dissidents have gone into exile⁶.

All along, the Judiciary has played a crucial role in this crackdown on Hongkongers' rights. Yet Neuberger continues to sit on its highest court, the CFA. In fact, in March 2022, as the Hong Kong Judiciary continued to oversee the imprisonment of more than 1,800 political prisoners,⁷ Neuberger declared in a joint statement with other British NPJs that he was "entirely satisfied" with the integrity of the Court⁸.

The jarring contrast between Lord Neuberger's lofty words on global human rights and his failure to protect these rights in the court on which he has actual judicial authority offers but one snapshot of the unprecedented conflicts and problems posed by the continued refusal of nine British, Australian, and Canadian justices to resign from the CFA. It is understandably a source of pride to these judges that they and the legal systems they come from are so well respected. By remaining on the CFA, however, they lend their prestige to a justice system that has been undermined and co-opted by Beijing in its relentless efforts to exert total control over Hong Kong.

Hong Kong's overseas NPJs have historically served as a symbol of common law continuity and support for rule of law. However, the evolving geopolitical landscape in which there are increasing tensions between China and Western democracies necessitates a re-evaluation of the suitability of such appointments. In this climate, these judges find themselves in an increasingly precarious position, where their obligations to uphold the interests of two opposing entities can often come into direct conflict.

In this report, we first provide an overview of the Court of Final Appeal (CFA), its unconventional overseas Non-Permanent Judges (NPJs) arrangement, and a list of the current overseas NPJs sitting on the CFA. We then highlight the problems this arrangement poses in an increasingly illiberal city, one in which rule of law and the judiciary are seriously compromised. We refute the claims made by the overseas NPJs

⁵ <https://hongkongfp.com/2022/06/30/explainer-over-50-groups-gone-in-11-months-how-hong-kongs-pro-democracy-forces-crumbled/>

⁶ https://www.ifj.org/fileadmin/user_upload/Journalists_In_Exile_-_A_Survey_of_Media_Workers_in_the_Hong_Kong_Diaspora.pdf

⁷ <https://www.hkdc.us/hong-kong-political-prisoners>

⁸ <https://www.scmp.com/news/hong-kong/politics/article/3172534/hong-kong-leader-accuses-britain-meddling-judicial>

that the CFA retains its independence from Beijing and is protecting the rule of law, and we highlight instances in which conflicts have arisen and will continue to arise due to British NPJs' competing allegiances to Hong Kong and the British Crown. Ultimately, our findings lead to an inescapable conclusion: that overseas NPJ appointments to the Hong Kong CFA must end.

Background

A. Overview of overseas non-permanent judges on the Court of Final Appeal

The CFA is the highest appellate court in Hong Kong. It was established on July 1, 1997, following the British handover of Hong Kong to China, and replaced the UK's Judicial Committee of the Privy Council as the "superior court of record" in the territory⁹.

The Court has both permanent and non-permanent appointees¹⁰. Most of these non-permanent judges, or NPJs, have been appointed from foreign common law jurisdictions, and have historically included judges who remain active in their home jurisdictions as well as those who have retired¹¹. Foreign common law courts typically must assent to serving judges sitting on Hong Kong courts, most notably via the September 1997 agreement between the CFA and the British Government to provide two active Law Lords to the CFA¹². Retired judges can choose to sit in their private capacities. As of April 2024, the CFA includes nine overseas NPJs from the United Kingdom, Australia, and Canada, all of whom are retired judges from these jurisdictions¹³.

This arrangement is rare but not unique to Hong Kong. UK judges have historically served on courts in other common law jurisdictions, notably New Zealand, Samoa, Kiribati, the Cook Islands, and Fiji¹⁴.

⁹ Court of Final Appeal Ordinance, § 3. <https://www.elegislation.gov.hk/hk/cap484!en>

¹⁰ *Id.*, § 5.

¹¹ See <https://www.hkcfa.hk/en/about/who/judges/former/index.html>

¹² <https://www.scmp.com/article/210579/british-law-lords-sit-top-court>

¹³ <https://www.hkcfa.hk/en/about/who/judges/npjs/index.html>

¹⁴ Dziedzic, Anna., & Young, Simon, N.M. (2023). *The Cambridge Handbook of Foreign Judges on Domestic Courts*. Cambridge University Press.
https://books.google.co.uk/books?id=883eEAAAQBAJ&q=HKCFA&source=gbs_word_cloud_r&cad=4#v=onepage&q&f=false

When foreign judges sit on the CFA, they are required by law to pledge allegiance to the Hong Kong Special Administrative Region of the People's Republic of China¹⁵.

The CFA typically has jurisdiction over two types of proceedings: applications for leave to appeal and, if leave is granted, the appeals themselves. Overseas NPJs are not typically invited to sit on applications for leave to appeal, but once leave is granted, one overseas NPJ typically sits on the five-judge panel to hear the appeal¹⁶. With the exception of 13 cases over its 26-year history, the CFA has heard all appeals with one overseas NPJ sitting on the bench¹⁷.

In March 2022, after consultations between the UK Foreign Secretary, Justice Secretary, and President of the Supreme Court, the UK government and judiciary jointly announced that active UK judges would withdraw from the Hong Kong Court of Final Appeal. In a joint statement, Justice Secretary Dominic Raab said he had concluded that “it is no longer appropriate for serving UK judges to continue sitting in Hong Kong’s courts,” while Foreign Secretary Liz Truss noted that there had been “a systematic erosion of liberty and democracy in Hong Kong” and that the 2020 National Security Law was being used to “undermine the fundamental rights and freedoms of the people of Hong Kong¹⁸.”

Simultaneously, UK Supreme Court President Lord Reed—who was at that time serving on the Court of Final Appeal—released a statement on behalf of himself and the only other active UK judge still on the CFA, Lord Hodge:

“I have concluded, in agreement with the government, that the judges of the Supreme Court cannot continue to sit in Hong Kong without appearing to endorse an administration which has departed from values of political freedom, and freedom of expression, to which the Justices of the Supreme Court are

¹⁵ Oaths and Declarations Ordinance, Cap. 11, Schedule 2, Part V.

https://www.elegislation.gov.hk/hk/cap11!en?xid=ID_1438402570970_001

¹⁶ <https://www.info.gov.hk/gia/general/202107/07/P2021070700538.htm>

¹⁷ Joseph Fok, *Judges from Other Common Law Jurisdictions on the Hong Kong Court of Final Appeal*.

<https://www.cambridge.org/core/books/abs/cambridge-handbook-of-foreign-judges-on-domestic-courts/judges-from-other-common-law-jurisdictions-on-the-hong-kong-court-of-final-appeal/CFF92B121A0146428C0DCA2FB01DA0D1>

¹⁸ Gov.UK. (2022). *Foreign Secretary supports the withdrawal of serving UK judges from the Hong Kong Court of Final Appeal*. Gov.UK. <https://www.gov.uk/government/news/foreign-secretary-supports-the-withdrawal-of-serving-uk-judges-from-the-hong-kong-court-of-final-appeal>

deeply committed. Lord Hodge and I have accordingly submitted our resignations as non-permanent judges of the HKCFA with immediate effect¹⁹.”

This decision did not, however, affect the retired British judges still sitting on the court. Immediately following the withdrawal of Lords Reed and Hodge, the five remaining retired British judges released a statement refusing to resign, stating that they were “entirely satisfied” with the independence and integrity of the judiciary²⁰.

Are they really “entirely satisfied” with the judiciary, or could their judgment be affected by the significant salary and benefits they receive as compensation? While Overseas NPJs have gone to great lengths to hide their compensation (see Section III-B, below), permanent judges on the CFA receive £37,000 per month with additional perks and benefits.²¹ It stands to reason that compensation for Overseas NPJs is similar or even higher.

¹⁹ <https://www.supremecourt.uk/news/stories/role-of-uk-judges-on-the-hong-kong-court-of-final-appeal-update-march-2022.html>

²⁰ <https://www.scmp.com/news/hong-kong/politics/article/3172534/hong-kong-leader-accuses-britain-meddling-judicial>

²¹ https://www.legco.gov.hk/yr2022/english/brief/aw275010015001_20221026-e.pdf

B. Current overseas non-permanent judges (NPJs)

There are currently five British, three Australian, and one Canadian foreign judge sitting on the Hong Kong Court of Final Appeal.

James Allsop AC²²

James Allsop, the former Chief Justice of the Federal Court of Australia, has been named to the court and is due to be sworn in this year. Hong Kong's Chief Executive, John Lee, described Allsop as "a judge of eminent standing and reputation²³."

Patrick Anthony Keane AC KC²⁴

Patrick Anthony Keane is also a former Chief Justice of the Federal Court of Australia and current chair of the Expert Advisory Group to the Administrative Appeals Tribunal in Australia. He was appointed in 2023 and endorsed by Chief Executive John Lee and the Hong Kong Legislative Council²⁵. He is the first foreign judge to be appointed since the implementation of the 2020 National Security Law. His appointment follows the resignation of three foreign judges, including Lords Reed and Hodges as noted above.

Robert Shenton French AC²⁶

Robert Shenton also served as Chief Justice of Australia before becoming a non-permanent judge on the CFA in 2017.

William Montague Charles Gummow AC KC²⁷

William Gummow, who served as a Justice of the High Court of Australia, became a non-permanent judge in 2013. His term of office was renewed in 2022 for three additional years²⁸.

²² <https://www.atkinchambers.com/people/the-hon-james-allsop-ac/>

²³ https://www.news.gov.hk/eng/2024/03/20240325/20240325_185350_215.html

²⁴ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_77.html

²⁵ <https://www.info.gov.hk/gia/general/202301/13/P2023011300281.htm>

²⁶ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_56.html

²⁷ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_20.html

²⁸ <https://www.info.gov.hk/gia/general/202205/06/P2022050600222.htm>

Beverley McLachlin PC CC²⁹

Beverly McLachlin served as the Chief Justice of Canada before becoming a non-permanent judge of the CFA in 2018. She was reappointed for a second three-year term in 2021³⁰. Her contract runs until June 2024.

Lord Jonathan Sumption³¹

Lord Sumption is a former Justice of the UK Supreme Court and was appointed to the CFA in December 2019. Unlike the other British overseas NPJs, he has a judicial courtesy title but is not a member of the House of Lords³².

Lord Nicholas Phillips of Worth Matravers KG GBS PC³³

Lord Phillips of Worth Matravers is the former President of the UK Supreme Court and former president of the Qatar International Court. Lord Phillips was appointed to the CFA in 2012. He has taken a leave of absence from the UK House of Lords. His contract for the CFA runs until September 2024.

Lord Lawrence Anthony Collins of Mapesbury PC FBA³⁴

Lord Collins is a former Justice of the UK Supreme Court and was appointed to the CFA in 2011. He has taken a leave of absence from the UK House of Lords.

Lord David Neuberger of Abbotsbury GBS PC HonFRS³⁵

Lord Neuberger is the former president of the UK Supreme Court. He is also the founder and current Chair of the International Bar Association's High-Level Panel of Legal Experts on Media Freedom³⁶. He was appointed to the CFA in 2009. He has taken a leave of absence from the UK House of Lords.

Lord Leonard Hubert Hoffmann GBS PC

Lord Hoffmann is the former Lord of Appeal in Ordinary and is the only British NPJ not to have taken a leave of absence from the House of Lords. Thus, he remains a current

²⁹ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_61.html

³⁰ <https://www.info.gov.hk/gia/general/202107/16/P2021071600506.htm>

³¹ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_63.html

³² <https://www.theguardian.com/law/2015/aug/06/jonathan-sumption-brain-of-britain>

³³ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_18.html

³⁴ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_16.html

³⁵ https://www.hkcfa.hk/en/about/who/judges/npjs/index_id_14.html

³⁶ <https://www.ibanet.org/HRI-Secretariat/Who-we-are#WhoWeAre>

sitting member. He was appointed in 1998 and is the longest serving overseas NPJ on the Hong Kong Court of Final Appeal.

C. Prior concerns raised by international parliamentarians about Overseas NPJs on the Court of Final Appeal

There have been ongoing discussions across the UK, Australian, and Canadian parliaments about the role of retired judges on the CFA since the implementation of Hong Kong's National Security Law (NSL). In the UK alone, at least four debates have raised the status of British judges on the CFA since 2021: In March 2021 in the House of Lords,³⁷ and in the House of Commons in March 2022,³⁸ June 2023,³⁹ and January 2024⁴⁰.

In the most recent instance in January 2024, Tim Loughton MP held a debate on "Human Rights in Hong Kong" which saw four cross-party MPs flag the issue of British judges sitting on Hong Kong courts⁴¹.

Sir Robert Buckland MP, former Lord Chancellor Secretary of State for Justice, said the decision to remove serving judges from the CFA was "not just an important decision in legal terms; it is the United Kingdom sending a very clear message that we will not be party to giving regimes that are sliding into tyranny any shred of respectability whatever⁴²."

In Australia, in February 2023 the Department of Foreign Affairs and Trade held a committee meeting that discussed the role of Australian judges on the CFA. Senator David Fawcett remarked that "the argument which is often put forward, which is that they can be a moderating influence, is undermined by the fact that when it comes to the national security law, they are often excluded or on a panel of five judges where

³⁷ <https://hansard.parliament.uk/lords/2021-03-22/debates/B84D8898-87D7-4716-AE01-60B21A0C7381/HongKongCourtsBritishJudges>

³⁸ <https://hansard.parliament.uk/commons/2022-03-30/debates/D706ABB2-F478-4AE9-8F86-4CE0C13C5DBD/BritishAndOverseasJudgesHongKong>

³⁹ <https://hansard.parliament.uk/commons/2023-06-28/debates/911DC7C5-1A33-447E-9FDA-913851FBC932/HongKongNationalSecurityLawAnniversary>

⁴⁰ <https://hansard.parliament.uk/commons/2024-01-23/debates/8AE25AAF-9A21-41B4-ADEB-042A4A0F3886/HumanRightsInHongKong>

⁴¹ <https://hansard.parliament.uk/commons/2024-01-23/debates/8AE25AAF-9A21-41B4-ADEB-042A4A0F3886/HumanRightsInHongKong>

⁴² <https://hansard.parliament.uk/commons/2022-03-30/debates/D706ABB2-F478-4AE9-8F86-4CE0C13C5DBD/BritishAndOverseasJudgesHongKong>

four are normally locally appointed judges, which means they will have minimal, if any, influence⁴³.”

And in Canada, in February 2021, the Canadian Parliament's Special Committee on Canada-China Relations released a report entitled, “Breach of Hong Kong’s High Degree of Autonomy: A situation of International Concern⁴⁴.” The main body of the report did not discuss overseas NPJs, but in a nod to the ongoing debate on the issue, the Conservative Party members of the Committee provided a supplementary opinion to the report in which they recommended:

“The Minister of Foreign Affairs and the Minister of Justice should begin consultations about when to review whether it continues to be appropriate for a Canadian judge, the Hon. Beverley McLachlin, to continue to sit as a non-permanent judge on the Hong Kong Court of Final Appeal (CFA), in light of the resignation of the Hon. James Spigelman from the CFA last September and the consultations regarding the CFA initiated by UK Foreign Minister Dominic Raab.”

Thus, the issue of overseas NPJs serving on the CFA and the consequences of that service have been a matter of substantial debate in the home countries of the remaining NPJs.

⁴³https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=committees/estimate/26534/&sid=0002

⁴⁴<https://www.ourcommons.ca/Content/Committee/432/CACN/Reports/RP11129908/cacnrp02/cacnrp02-e.pdf>

II. Argument

A. *Overseas NPJs' claims that the CFA is preserving rule of law and judicial independence are false.*

In the face of calls for their resignation, many of the overseas NPJs have claimed that Hong Kong's rule of law and judicial independence remain strong despite the government's authoritarian crackdown.

In December 2023, Canadian judge Beverly McLachlin told *The Globe and Mail*, "The court is doing a terrific job of helping maintain rights for people, insofar as the law permits it, in Hong Kong⁴⁵."

In March 2022, after the resignations of active British judges Lord Reed and Lord Hodge, the three Australian judges then serving on the court—Justices French, Gleeson, and Gummow—jointly told the press: "We do not intend to resign, and we support the judges of the Court of Final Appeal in their commitment to judicial independence⁴⁶." Judge French reiterated this stance in July 2023: "As previously stated, I support the judges of the Court of Final Appeal in their commitment to maintaining judicial independence⁴⁷."

Also in March 2022, in response to the withdrawal of Lords Reed and Hodge, the remaining five British judges on the court—Lords Sumption, Neuberger, Hoffmann, Phillips, and Collins, all of whom were retired from the UK bench and thus unaffected by the UK Supreme Court's decision—jointly issued a statement to the press declaring, "At a critical time in the history of Hong Kong, it is more than ever important to support the work of its appellate courts in their task of maintaining the rule of law and reviewing the acts of the executive⁴⁸." They further stated that they were "entirely satisfied" with the independence and integrity of the CFA.

⁴⁵ <https://www.theglobeandmail.com/canada/article-canadas-beverley-mclachlin-defends-role-in-hong-kong-court-system/>

⁴⁶ <https://www.reuters.com/world/hong-kong-leader-says-british-judges-resignations-politically-motivated-2022-03-31/>

⁴⁷ <https://www.scmp.com/news/hong-kong/politics/article/3172534/hong-kong-leader-accuses-britain-meddling-judicial>

⁴⁸ <https://www.law.com/international-edition/2022/04/01/we-are-seeing-the-criminalising-of-dissent-british-official-explains-hong-kong-judge-resignations/?slreturn=20240322071934>

These statements paint a picture of the judiciary as having stood its ground against overreach by the government, willing and able to independently balance the government's expanding exercise of power with the rights of the people of Hong Kong. Yet there is little evidence that this is the case, and in fact significant evidence to the contrary. This section will detail the ways in which the CFA's independence and commitment to rule of law have been compromised by Beijing and the actions of its own justices.

1. Hong Kong's courts are not independent, as Beijing exercises significant control over the judiciary

While the overseas NPJs have echoed the Hong Kong government's claim that the judiciary remains independent, various laws and policies in Hong Kong make clear that this is simply untrue.

In fact, Beijing's authority over the judiciary is not really in dispute, which makes the NPJs' claim particularly surprising. In one notable example of Beijing's view on the matter, the director of the PRC's Hong Kong and Macau Affairs Office, Zhang Xiaoming, explained in a 2015 speech that the Beijing-appointed Chief Executive's role "gives him a special legal status that transcends the executive, legislature and judiciary," and that "Hong Kong does not practice the separation of powers system⁴⁹."

The PRC government agreed in its annex to the 1984 Sino-British Joint Declaration that it would maintain judicial independence in Hong Kong, stating that the Hong Kong courts shall "exercise judicial power independently and free from any interference⁵⁰." When Beijing promulgated the Hong Kong Basic Law, however, it enshrined several important qualifications to this principle.

Most explicitly, Beijing retains direct, ultimate control over court decisions via its right to "interpret" the Basic Law and national security laws. It also maintains control over the courts through intermediaries in Hong Kong: The Beijing-appointed Chief Executive appoints national security judges and decides which magistrates and judges to promote, and the Beijing-controlled LegCo prescribes restrictions on the judiciary.

⁴⁹ <https://www.scmp.com/news/hong-kong/politics/article/1858484/zhang-xiaomings-controversial-speech-hong-kong-governance>

⁵⁰ <https://treaties.un.org/doc/Publication/UNTS/Volume%201399/v1399.pdf>

2. *Beijing retains direct authority to overturn the “final” rulings of the Court of Final Appeal*

Under Basic Law Article 158, the Beijing-controlled National People’s Congress Standing Committee “authorises” the Hong Kong judiciary to interpret the Basic Law but retains final “power of interpretation” for itself. The 2020 National Security Law and 2024 Article 23 “NSL 2.0”—which are the sources of much recent persecution of Hongkongers—also make explicit that the NPC Standing Committee (in the case of the 2020 NSL) and the Chief Executive (in the case of the 2024 NSL) hold final power of interpretation over these laws⁵¹.

Beijing has exercised this power over the Hong Kong courts five times under the Basic Law provision and once under the 2020 NSL. Most controversial were the 2022 NSL interpretation and the most recent of the Basic Law interpretations in 2016.

In the 2016 incident, elected “localist” lawmakers Baggio Leung and Yau Wai-Ching mispronounced “China” when taking their oath of office in protest of Beijing’s relationship to Hong Kong. The oaths were rejected, but Legislative Council president Andrew Leung then invited them to return to take the oath correctly. The government filed an application for judicial review in court to oppose the retaking of the oath⁵².

Beijing then stepped in, even before the courts had a chance to consider the motion. Issuing a new “interpretation” of the Basic Law, the NPC Standing Committee declared that because the two politicians did not take the oath “solemnly” enough the first time, they were thereafter disqualified from taking office⁵³. This represented Beijing’s most significant direct interference with the functioning of Hong Kong’s quasi-democratic institutions to date and was the first time Beijing had stepped in to prevent the judiciary from ruling on a case before it.

In the 2022 incident, the CFA ruled that *Apple Daily* media mogul Jimmy Lai, who was charged under the NSL, had the right to appoint British barrister Timothy Owen KC to defend him. In Hong Kong’s common law system, the courts have long had discretion under the Legal Practitioners Ordinance to admit foreign lawyers to represent clients

⁵¹ NSL Art. 65; Safeguarding National Security Ordinance, Instrument A305, § 110.

⁵² <https://www.theguardian.com/world/2016/nov/15/we-didnt-do-anything-wrong-banned-hong-kong-politician-yau-wai-ching-oath-taking-protest>

⁵³ <https://www.aljazeera.com/news/2016/11/7/china-bars-two-rebel-hong-kong-mps-from-retaking-oath>

when their expertise is needed, and Owen was an expert on the human rights protections at issue in the Lai case.

The ruling sparked outrage in the pro-Beijing camp, and Chief Executive John Lee sought Beijing’s “interpretation” of the NSL to prohibit Owen from representing Lai⁵⁴.

The NPC Standing Committee overruled the CFA on the question of foreign lawyers and took the opportunity to go even further. It declared that not only must the courts seek permission from the Beijing-appointed Chief Executive for foreign lawyer appointments, but also granted the powerful Committee for Safeguarding National Security—a Hong Kong body “under the supervision of and accountable to the Central People’s Government”⁵⁵—the unfettered right to declare that *any* court case “involves national security”⁵⁶. Once such a determination was made, the case would be removed from the normal court process and assigned to a Beijing-appointed national security judge, and the defendant would lose the rights typically afforded to non-national security defendants.

3. The Beijing-appointed Chief Executive retains authority over judicial appointments and promotions.

The Chief Executive is appointed by Beijing after a vote by a local election committee. The local election committee’s members must also be approved by the Beijing-controlled candidate eligibility review committee⁵⁷. Thus, Beijing maintains full control over the Chief Executive.

Recommendations for judicial appointments are made to the Chief Executive via a committee called the Judicial Officers Recommendation Commission (JORC), but only the Chief Executive holds the power to appoint the recommended judges and magistrates⁵⁸. In 2021, in an unprecedented move, Chief Executive Carrie Lam refused to appoint three of six High Court judges nominated by JORC. *Nikkei* reported

⁵⁴ <https://www.theguardian.com/world/2022/dec/01/hong-kong-jimmy-lai-british-lawyers-visa-withheld-trial-delay-timothy-owen>

⁵⁵ 2020 National Security Law, Art. 12.

⁵⁶ National People’s Congress Standing Committee, “Interpretation of Article 14 and Article 47 of the PRC Law on Safeguarding National Security in the Hong Kong Special Administrative Region,” Dec. 30, 2022. <https://www.chinalawtranslate.com/en/18902-2/>

⁵⁷ <https://www.cmab.gov.hk/improvement/en/ceo-committee/index.html>; <https://www.cmab.gov.hk/improvement/en/qualification-review/index.html>

⁵⁸ Judicial Officers Recommendation Commission Ordinance, Cap. 92, § 6. <https://www.elegislation.gov.hk/hk/cap92>

that one had failed to “pass a background check” and another later pulled out due to the national security law—suggesting that the Chief Executive’s refusal to appoint these judges was due to their political views⁵⁹.

The 2020 NSL also vastly expanded the Chief Executive’s power to influence judges in political cases. The law provided that all national security cases be heard by special judges picked by the Chief Executive⁶⁰.

Since passage of the NSL, “national security judges” selected under this provision have taken up all national security cases under the NSL and sedition laws. Under the law, each is appointed for a year term and can be removed from the position if they rule in a way that displeases national security authorities. This power bypasses the JORC entirely, giving the Chief Executive—and, by extension, Beijing—direct influence over the behaviour of judges in political cases.

By exercising greater control over judicial appointments, Beijing, via its Chief Executive in Hong Kong, has sent a strong message to sitting judges and magistrates hoping to one day move up the ranks: toe the official line or give up the chance at ever being promoted.

4. The Beijing-controlled Legislative Council retains authority to restrict judicial powers.

The Basic Law grants the CFA the “power of final adjudication,” but also stipulates that the “structure, powers and functions of the courts” shall be “prescribed by law”—meaning that the Legislative Council can grant or take away power from the CFA and lower courts⁶¹.

It is common internationally for legislatures to retain some power over the operation of independent courts. This power, however, is typically limited by written or unwritten constitutional powers and norms held by the judiciary⁶². Yet, as discussed above, Hong Kong’s only quasi-constitutional provisions, the Basic Law, are ultimately under

⁵⁹ <https://asia.nikkei.com/Spotlight/Hong-Kong-security-law/Hong-Kong-neglects-judicial-nominations-despite-case-backlog>

⁶⁰ Law of the People’s Republic of China on Safeguarding National Security in the HKSAR, Art. 44.

⁶¹ The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Arts. 82-83. <https://www.elegislation.gov.hk/hk/A101>

⁶² See, e.g., U.S. Constitution, Art. 3, § 2, granting Congress the power to limit the Supreme Court’s appellate jurisdiction, <https://constitutioncenter.org/the-constitution/articles/article-iii>; U.K. Constitutional Reform Act 2005, granting appellate power to a newly-created U.K. Supreme Court, <https://www.legislation.gov.uk/ukpga/2005/4/contents>.

the control of Beijing. What's more, after Beijing imposed anti-democratic "reforms" on the Legislative Council (LegCo) in 2021, LegCo candidates must now be screened and approved by the Beijing-controlled Committee for Safeguarding for National Security. As such, Hong Kong's Legislative Council is fully under Beijing's control⁶³.

In short, Beijing maintains ultimate authority over all three branches of Hong Kong's government—the Chief Executive, the Legislative Council, and the Judiciary. In turn, it exerts influence over the judiciary via mechanisms in all three branches. As a result, the CFA must always consider the possibility that its rulings could cause a negative reaction from Beijing, and to avoid this, must strive to avoid politically sensitive rulings—irrespective of their duty to faithfully apply Hong Kong law.

5. *The CFA is unable – or unwilling – to exercise its authority to rein in government abuses.*

Since the 2019 protests, the Hong Kong government has cracked down on civil liberties protected by the Basic Law, Hong Kong Bill of Rights, and international treaties such as the International Convention on Civil and Political Rights to which Hong Kong is a signatory. It has used both pre-existing laws such as the Public Order Ordinance and sedition law as well as new laws such as the 2020 and 2024 NSLs to prosecute and imprison thousands of political dissidents⁶⁴. According to one count, as of April 2024, Hong Kong has more than 1,800 political prisoners⁶⁵. The result of these convictions and imprisonments has been a near-total shutdown of Hong Kong's civil society, with residents silencing themselves to avoid prosecution⁶⁶.

Each one of these prosecutions has required the cooperation of the judiciary, including its highest court, the CFA. As unjust convictions have mounted, the overseas NPs have remained silent on their judiciary's abuses, and in some cases have actively ruled against political defendants.

⁶³ <https://www.bbc.com/news/world-asia-57236775>

⁶⁴ See, e.g., Lindsay Maizland and Clara Fong, *Hong Kong's Freedoms: What China Promised and How It's Cracking Down*, Council on Foreign Relations (Mar. 19, 2024). <https://www.cfr.org/background/hong-kong-freedoms-democracy-protests-china-crackdown>

⁶⁵ Hong Kong Democracy Council, Hong Kong Political Prisoner Database, <https://www.hkdc.us/political-prisoner-database> (Last updated April 5, 2024).

⁶⁶ See, e.g., Congressional-Executive Commission on China, *Hong Kong's Civil Society: From an Open City to a City of Fear* (Oct. 2022). <https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/Hong%20Kong%20Civil%20Society%20Report.pdf>.

6. The CFA has refused to hear most appeals from political dissidents.

Beijing's use of its powers to influence the judiciary has led to widespread manipulations and abuses in the lower courts, with judges and magistrates regularly—and sometimes quite brazenly—twisting laws and evidence to obtain convictions. Yet the CFA has avoided having to wade into these controversies by simply refusing to hear most appeals from political defendants.

However, Hong Kong's lower courts have been undermined by external pressures from Beijing and state media, leading to far more frequent unjust rulings. To briefly illustrate a few standouts among the countless examples of such injustices: a case where two court spectators were convicted of sedition for clapping in court and saying that a magistrate had lost her conscience;⁶⁷ a case where an activist was tried for the relatively minor crime of “perverting the course of justice,” but after trial the judge decided to convict him of a completely different (and more serious) crime—rioting—for which he had received no trial;⁶⁸ and a case in which a student leader was stopped by plainclothes police officers while buying laser pointers at a shop, charged with possessing “offensive weapons,” and ultimately convicted of resisting police—just for asking for the police officer's identification⁶⁹.

Given the widespread and well-publicised nature of these unjust convictions, one would expect the CFA to be stepping in frequently to rein in abusive lower courts. However, the court has granted exceedingly few requests by political defendants seeking leave to appeal⁷⁰. By refusing to even hear these cases, the CFA can avoid angering Beijing and its state-controlled media, and consequently avoid the risk that Beijing will use its levers of power to retaliate, such as by again exercising its power to “interpret” the law. But by sticking its head in the sand, the CFA has allowed rampant lower court abuses to go unchecked, undermining the CFA and the entire court system in the process.

⁶⁷ <https://apnews.com/article/hong-kong-government-and-politics-5268cf581cd78da5bd8d766d5c249c05>

⁶⁸ <https://samuelbickett.substack.com/p/charged-with-one-crime-convicted>

⁶⁹ <https://www.wired.com/story/hong-kong-protests-things-they-carried/>

⁷⁰ Notable exceptions include when the CFA accepted and overruled the conviction and fine of journalist Bao Choy for using a public government database to investigate police corruption, and the aforementioned case in which Jimmy Lai sought approval to hire a foreign lawyer.

7. Where the CFA has granted leave to appeal political cases, it has almost exclusively ruled in the government's favour.

In the instances where the CFA has agreed to hear political cases, the results have typically been pro-government, and have largely ignored the robust rights afforded defendants by the Basic Law and even the NSL itself. By inserting itself in these cases and ruling in the government's favour, the CFA has actively worked to set precedents that harm the individual rights of Hongkongers.

In a particularly notable pro-government ruling in December 2020—six months after the NSL became law—the CFA set a precedent that would empower the government to use the NSL unfettered by human rights concerns. In that case, the CFA granted leave to the government to appeal the bail granted to pro-democracy media figure Jimmy Lai. In its ruling, the CFA revoked Lai's bail,⁷¹ but the scope of its judgment went well beyond that.

Hong Kong's courts, the CFA ruled, had no power *at all* to review the NSL for compatibility with the human rights protections guaranteed to Hongkongers under the law. In effect, the CFA declared that no court would be permitted to balance the NSL against human right concerns—the NSL's security interests would always prevail⁷².

The CFA has also at times carefully selected the questions to be discussed on appeal to allow it to rule in support of the government while avoiding issues that could upset Beijing. In May 2023, for example, the CFA granted national security defendant Lui Sai Yu leave to appeal his sentence of 5 years' imprisonment for subversion under the NSL. The trial court judge had formally categorised the offence as “serious,” a designation that warranted a mandatory minimum five-year sentence under the NSL. The CFA decided to hear the case, but was careful in stating exactly what it would hear: It said it would consider only the legal enforceability of the mandatory minimum—a practically indisputable feature of the NSL—but refused the defendant's request to consider the trial court's ruling that the offence was “serious.”⁷³ From a legal standpoint, the latter question was far more favourable to the defendant, but ruling in his favour was likely to anger Beijing. Ultimately, the CFA upheld the five-year

⁷¹ https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=133491&currpage=T

⁷² *Id.*

⁷³ <https://www.hklii.hk/en/cases/hkcfa/2023/10?hl=lui%20sai%20yu>

mandatory minimum, rejecting the appeal without ever considering the defendant's best argument for appeal⁷⁴.

These CFA rulings are indicative of how the Court has approached Hong Kong's political crackdown overall: by doing everything it can to avoid drawing Beijing's ire, irrespective of what the law says, and at times actively stepping in to enable further repression.

While the CFA's desire to avoid Beijing's wrath may be understandable, it is not the sign of a healthy court system or a robust rule of law. For overseas NPJs, it should raise serious doubts about the justifications they have given for staying on the CFA, particularly regarding the fairness and independence of the court.

8. Some overseas NPJs themselves have directly ruled against dissidents in political cases despite the serious human rights issues involved.

The fact that the court is politically compromised should be reason enough for overseas NPJ appointments to end. But in some instances, overseas NPJs have participated in upholding unjust political convictions. While overseas NPJs are not appointed to national security cases, several overseas NPJs have ruled against pro-democracy activists in protest-related cases brought under the Public Order Ordinance and other Hong Kong laws.

a. Judge Gleeson's involvement in Chow Hang-tung case.

Most recently, in January 2024, Anthony Gleeson, an Australian overseas NPJ who stepped down in March 2024 citing his advanced age, voted in favour of a unanimous decision reimposing activist Chow Hang-tung's conviction for inciting an unauthorised assembly. The assembly in question was the annual candlelight vigil for victims of the 1989 Tiananmen Square Massacre, held each June 4th until the police banned it in 2020. Chow had been convicted in magistrate's court on highly questionable evidence including a social media post in which the magistrate had quoted incriminating lines but deleted exculpatory portions⁷⁵.

⁷⁴ https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=154516

⁷⁵ <https://samuelbickett.substack.com/p/chow-hang-tung-conviction-magistrate>

In the CFA, five judges including Justice Gleeson voted to reinstate the conviction. Similar to their approach in other controversial cases, the panel managed to avoid hearing full arguments, instead relying on technical arguments about procedures and filing details to reinstate the criminal conviction.

It is extraordinary that Judge Gleeson agreed to participate directly in this case, as the charges and conviction were a clear instance of political persecution against a respected human rights leader, intended only to imprison and silence her. She is now serving her 15-month sentence while awaiting trial in a separate case for subversion under the National Security Law⁷⁶.

b. Judge Keane's involvement in a case sentencing a juvenile to hard labour for shining a flashlight at police.

In 2023, the CFA reinstated a conviction against 16-year-old Mak Wing Wa for “taking part in an unlawful assembly.” His supposed crime involved shining a flashlight towards a police officer. Overseas NPJ Patrick Keane heard the case with four local colleagues⁷⁷.

At trial, Mak had been convicted and sentenced to a detention centre where he would face up to six months of hard physical labour⁷⁸. On appeal to the High Court, Judge Judianna Barnes overturned the conviction, pointing out that a teenager shining a flashlight may have simply been a youthful act “out of fun” rather than a coordinated plan to unlawfully assemble.

The CFA could have left it at that, and allowed the teen to move on. However, the judges decided to accept the government’s application to appeal. After a hearing, Judge Keane and four of his colleagues voted to reinstate the conviction and sentence. In doing so, they directed lower courts to convict defendants of these charges even if they had no “intention to take part in the assembly⁷⁹.”

The ruling expanded the already repressive reach of the Public Order Ordinance, enabling lower courts to convict protesters on less evidence than before. Judge Keane

⁷⁶ <https://hongkongfp.com/2024/02/21/hong-kong-tiananmen-vigil-activist-chow-hang-tung-to-serve-rest-of-15-month-jail-term-after-sentence-upheld/>

⁷⁷ <https://www.hklii.hk/en/cases/hkcfa/2023/19>

⁷⁸ <https://youthcllc.hk/en/usefulInfo/Punishment-and-sentencing-options/Detention-Centre-Order/>

⁷⁹ *Id.*, at pgh. 31.

seemingly saw no reason to question his participation in this effort to curtail the right to assemble.

c. Lord Hoffmann's involvement in a case convicting a man for filming an allegedly unlawful assembly.

In 2022, the CFA reinstated the conviction of a man in another case for “taking part in an unlawful assembly⁸⁰.” The defendant, Choy Kin Yue, was accused of filming others who were shouting at and following a police officer. He had been convicted at magistrate’s court and sentenced to three months’ imprisonment. On appeal at the High Court, the judge overturned the conviction, pointing out that there were alternative explanations for someone wanting to film such an encounter other than an intent to take part in an unlawful assembly.

The CFA agreed to hear the case, and Lord Hoffmann was assigned to the five-justice panel. As with the Mak case, all five justices voted to reinstate the conviction and sentence on the grounds that “it is not necessary...for the prosecution to prove an intent on the part of [Choy] to act in furtherance of the prohibited conduct of the other defendants.” In other words, the court ruled, a person can be convicted of unlawful assembly without ever intending to take part in an unlawful assembly.

This case further eroded the boundary between those seeking to document events and “unlawful” participants in a disturbance. This case caused concern internationally, with the Committee to Protect Journalists issuing a statement that Choy was a journalist and demanding his release⁸¹. The statement noted that Choy had reportedly been filming protests since June 2019 in hopes that the footage would be used by news sites and included in documentaries.

Given the implications for the rights of both amateur and professional journalists, it is particularly notable that Lord Hoffmann voted in favour of this conviction.

⁸⁰ <https://www.hkliv.hk/en/cases/hkcfa/2022/27>

⁸¹ <https://cpj.org/2023/01/cpj-calls-for-release-of-2-journalists-jailed-for-covering-hong-kongs-pro-democracy-protests/>

d. Lord Hoffmann's involvement in a case reimposing an expansive ban on face coverings at public gatherings.

In response to the 2019-2020 Hong Kong protests, then-Chief Executive Carrie Lam invoked the Emergency Regulations Ordinance to issue a regulation prohibiting face coverings at public gatherings. Protesters frequently wore masks at demonstrations to protect their anonymity, and the mask ban was seen as an attempt to stifle the ongoing protests.

Twenty-four members of the Hong Kong Legislative Council filed a case challenging the constitutionality of the ban. The Court of First Instance ruled that the law granting the Chief Executive such expansive power was unconstitutional, which the government appealed⁸². The Court of Appeal disagreed and reinstated the law, but only partially reinstated the ban, finding that it should only apply only to “unauthorised assemblies⁸³.” Both parties appealed to the CFA.

At the CFA, Lord Hoffmann was assigned to the five-justice panel hearing the case. In a unanimous judgment, the panel rejected both lower court rulings. Instead, the five justices reimposed the entire ban, ruling that a mask ban could be imposed *even at lawful, peaceful protests*.

In effect, with Lord Hoffmann's support, the CFA endorsed the most restrictive and repressive of all options available, ultimately endorsing a regulation that would greatly diminish the ability of people to anonymously protest on controversial matters⁸⁴.

e. Lord Sumption's involvement in a case affirming the expansive use of rioting charges to imprison nonviolent protesters.

In 2021, the CFA agreed to hear two rioting appeals together. The charge of rioting, which has a maximum sentence of seven years when brought in District Court, has been used by the Hong Kong authorities to prosecute and imprison more than two hundred protesters thus far, most of whom were never accused of violence⁸⁵. The CFA granted leave to appeal in the two rioting cases to consider what constitutes “taking

⁸² https://legalref.judiciary.hk/lrs/common/ju/ju_body.jsp?AH=&QS=&FN=&currpage=T&DIS=125574#p42

⁸³ https://legalref.judiciary.hk/lrs/common/ju/ju_body.jsp?AH=&QS=&FN=&currpage=T&DIS=127376#p353

⁸⁴ https://legalref.judiciary.hk/lrs/common/ju/ju_body.jsp?AH=&QS=&FN=&currpage=T&DIS=132498#

⁸⁵ <https://hongkongfp.com/2023/04/07/data-analysis-how-hong-kong-convicted-200-people-for-rioting-during-the-2019-protests-and-unrest/>

part” in a riot and whether so-called “inchoate” offences such as joint enterprise could be applied to rioting cases. While this issue was fairly technical, the main questions for the court were whether someone who did not actively breach the peace could be convicted of rioting, and whether someone not present at the scene could be convicted of rioting⁸⁶.

Lord Sumption was assigned as one of the five judges to hear the appeal, and he joined in the unanimous decision. In the ruling, the CFA upheld the convictions in one case while upholding the acquittal in another case. More importantly, however, the CFA affirmed that someone who does not breach the peace, and even someone who is not present at the riot, can be convicted of rioting. While the court ruled that “joint enterprise” could not be used in rioting cases to reach people not at the scene, it emphasised that those who facilitate, assist, or encourage the riot can be convicted—even if they are nowhere near the scene⁸⁷.

While the legal issues in this ruling were complex, one disturbing fact stands out: A British Law Lord voted for a vast definition of “rioting” to encompass both violent and nonviolent protesters, as well as people who merely support them from afar. The ruling set a precedent through which many nonviolent protesters have been sentenced to years in prison. Lord Sumption’s name on the judgment helped give the government the credibility it needed to defend the crackdown.

The overseas NPJs’ direct participation in cases of political persecution exposes the falsity of their claims that their presence on the court helps to protect Hongkongers’ rights. NPJs are not guiltless in stifling the rights of pro-democracy activists in Hong Kong. At best, these judges have sat idly by as their colleagues persecute dissidents; at worst, they have participated in persecution themselves.

⁸⁶https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=139869&QS=%2B&TP=J

⁸⁷ <https://dcc.law/doctrine-of-basic-joint-enterprise-unlawful-assembly-riot-court-of-final-appeal/>

B. British overseas NPJs' membership in the House of Lords presents irreconcilable conflicts of interest.

1. *Conflict between overseas NPJs' allegiance to Hong Kong and Lords' allegiance to the Crown*

Many British judges are appointed life peers, which gives them a seat in the House of Lords. As such, they take an oath of allegiance to the Crown and must consider legislation that comes through the chamber in accordance with that oath. When they take up positions in Hong Kong as overseas NPJs, they must also take an oath of allegiance to Hong Kong. While historically these dual oaths posed little concern, the situation has changed with China and the UK in increasing conflict. It is increasingly difficult to reconcile allegiance to the Crown via the House of Lords with allegiance to the Hong Kong government.

Four of the five current British overseas non-permanent judges—Lords Neuberger, Hoffmann, Collins, and Phillips—are members of the House of Lords. Lords Phillips, Collins, and Neuberger are currently on leave of absence from this role (though this is relatively recent⁸⁸), but Lord Hoffmann remains an active, participating member of the House of Lords⁸⁹.

Before taking their seats, Lords must take an oath to “be faithful and bear true allegiance” to the Crown⁹⁰. Overseas NPJs in Hong Kong, like their local counterparts, must swear that they will “bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China⁹¹.”

Appointments of British lords to the CFA have historically served as a symbol of common law continuity and, as such, support for rule of law. However, the evolving geopolitical landscape and increasing tensions between China and Western democracies necessitate a re-evaluation of the suitability of such appointments. As these tensions escalate, including over issues of human rights in Hong Kong as well as China’s activities in the UK, these judges find themselves in an increasingly

⁸⁸ <https://members.parliament.uk/members/lords?showadvanced=true&membershipstatus=5>

⁸⁹ <https://members.parliament.uk/member/2633/career>

⁹⁰ UK Parliament. *Swearing in and the parliamentary oath*. UK Parliament. <https://www.parliament.uk/about/how/elections-and-voting/swearingin/>

⁹¹ Oaths and Declarations Ordinance, Cap. 11, § 17.

precarious position, where their obligations to uphold the interests of two opposing entities conflict.

These conflicts are not hypothetical. In January 2021, for example, the National Security and Investment Act had its first reading in the House of Lords and went on to become law⁹². The bill granted the UK government new powers to intervene in foreign takeovers, and the parliamentary debate repeatedly referenced the risks Chinese firms and capital posed to the UK⁹³. This bill was counter to the interests of China and Hong Kong, where many Chinese firms incorporate and base their operations.

In another problematic instance of conflict, on November 17, 2022, the House of Lords held a debate on the question of “what assessment His Majesty’s Government have made of allegations of human rights abuses in China⁹⁴.” The debate repeatedly invoked the ongoing human rights abuses in Hong Kong—abuses which the aforementioned members of the House of Lords had contributed to by ruling on cases of political persecution.

Such bills and debates related to China are a frequent occurrence, and each poses a difficult question for the NPJs of how to navigate their competing obligations. In most cases, the NPJs have remained silent. Yet even remaining silent presents a problem: if a competing loyalty to an adversary repeatedly prevents a member of the House of Lords from stating any view at all, they are failing in their duties to the chamber and to the Crown to contribute to debates on which they have expertise.

2. Conflicts posed by undeclared interests in the House of Lords.

The remuneration paid to overseas NPJs by the Hong Kong government is another source of conflict.

⁹² Authority of the House of Lords. (2023). *Code of Conduct for Members of the House of Lords 13th Edition*. House of Lords. (“Code of Conduct”), <https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/hl-code-of-conduct.pdf>

⁹³ <https://hansard.parliament.uk/lords/2021-03-09/debates/064FF49B-3A17-4501-862E-1830F344A068/NationalSecurityAndInvestmentBill>

⁹⁴ <https://hansard.parliament.uk/Lords/2022-11-17/debates/EFFFAD0F-A7AF-4C96-A524-DD77F24257CA/details>

The House of Lords' Code of Conduct requires all peers to regularly disclose outside remunerated positions⁹⁵. Following a 2021 revision to the Code,⁹⁶ members who receive remuneration from “governments of foreign states (including departments and agencies), organisations which may be thought by a reasonable member of the public to be foreign state-owned or controlled, and individuals with official status (whether executive, legislative or judicial) in foreign states when acting in that capacity” must also disclose the amounts they received⁹⁷.

However, in a quirk of the House of Lords, peers can take a leave of absence to avoid fulfilling these requirements⁹⁸. There are legitimate reasons for taking a leave of absence, but some members may do so to avoid registering their interests. Members on leave of absence benefit from all the prestige of the title, without needing to uphold the obligations of peerage.

The revisions to the Code requiring disclosure of compensation received from foreign governments took effect in October 2021⁹⁹. Lord Collins took a leave of absence in September 2021,¹⁰⁰ Lord Phillips took a leave of absence in December 2021,¹⁰¹ and Lord Neuberger took a leave of absence in January 2022¹⁰². All three went on leave before ever having to disclose their financial remuneration from the Court of Final Appeal.

Lord Hoffmann is the only NPJ member of the House of Lords who has not taken a leave of absence. His registered interests include “Non-permanent Judge, Court of Final Appeal of Hong Kong,” but he does not list any financial compensation or non-financial benefit. There has not been any mention of trips taken to Hong Kong in his

⁹⁵ *Code of Conduct* <https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/hl-code-of-conduct.pdf>

⁹⁶ <https://publications.parliament.uk/pa/ld5801/ldselect/ldcond/255/255.pdf>

⁹⁷ *Code of Conduct*, § 72. <https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/hl-code-of-conduct.pdf>

⁹⁸ *Id.*, § 5.

⁹⁹ House of Lords Code of Conduct (October 2021 version), <https://www.parliament.uk/globalassets/documents/lords-commissioner-for-standards/11th-edition-code-of-conduct-and-guide-to-the-code.pdf>.

¹⁰⁰ <https://lordsbusiness.parliament.uk/ItemOfBusiness?itemOfBusinessId=101693§ionId=40&businessPaperDate=2021-09-09>

¹⁰¹ <https://lordsbusiness.parliament.uk/ItemOfBusiness?itemOfBusinessId=106363§ionId=40&businessPaperDate=2022-01-05>

¹⁰² <https://lordsbusiness.parliament.uk/ItemOfBusiness?itemOfBusinessId=106506§ionId=40&businessPaperDate=2022-01-10>

registered interests in the last five years, despite having sat on CFA cases during that time as described in this report¹⁰³.

Lord Neuberger's behaviour while active in the House of Lords reveals how this compensation can lead to a perception of conflict. In 17 years in the House of Lords, Lord Neuberger has only spoken in eight debates¹⁰⁴. In two of those speeches, he spoke against the disclosure of overseas financial interests.

In 2018, Lord Neuberger spoke in support of an amendment to the Sanctions and Anti-Money Laundering Bill that would have removed a requirement for overseas territories to set up a public register of company beneficial ownership—a measure intended to combat the use of offshore jurisdictions to hide sensitive or illicit income. It is unknown whether Lord Neuberger holds offshore accounts, but it raises questions given his extensive overseas compensation from the CFA and his international arbitration practice.

Then, in April 2021, Lord Neuberger spoke to explicitly oppose a change to the Lords' Code of Conduct that would have required him to disclose his compensation from the CFA. The House of Lords was debating the new regulations (discussed above) that would require all members to register earnings from foreign governments and bodies associated with foreign governments.

In his comments, Lord Neuberger disclosed a personal interest based on his post-retirement role as “an international arbitrator and legal expert,” without mentioning his role on the CFA. He then focused his arguments in opposition on the need for privacy in arbitrations. Lord Neuberger concluded by requesting that the committee introduce “some more satisfactory qualifications to the relatively blanket nature of the current proposals⁵¹.”

It is concerning that the British NPJs—whether deliberately or not—have given the appearance that they will go to great lengths to avoid disclosing benefits received from the Hong Kong government.

¹⁰³ <https://members.parliament.uk/member/2633/registeredinterests>

¹⁰⁴ <https://members.parliament.uk/member/3827/contributions>

III. Conclusion

“If journalists cannot report on what goes on in court, and if journalists and indeed members of the public, cannot give their views on what goes on in court, that would undermine freedom of expression, another vital ingredient of a modern democratic society. The media therefore have the right to report fearlessly on what the courts are doing and deciding, uncomfortable though that may be for us judges from time to time... it is part of freedom of expression that newspapers and other media should be able to criticise a judgment or to campaign for a change in the law.” – Lord David Neuberger, 2014¹⁰⁵

Any foreign judge who sits on the CFA has become complicit in a judicial system that is actively undermining the rule of law. Worse, they are providing legitimacy to that judicial system.

As former Canadian Justice Beverley McLachlin has said, “The presence of judges from England, Australia, or Canada on the court, signing on to the decisions, enhances public confidence in their justice system and in those decisions¹⁰⁶.” McLachlin is exactly right - the Hong Kong authorities are using their prestige to prop up the fiction that the Hong Kong judiciary remains independent and impartial.

To maintain their personal integrity and ethics, retired overseas non-permanent judges must uphold the constitutional principles of fairness, justice, and the application of international law, all of which have been seriously undermined by Hong Kong authorities. When judges are routinely sending Hong Kong teenagers to jail for exercising their freedom of expression, these judges must understand that their presence offers no positive impact for the people of Hong Kong. They only help to maintain the illusion of rule of law. The judges must resign.

¹⁰⁵ <https://www.supremecourt.uk/docs/speech-140826.pdf>

¹⁰⁶ <https://nationalpost.com/news/courts-immune-to-pressure-from-china-ex-canadian-chief-justice-says-after-hong-kong-judging-stint>