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***The Expatriate Judges and Rule of Law in
Hong Kong: Its Past, Present and Future***

by

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The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future

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I. Introduction

Unlike in many other jurisdictions in the world, expatriate judges have always played an important role in Hong Kong ever since it was occupied by the United Kingdom (UK) in 1843 as a colony. The very first issue this paper needs to address is the definition of “expatriate judges”. Should the term be defined according to nationality, ethnicity or any other criteria? The Local Judicial Officers’ Association in Hong Kong doesn’t define local officers by race. Instead, it defines local judicial officers by their ties with Hong Kong. A local officer means, under its constitution, any person holding judicial office on local terms, or those who have substantial Hong Kong connections.¹ This definition embodies the principle of equality and will be adopted in this article.

The roles of expatriate judges have changed over different historical periods in Hong Kong. This article will classify the roles of expatriate judges in Hong Kong into two categories, i.e., practical and symbolic roles. It will examine the roles and importance of expatriate judges from Hong Kong’s colonial period to its present status as a Special Administrative Region of the People’s Republic of China (China). By tracing and discussing the roles of expatriate judges in Hong Kong and their contribution to the rule of law in more than 170 years since Hong Kong became a colony, the paper will show that the importance of their practical roles versus symbolic roles has changed over the years from having more practical importance in the early days to having more symbolic importance nowadays. The paper argues that the symbolic roles of expatriate judges have been important after Hong Kong’s change of sovereignty and will remain important so long as Hong Kong’s host state, China, has not developed into a fully-fledged rule of law state. While the practical roles of expatriate judges are still important, they are, however, not irreplaceable. The day China becomes a rule of law state will be the day on which it will be no longer necessary to have expatriate judges in Hong Kong.

II. Expatriate Judges in Hong Kong from British Occupation to Time before Japanese Occupation

1. Courts and Expatriate Judges

From the time it became a colony of the UK to the reversion of its sovereignty to China, Hong Kong’s judiciary was primarily composed of expatriates. This is largely due to the UK’s introduction of the common law system and its judicial system into Hong Kong soon after its occupation of Hong Kong in 1841.²

Mr. James William Norton-Kyshe, the author who documented the first 67 years of Hong Kong laws and courts, said the following in 1898 of the Hong Kong legal system³:

¹ S. Y. Yue etc., “Judiciary ‘faces state of crisis’”, in SCMP, Jun 29, 1993.

² Peter Wesley-Smith, *The Sources of Hong Kong Law*, Hong Kong University Press, 1994, pp.87 - 89.

³ James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong: From the Earliest Period to 1891* (Hong Kong: Vetch and Lee Limited, 1971), Vol. I, at vii.

“... it seems as if Hong Kong by its position had been destined to become the starting point from whence a civilizing power by its beneficent rule and humane laws was to endeavor to effect those reforms which an uncivilized power like China was ever in need of”.

In a promulgation entitled “To the Chinese Inhabitants of Hong Kong”, dated 1st February 1841, it was stipulated that: ⁴

[The inhabitants of the island of Hong Kong] will be governed, pending Her Majesty’s further pleasure, according to the laws, customs, and usages of the Chinese (every description of torture expected) by the elders of villages, subject to the control of a British magistrate.

As can be seen from the aforementioned quotation, while the Hong Kong natives would continue to be governed by the village elders according to Chinese laws, customs and usages, they were subjected to the control of a British magistrate.

The next day, 2nd February 1841, another Proclamation was issued in which it was stated that all native Chinese would be governed according to the laws and customs of China whereas all British subjects would be governed “according to the principles and practice of British law”⁵ but under the Criminal and Admiralty Jurisdiction existing in Canton, China.⁶ It was on 30th April 1841 that Captain William Caine was appointed as the first Chief Magistrate of Hong Kong.⁷ By February 1842, the judicial establishment in Hong Kong had been expanded to consist of Major Caine as Chief Magistrate, Mr. S Fearon, as Interpreter and Clerk of the Court, Coroner, and Notary Public, and Lieutenant Pedder as Marine Magistrate and Harbour Master⁸. The Privy Council passed an Order on 4th January 1843 directing removal to Hong Kong of the Criminal and Admiralty Courts held at Canton.⁹ By a Royal Charter dated 5th April 1843, the Colony of Hong Kong was formally established.¹⁰ Sir Henry Pottinger was appointed the first Governor. The Royal Charter authorized and empowered the Governor “to constitute and appoint Judges, ..., for the due and impartial administration of justice, and for putting the Laws into execution”¹¹

In addition, the colonial legislature first provided for the wholesale reception of English law in Hong Kong in 1844 through the Supreme Court Ordinance (No. 15 of 1844).¹² The original formula was reworded in s. 5 of the Supreme Court Ordinance 1873 as follows: ¹³

⁴ Ibid., pp. 5-6.

⁵ Ibid., p. 5.

⁶ Ibid., p. 4.

⁷ Ibid., p. 6.

⁸ Ibid., p. 12.

⁹ Ibid., p. 18.

¹⁰ Ibid., pp.20-23. The Charter was published only on 26th June 1843.

¹¹ Ibid., p. 22.

¹² Peter Wesley-Smith, *The Sources of Hong Kong Law*, Hong Kong University Press, 1994, p. 89.

¹³ Ibid., p. 90.

“Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature”.

The formal establishment of Hong Kong as a colony of the UK, the removal of courts from Canton to Hong Kong, and the application of English laws to all British subjects had made it necessary for the colony to appoint judges familiar with English law. Since Hong Kong was a British colony, it was natural for the colonial Government to appoint British legal professionals to Hong Kong judiciary. They were mainly appointed either from Colonial Legal Service¹⁴ or directly from the UK.

The first Chief Justice of Hong Kong's Supreme Court — John Walter Hulme — and the first Registrar of the Supreme Court — Robert Dundas Cay — were sent from London.¹⁵ On 7th May 1844, the first Chief Justice, the Honourable John Walter Hulme arrived in Hong Kong.¹⁶ He was appointed a member of the Legislative Council in June 1844.¹⁷

In the early years, the Judiciary in Hong Kong was not independent from either the Executive or the Legislature. Major Caine, the Chief Magistrate, had been appointed as a member of both the Executive and Legislative Councils.¹⁸ The Chief Magistrate was also the Superintendent of Police.¹⁹ The appointment of the Chief Justice to the Legislative Council was another evidence in support. When the Criminal Court first opened on the 4th March 1844, the Governor Sir Henry Pottinger, and the Lieutenant-Governor Major-General D'Aguilar, both sat as Judges of the Court.²⁰

The Court presided over by the Governor was said to be a “complete failure” because neither the Governor nor the Lieutenant-Governor was properly trained in law. The Governor admitted himself that it would be better to have “more qualified hands”.²¹ That is possibly why it had been observed that “rather than submit to a decision which was only legal by chance, the majority of the inhabitants had preferred foregoing their claims than incurring ‘the certain expense and uncertain justice of the decision of a Judge who was totally unacquainted with law’”.²² People had a general wish that the Supreme Court be opened as soon as possible.²³

¹⁴ The Colonial Legal Service was a freely interchangeable Service of which the functions fall into three divisions: judicial division, legal work of the Government, and a number of posts not very uniformly dispersed throughout the Colonial Empire, the holders of which deal with special aspects of legal work (such as Court Registrars etc.). See Charles Jeffries, *The Colonial Empire and Its Civil Service*, Cambridge, 1938, pp. 143-144.

¹⁵ Not surprisingly, even the first Attorney-General of Hong Kong — Paul Ivy Sterling — was also sent from Britain. James William Norton-Kyshe, *The History of the Laws and Courts of Hong Kong: From the Earliest Period to 1891* (Hong Kong: Vetch and Lee Limited, 1971), Vol. I, at pp. 47 and 56.

¹⁶ *Ibid.*, p. 47.

¹⁷ *Ibid.*, p. 49

¹⁸ *Ibid.*, p.33.

¹⁹ *Ibid.*, pp. 103-104.

²⁰ *ibid.*, p. 37.

²¹ *Ibid.*, p. 39.

²² *Ibid.*, p. 39.

²³ *Ibid.*, p. 40.

It was against this background that the Supreme Court was established. The Ordinance No. 15 of 1844 was passed on the 21st August 1844 to establish a Supreme Court of Judicature in Hong Kong.²⁴ The Chief Justice, according to that Ordinance, was “appointed by Letters Patent under the Public Seal of the Colony from time to time by the Governor of Hong Kong, in accordance with such instructions as he may receive from Her Majesty, Her Heirs and Successors”.²⁵ The Supreme Court was formally opened on 1st October 1845.²⁶ Chief Justice Hulme was the only judge of the Supreme Court.²⁷

The second Governor Davis intended to influence the result of various cases. The acting Chief Magistrate Mr. Hillier followed his order.²⁸ In addition to overruling many decisions of Mr. Hillier on appeal²⁹, Chief Justice Hulme refused to allow himself to be improperly dictated to in the Compton Case. That became intolerable to the Governor³⁰ who started a series of persecutions against Chief Justice Hulme.³¹ The Governor suspended Chief Justice Hulme in November 1847.³² It was observed that people “fervently hoped that at no distant period he [the Chief Justice] would return to the Bench, the integrity and independence of which he had so nobly sustained, and for doing which he had now paid such a heavy penalty”.³³ Soon thereafter Governor Davis was forced to resign and Chief Justice Hulme was reinstated in June 1848 with full powers.³⁴

This episode shows that in the early years the Judiciary in Hong Kong was neither independent nor impartial as the Governor had a great influence over the Judiciary. Both the Chief Justice and Chief Magistrate were members of the Legislative Council. Fortunately, the first Chief Justice Hulme maintained his integrity and independence. His reinstatement after being suspended by Governor Davis indicated that the British Government at that time had the intention to have a relatively independent Supreme Court in Hong Kong.

In the early days, the fitness of English law for Hong Kong had been questioned because it was mainly a Chinese society.³⁵ But Mr. Norton-Kyshe opined in 1898 that:³⁶

“... it may be safely asserted that not merely free trade but the equal justice of our laws, dealing alike with native and with European, have drawn to the Colony a population upon whom our commerce is entirely and absolutely

²⁴ It was a detailed legislation but was replaced one year later by Ordinance No. 6 of 1845 which was again repealed in part by Ordinance No. 2 of 1846. See Norton-Kyshe, above n. 3, pp. 60-61.

²⁵ Section 4, Ordinance No. 15 of 1844 (On file with the author).

²⁶ See Norton-Kyshe, above n. 3, p. 64.

²⁷ *Ibid.*, p. 81.

²⁸ *Ibid.*, p. 128.

²⁹ *Ibid.*

³⁰ *Ibid.*, p. 137. It was the Compton Case.

³¹ *ibid.*, p. 140.

³² *Ibid.*, pp. 159-160.

³³ *Ibid.*, p. 167.

³⁴ *Ibid.*, p. 199.

³⁵ *Ibid.*, p. viii.

³⁶ *Ibid.*, p. ix.

dependent for support, and it may be reasonably inferred therefore that had any departure from this course been attempted, although evidence is not wanting as to what was originally intended in that respect, it would probably have deterred emigration if not driven away many already settled in the island. English law ... was the only law expedient to put into practice in a Crown Colony settled essentially under British rule, like Hong Kong, and therefore differing from a conquered place with its already established laws and customs”.

In the words of London Law Times, Mr. Norton-Kyshe has shown through his book the success that³⁷

“English law and English justice can be planted in an empire so full of contradiction as China, and we can learn from the pages how the court has helped to turn what was a state of lawlessness by sea and land, danger from riot by natives, and open and flagrant corruption in judicial circles, into the acquiescence with which the Chinese now accept our law and its firm and impartial rule...”.

While it is understandable that expatriate judges were appointed in the early days of Hong Kong as a colony, the same practice continued until Japanese occupation during the Second World War.

2. The Roles of Judges

It is indisputable that expatriate judges were the backbone who helped, from scratch, establishing and developing the common law legal and judicial system in Hong Kong. One has no difficulty to imagine how tortuous it was to bring the common law system, which was something considered as a “foreign product” into a Chinese territory with most of the people also being ethnic Chinese. But with the great effort of the expatriate judges in those years, the common law system had been transplanted into Hong Kong. Second, expatriate judges were indispensable during the early years of the colony for the enforcement of law as Chinese natives were not familiar with English law and its legal system. Consequently, it would be extremely difficult if not impossible for them to enforce the law. Though there was improper interference by the executive with judicial process, British Government at that time decided to support Chief Justice Hulme which contributed to winning the confidence of local community in Hong Kong. That was essential to the success of legal transplant. Third, the existence of expatriate judges gave traders from other jurisdictions confidence to stay if they were already in Hong Kong and also attracted those who had not come yet.

The first two are more about the practical roles of expatriate judges which were clearly of essential importance in the earlier years. The energy of both the British and colonial Governments was also spent primarily on the first two practical roles. As far as the third role is concerned, while realizing symbolic role might be of equal importance because Hong Kong’s success depended on trade and commerce, it should be noted that the argument of the symbolic value was more or less based on assertion.

³⁷Ibid., at p. e.

III. Expatriate Judges and Localization of the Judiciary from the Resumption of British Administration in 1945 to the Change of Sovereignty in 1997

1. Localization

The policy of localization was declared by the colonial government when the British returned to Hong Kong in 1945 after the Second World War³⁸ following several years of occupation by the Japanese. The policy purported to redress the faults of past colonial practice whereby the upper echelons of the civil service and judicial positions were all held by expatriates.³⁹ The policy was not taken seriously, however, until John Oliver was appointed Registrar of the Supreme Court in 1976 under Chief Justice Briggs (1973-1978).⁴⁰ It had been commented that “John Oliver was the only Registrar who had honestly and conscientiously implemented the government’s policy of localization”.⁴¹

Ng Choy, also called Wu Tinfang, was the first Chinese appointed as Acting Police Magistrate in 1880.⁴² In 1966, Simon Li became the first Chinese who was appointed a district judge. He was also the first Chinese judge appointed to the High Court in 1971.⁴³ Despite these appointments, majority of judges in Hong Kong were still expatriates. Mr. Justice Simon Li, the only Chinese Puisne Judge at that time, criticized the colonial Government for discriminating against local civil servants. His view was echoed by the Bar Association.⁴⁴ In 1976 Ms. Marjorie Chui was the first Chinese woman on the bench in Hong Kong⁴⁵ and the only and first Chinese woman to sit as a judge in a male-dominated and expatriate-oriented Judiciary.⁴⁶ In the same year, there were 75 judges and magistrates, of which only 16 were Chinese. Of these 16 Chinese judges and magistrates, 13 were appointed during John Oliver’s term as Registrar.⁴⁷ In 1979, there were only two local District Court judges.⁴⁸ So the appointment of local Chinese to the Judiciary was primarily at the level of magistracy. Ms. Chui opined that while promotions in 1970s were fair⁴⁹, it was an end of an era and the Judiciary was never the same after the departure of Chief Briggs in 1979.⁵⁰

³⁸ Japan declared its unconditional surrender on August 15, 1945 and Britain restored its control over Hong Kong.

³⁹ This comment was made by the first ever Chinese woman magistrate, Ms Chui. Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 6.

⁴⁰ See South China Morning Post, July 11, 1976, p. 10.

⁴¹ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 6.

⁴² See Linda Pomerantz-Zhang, Wu Tingfang (1842-1922): Reform and Modernization in Modern Chinese History, Hong Kong University Press, 1993.

⁴³ “Simon Li, the first Chinese to act as chief justice dies aged 91 surrounded by family in hospital, SCMP, Feb 28, 2013.

⁴⁴ See South China Morning Post, Oct 24, 1973, p. 1: ‘Scandalous’ judicial system in HK condemned.

⁴⁵ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 2.

⁴⁶ Ibid., p. 41.

⁴⁷ Ibid., p. 6.

⁴⁸ Ibid., p. 41.

⁴⁹ Ibid., p. 10.

⁵⁰ Ibid., p. 12.

While the lack of local judges had been a known problem in Hong Kong, there was no great urgency to change this situation prior to the mid-1980s. With the signing of the Joint Declaration between the UK and China in 1984⁵¹, localization of the judiciary became an item on the agenda, and this led Hong Kong to seriously face the problem of lack of local judges. But this definitely was not an easy task. It was reported that “both the Chief Justice and the administration were aware of the need for Cantonese-speaking people on the Bench”.⁵² The Government started in 1981 to encourage those not meeting the requirements to apply and two Cantonese-speaking candidates were appointed as magistrates between 1981 and 1984.⁵³ The requirements for judicial appointments were further relaxed in 1984 to five years’ experience and 30 years of age.⁵⁴ Thereafter, six more appointments were made in 1985.⁵⁵

Mr Justice Simon Li was appointed the first Chinese appeal judge (as VP) in 1984. He was also the first Chinese acting Chief Justice in the 1980s.⁵⁶ It was reported that around the end of 1984 only one out of a total of 48 magistrates had been hired on local terms though four others were Cantonese-speaking.⁵⁷ That is surprising! In the four years up to 1986, six Cantonese-speaking district judges were appointed. Five of them were promoted from within the judiciary. In addition, a Cantonese speaking district court judge was appointed to sit in the High Court. In an article written in 1985, Albert Chen stated that: “A rough survey indicates that more than 80% of the judges, magistrates and other judicial officers in Hong Kong are expatriates”.⁵⁸ On 1st April 1986, there were 35 judicial officers on local terms of employment in an establishment of 145.⁵⁹ What should be noted is that these 35 judicial officers were not necessarily all Cantonese speaking as they might be expatriates but employed on local terms. In 1987 all the ten principal magistrates were expatriates until Ms. Chui was appointed after one of the ten left.⁶⁰ At that time, “the Magistracy was still dominated by expatriates, all of them, young or old, were appointed in the 1980s”.⁶¹ In early 1987, four local Chinese were appointed as magistrates and it was noted that “more Cantonese-speaking magistrates with proper legal qualifications are clearly needed”.⁶² It was argued that there were too many expatriates in the Judiciary though “a fair assessment would have to give relatively high marks to the past independence and competency of the courts here”.⁶³ By September 1987, only around 10 out of 60

⁵¹ The nature of the Sino-British Joint Declaration is a bilateral treaty between between the UK and the PRC on the future of Hong Kong.

⁵² Daniel Chung, Matthew Leung and Wong Wing-hang, “Bid for more locals in the judiciary: Legco meets”, in *South China Morning Post*, April 10, 1986.

⁵³ *ibid.*

⁵⁴ *Ibid.*

⁵⁵ *ibid.*

⁵⁶ “Simon Li, the first Chinese to act as chief justice dies aged 91 surrounded by family in hospital, *SCMP*, Feb 28, 2013.

⁵⁷ “Problems recruiting for the judiciary”, *SCMP*, p. 30, Jun 3, 1987.

⁵⁸ Albert H Y Chen, “1997: The Language of the Law in Hong Kong” (1985) 15(1) *Hong Kong Law Journal* 19, at p. 25.

⁵⁹ *ibid.*

⁶⁰ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 2 of the forward by the author, p. 74. She held the position of Principle Magistrate (only Chinese) until her retirement in 1993.

⁶¹ *Ibid.*, pp. 76-77.

⁶² “Problems recruiting for the judiciary”, *SCMP*, p. 30, Jun 3, 1987.

⁶³ *Ibid.*

magistrates were local.⁶⁴ There were only two local High Court judges, making localization at the top end of the Judiciary a remote prospect.⁶⁵ That was a drop of Chinese judges both in percentage and in absolute number in comparison with 1976.

A landmark in localization of the Judiciary occurred in 1988 when Sir Ti-Liang Yang was appointed as the Chief Justice. At the time he was appointed, only 30 percent of judicial officers were locally employed, with the remainder on expatriate terms. Sir Ti Liang Yang said that localization of the Judiciary was one of his main objectives.⁶⁶ Being the first ethnic Chinese Chief Justice of a judiciary which was dominated by expatriate judges,⁶⁷ Sir Ti-Liang Yang had attracted resentment from some expatriate judges who criticized that his appointment was simply because of the government's localization policy to prepare for the transfer of sovereignty in 1997.⁶⁸ Despite his appointment, judicial positions in upper echelon of the Judiciary were mainly occupied by expatriates. In 1991, apart from CJ, all the other nine justices in the Court of Appeal were expatriate. There were three locally employed High Court judges on the 20-post High Court bench. Only 10 out of 32 District Court judges were locally employed.⁶⁹ There were 77 posts at magistrate level. Also in 1991 the Judiciary appointed two expatriate judges without explaining the reasons.⁷⁰ It means despite efforts to localize the Judiciary, the appointment of expatriate judges did not stop. Governor Sir David Wilson realized the necessity to appoint more Cantonese-speaking judges to the Judiciary and noted that "We must make sure that we have enough local people sitting on the bench. We have lots of barristers but there are not yet enough local Chinese sitting as judges. This is something we must do a lot of work on" ⁷¹

The Local Judicial Officers' Association warned in 1993 that "the Judiciary will be in a state of crisis if the pace of localization does not speed up". ⁷² This view was prompted by the appointment of 2 expatriates to the High Court and the elevation of another expatriate to the Appeal Court. The Association said that it was surprised that the Judiciary appointed someone from overseas – London Silk Michael Stuart-Moore – to the High Court. "With this pace of localization, we can't reach the target of 50 percent by 1997". ⁷³ The Association was also unhappy that only one out of 12 District judges who were appointed during 1991 was local.⁷⁴ Mr. Simon Li, a retired Hong Kong Court of Appeal judge was very pessimistic and estimated in 1988 that "it would take at least twenty years to produce a judiciary of good quality in Hong Kong

⁶⁴ Simon Macklin, "A third of HK's magistrates missing, but boycott denied", SCMP, p. 1, Sept 25, 1987.

⁶⁵ Lindy Course, "Judge in book row expected to resign", SCMP, Nov 25, 1988, p. 1.

⁶⁶ Simon Macklin, "Lawyers wary of judiciary", in SCMP, May 23, 1988, p. 3.

⁶⁷ In an article written in 1985, Albert Chen stated that: "A rough survey indicates that more than 80% of the judges, magistrates and other judicial officers in Hong Kong are expatriates". Albert H Y Chen, "1997: The Language of the Law in Hong Kong" (1985) 15(1) Hong Kong Law Journal 19, at p. 25.

⁶⁸ Emily Lau, "The government reneges on High Court appointment" 148 (3 May 1990) Far Eastern Economic Review 18. Sir Ti-Liang Yang served as the Chief Justice of Hong Kong for eight years until he resigned in 1996 to contest the First Chief Executive Election of the HKSAR.

⁶⁹ Jennifer Cooke, "Cash allowance lure for local judges", SCMP, Jun 26, 1991, p.1. The three High Court judges were Justices, Wong, Liu and Bokhary.

⁷⁰ Lindy Course, "Cost-cutting to hit magistrates", SCMP, Oct 14, 1991, p. 1.

⁷¹ "Crisis in the Courts", South China Sunday Morning Post, May 19, 1991, p. 43.

⁷² S. Y. Yue etc., "Judiciary 'faces state of crisis'", in SCMP, Jun 29, 1993.

⁷³ Ibid.

⁷⁴ Ibid.

among Chinese lawyers”.⁷⁵ The same concern was also shared by the then Chief Justice, Sir Ti-liang Yang who said on 6 November 1988 that the Judiciary might have to continue relying on expatriate judges for some time and a time table for the localization of the Judiciary would not be realistic ...⁷⁶

2. The Reasons for Lack of Locals in the Judiciary

It is clear from above discussion that the colonial Government in Hong Kong had a localization policy for the Judiciary as early as 1950s and the policy became more specific after the signing of the Sino-British Joint Declaration in 1984.⁷⁷ But the progress of localization of the Judiciary had not been satisfactory. It is necessary to explore the reasons.

2.1 Lack of Suitable Local Candidates

One argument is that it was due to the lack of suitable local candidates. There is some merit in this argument because of late start of local training of legal professionals. Hong Kong did not start to offer its own legal education until 1969 when the Faculty of Law of the University of Hong Kong (HKU Law Faculty) was established. Due to this reason, prior to the mid-1970s, all legal professionals (including judges, barristers and solicitors) in Hong Kong were trained in foreign countries. Also, given the fact that not many local people could afford the huge cost of overseas studies, the legal profession during those days was dominated by expatriates. Given that locally trained lawyers won't be eligible to be appointed as judges until having been in practice for 10 years or more⁷⁸, the earliest time for locally trained lawyers to be eligible for judicial appointments will be 1983. Merry opined that the late development of legal education in Hong Kong resulted in shortage of people who are both bilingual and rich in legal experience to take of the judicial position.⁷⁹

That view is, however, not shared by all. In her book, Ms. Chui opined that:⁸⁰

“in fact, many local lawyers who were interested in a career on the bench and who were regarded as eminently suitable by their peers were rejected by the Judiciary. These rejected lawyers could only feel insulted when the CJ stated

⁷⁵ Berry Fong-Chung Hsu, “The Common Law System in Chinese Context: Hong Kong in Transition (New York: M.E. Sharpe, Inc., 1992), p. 121.

⁷⁶ Simon Macklin, “Snaps hit Judiciary hopes for extra staff”, SCMP, Nov. 7, 1988, p. 3. Berry Fong-Chung Hsu, “The Common Law System in Chinese Context: Hong Kong in Transition (New York: M.E. Sharpe, Inc., 1992), p. 121.

⁷⁷ Gao Siya (高思雅), Localization of Civil Servants in Hong Kong (香港公务员的本地化), in Administration (《行政》), vol. 2, issue 6, 1989, No. 4, pp. 801-803.

⁷⁸ The requirements for judicial appointment before 1981 were: 10 years' professional experience and at least 40 years old.

⁷⁹ Malcolm Merry, “Not Entirely Legal – Part 55”, LexisNexis Hong Kong Blog, 11 October 2012, <http://lexisnexishk.com/2012/10/11/not-entirely-legal-part-55-no-shortage-of-judges-generous-retirement-terms-judiciary/> (Last accessed 11 August 2015). The same comment was shared by commentator Frank Ching. See, Frank Ching, “Recruiting overseas judges the right thing to do for now”, South China Morning Post, 8 May 2013, <http://www.scmp.com/comment/insight-opinion/article/1232435/recruiting-overseas-judges-right-thing-do-now> (Last accessed 19 August 2015).

⁸⁰ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 20.

in one speech after another that he did not want to localize the Judiciary at the expense of appointing third rate judges or magistrates and filling the bench with men of inadequate qualities of mind and character”.

Chui further observed that:⁸¹

“Expatriates who were hired at the bottom rungs of the judicial ladder soon leapfrogged their local colleagues and rapidly assumed senior positions. Expatriates were promoted by the batch. At one point five expatriates were promoted to fill all five senior judicial vacancies. ... Similarly, when nine expatriates were promoted to fill another nine senior judicial vacancies, ...”

It doesn't mean, however, that there were no locals who were eligible for judicial appointments. It is because there were locals who went to England to read law and came back to Hong Kong to practice as barristers. In fact the very first Chinese barrister was Ng Choy mentioned above in this paper.⁸²

As discussed above, the total number of judges in both the Court of Appeal and High Court in the 1990s before the change of sovereignty was only 30, which is very small. There were already 3 Chinese justices and eight Chinese judges sitting on the Court of Appeal and High Court benches respectively in 1995.⁸³ To reach the target of have 50% of them to be Chinese, only 5 suitable candidates were needed in 1996. There were 47 QCs with the local Bar in 1996.⁸⁴ All of them were qualified for appointment to the High Court. It is not really convincing to say that it was so difficult to find 5 replacements because there was still a short of suitable local candidates for appointment to the Judiciary.

2.2 Lack of Enthusiasm to Localize

Lack of motivation and concrete plan to cultivate local talents is a major reason. The chairman of Bar Association observed in 1991 that “there had been very little concerted attempts by the bench to recruit local lawyers”.⁸⁵ Though there was governmental policy on localization, its implementation depended, however, very much on the Judiciary. Chief Justice Briggs and the Registrar Mr Oliver implemented the policy well in 1970s. Since Sir Denys Roberts succeeded Briggs as Chief Justice in 1979, the management in the Judiciary changed and by the end of the 1980s, it had been totally transformed.⁸⁶ Specifically speaking, it had been observed that there was no longer transparency in the Judiciary because Chief Justice Roberts decided to remove all information on the appointment, promotion and transfer of judges and magistrates from the scrutiny of members of the public as well as judicial officers.

⁸¹ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 21.

⁸² He became barrister in 1876.

⁸³ See Hong Kong Judiciary 1994-1995.

⁸⁴ See the Bar List in 1996.

⁸⁵ “Making justice seem a good career move”, SCMP, Oct 8, 1991.

⁸⁶ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 17.

That happened in the years immediately following the Sino-British Joint Declaration of 1984.⁸⁷

Even worse, in mid-1980s, there was an increase in the recruitment and promotion of expatriates. It was noted that a large number of senior judicial posts were created and filled mainly by expatriates and many of them had served in the Chief Justice's former department, i.e., the Attorney General's Chambers. As a result, 90% of the higher judicial postings were held by the expatriates. Many locals felt that "the expatriates were looking after their own and making the most out of the colony before the hand-over to China".⁸⁸

That is why Ms. Chui said the following about the localization in the 1980s:⁸⁹

"... localization in the Judiciary took a backward step. Throughout the 1980s and up to a few years before Hong Kong was handed back to China, expatriates were recruited in preference to locals, even at the magistracy level, despite the fact that expatriates did not speak the local language and were inexperienced in local laws and customs. The Judiciary was still dominated by expatriates".

As noted above, the colonial government's slowness in localizing the Judiciary was strongly criticized by the Local Judicial Officers' Association in 1993.⁹⁰

2.3 Preferential/Discriminatory Treatment

There exists consensus among local professionals that there existed discriminatory treatment towards locals. In fact, discriminatory treatment for locals was a primary reason for Mr Patrick Yu, QC, SC to refuse to join the High Court three times in the 1970s.⁹¹ He argued that "right to the very end of British colonial rule in the territory, discriminatory terms of employment persisted to varying extents in one form or another even in the judiciary where all its members, whether expatriate or non-expatriate, were ironically expected to rule fairly and justly on human rights".⁹² Mr Daniel Fung, another QC, stated that more Chinese judges should and could be recruited but for the policy favouring expatriates with higher pay and privileges.⁹³

Not only barristers, but also those working within the Judiciary also held the same view. Ms. Chui opined that "... for nearly the entirety of Hong Kong's colonial history, all the top posts as well as an overwhelming majority of senior posts in ... the Judiciary were held by expatriates, notwithstanding the availability of equally qualified local candidates, and despite the Government's declared policy of

⁸⁷ Ibid., p. 18.

⁸⁸ Ibid.

⁸⁹ Ibid., p.19.

⁹⁰ S. Y. Yue etc., "Judiciary 'faces state of crisis'", in SCMP, Jun 29, 1993.

⁹¹ See Patrick Yu Shuk-siu, *Tales from No. 9 Ice House Street*, Hong Kong University Press, 2002, at p. 22.

⁹² Ibid.

⁹³ "Crisis in the Courts", *South China Sunday Morning Post*, May 19, 1991, p. 43.

localization”.⁹⁴ In addition to discrimination, she also implied that the colonial Government only paid lip service to localization.

A somewhat different view was expressed by Governor Sir David Wilson when he said to bring more local Chinese to the bench would “involve some people giving up very handsome salaries as QCs or barristers”.⁹⁵ While it is true that a judge would make less money than a QC in general, it is not really the actual amount of money but the discriminatory treatment which put some locals off.

2.4 Political and Legal Uncertainty

Political uncertainty caused by the forthcoming change of sovereignty and also uncertainty about judicial independence were also factors affecting negatively locals from joining the bench. The Bar Association Chairman, Robert Tang, QC at that time said that local barristers were unwilling to join the judiciary “because of a lack of confidence in Hong Kong’s political future.”⁹⁶ The Bar Association Chairman, Mr Rogers, QC said in 1991 that “people are concerned about the future of the legal system itself, and about how far the common law system will be maintained”.⁹⁷ Gladys Li, QC, SC shared similar concern by saying that the independence of Judiciary is well above any financial worries for local Chinese barristers to choose to join the bench.⁹⁸

Gladys Li also warned that “one cannot take for granted that the idea of judicial independence is thoroughly entrenched in the mind of the present administration, never mind the future one”.⁹⁹ In August 1996, “Judicial independence emerged as a subject of much public concern” because a District Court judge alleged that he had been subjected to pressure by fellow judges and that became headline news.¹⁰⁰ Ms. Chui also noted that she had been subtly pressurized by her peers.¹⁰¹

2.5 Arguments against Localization

Apart from those reasons which made local talents reluctant to join the benches, some arguments against localization had also been raised. The first argument is that localization may discriminate against the expatriates and other minorities in Hong Kong.¹⁰²

“No just expatriate lawyers are at risk, although many of them made their homes in Hong Kong, but also members of the local Indian community and other minorities who have made their mark throughout the legal profession and are well represented in the judiciary. A particular nationality is not given

⁹⁴ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 2 of the forward by the author.

⁹⁵ “Crisis in the Courts”, South China Sunday Morning Post, May 19, 1991, p. 43.

⁹⁶ See Simon Macklin, “Lawyers wary of judiciary”, SCMP, May 23, 1988.

⁹⁷ See above n. 95.

⁹⁸ Ibid.

⁹⁹ “Crisis in the Courts”, South China Sunday Morning Post, May 19, 1991, p. 43.

¹⁰⁰ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p. 47.

¹⁰¹ Ibid., p. 49.

¹⁰² “Crisis in the Courts”, South China Sunday Morning Post, May 19, 1991, p. 43.

as a factor to be taken into account in either the JD or the Basic Law, judicial and professional qualities are what are laid down there, not ethnicity”.

This argument is valid if those ethnic foreigners have established substantial connection with Hong Kong are treated as expatriates. But according to the definition of expatriates adopted in this paper, those who are either employed on local terms or substantially connected with Hong Kong will not be defined as expatriates.

The second argument is that localization may ruin people’s confidence in local legal system. Chief Justice Roberts once stated publicly that “maintaining a substantial expatriate element in the Judiciary was essential for the preservation of confidence in Hong Kong’s system of justice after the reversion of sovereignty to China”.¹⁰³

The third is the competency of local judiciary. But the critics both within and outside legal circle saw this problem “as the legacy of former Chief Justice Sir Denys Roberts’ nine-year reign. Roberts, who is alleged to have promoted people of low quality to the bench, retired in March 1988 ...”¹⁰⁴

While acknowledging that the first two arguments, especially the second one, have some merits, the third is not a reason against localization. It was not a problem caused by locals. Instead, it was caused by the expatriates at the top level.

3. Roles of Expatriate Judges

During the period discussed above, the judicial system in Hong Kong continued to develop. For example, the District Court was first established in 1953, the first batch of three judges were all expatriates.¹⁰⁵ The Court of Appeal and the High Court were established in 1976 under the Supreme Court Ordinance 1975 with only one ethnic Chinese Puisne judge.¹⁰⁶ So the role for expatriate judges to establish the legal system in Hong Kong was still there though it was less demanding than in the earlier years. Their primary function was to enforce the law.

While the quality of expatriate judges was generally good and overall they did a good job, there were some scandals, particularly in 1980s. For example, Mr. Justice O’Dea admitted reading a book during a trial and had to resign because of that.¹⁰⁷ Mr. Justice Barker resigned in March 1988, six months after a controversial decision to acquit Carrian boss and five other defendants.¹⁰⁸ Concerns over the scale of injustice in

¹⁰³ Marjorie Chui, “Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong”, p.22.

¹⁰⁴ Emily Lau, “Scandals dog the colony’s judiciary: The wobbly bench”, Far Eastern Economic Review, Apr 20, 1989, 144, 16, p. 23.

¹⁰⁵ “Hong Kong District Court: Appointment of Three Judges, SCMP, Jan 21, 1953. They were all appointments within the colony: Mr. Justice A. D. Scholes (acting Puisne Judge, Mr. James Reynolds (acting Solicitor General), and Mr. James Wicks (President of the Tenancy Tribunal).

¹⁰⁶ See “New Court System today”, in SCMP, Feb 26, 1976, p. 7. The Court of Appeal consisted of the CJ, Justices Huggins and Pickering. The High Court consisted of the CJ and the remaining Puisne Judges of the then Supreme Court.

¹⁰⁷ Lindy Course, “Judge in book row expected to resign”, SCMP, Nov 25, 1988, p. 1.

¹⁰⁸ His decision was later found by the Appeal Court to be wrong in law on several key points. See Lulu Yu, “Carrian trial judge takes Botswana job”, South China Sunday Morning Post, Dec 11, 1988, p. 1.

Hong Kong were expressed by media and shared by many.¹⁰⁹ As a result, some of Hong Kong's better legal brains were disillusioned to the point where they did not feel the bench was an appropriate place for them to continue their careers. In 1996, there were press reports about the senior District Court judge in charge of the District Court, ..., who tried to bully counsel appearing before him ...". Subsequently that judge had to step down from his post of senior District Court judge in charge".¹¹⁰

More serious claim was about mismanagement of the Judiciary. Ms. Chui opined that "Mismanagement of the Judiciary was well-known throughout the Judiciary in the 1980s" though the issues were only publicly acknowledged in the 1990s as the Registrar interfered not only in civil but also criminal cases.¹¹¹ Finally, due to pressure from some elected members of the Legislative Council, "the Registrar of the Supreme Court was stripped of all his administrative powers" in December 1995¹¹², which was less than two years before the handover.

By then, with the increase of experienced local talents, it was fair to say locals had built the capacity to perform the role of enforcement of law at all levels of courts. There was, however, lack of locals on the benches due partly to the colonial government's discriminatory policy and partly to some locals' lack of enthusiasm to join the benches for various reasons.

By 1980s, particularly after the 4th June event¹¹³, the confidence in the future of the colony became a serious issue not only for foreign investors but also for ordinary local residents.¹¹⁴ Chief Justice Roberts' statement that "maintaining a substantial expatriate element in the Judiciary was essential for the preservation of confidence in Hong Kong's system of justice after the reversion of sovereignty to China" made Ms. Chui felt insulted as a Chinese magistrate with self-respect.¹¹⁵ There was, however, some truth in that statement. Before the change of sovereignty in 1997, maintaining people's confidence in the future of Hong Kong was a key concern of both British and Chinese Governments.

During the period covered by this part of the paper, expatriate judges still played important roles in the continuing establishment of legal system in Hong Kong and law enforcement in Hong Kong. With the time passing by and by the 1990s, local talents had gained experience and became mature and demanded proper implementation of localization policy. But the pace of localization was still very slow and some local talents remained reluctant to join the benches for various reasons. So the importance of practical roles performed by expatriate judges was almost self-evident. Meanwhile, with the approaching of the change of sovereignty, due to people's lack of confidence

¹⁰⁹ Marjorie Chui, "Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong", pp. 156-161,

¹¹⁰ Ibid., p. 92.

¹¹¹ Ibid., p. 81.

¹¹² Ibid., p.27.

¹¹³ This event refers to the crackdown by the Chinese Government of students movement fighting against corruption and for democracy on 4th June 1989.

¹¹⁴ Many local residents emigrated overseas due to their fear of uncertainty of the colony's future.

¹¹⁵ Marjorie Chui, "Justice Without Fear or Favour: Reflections of a Chinese Magistrate in Colonial Hong Kong", p.22.

in mainland China particularly after 4th June event, the symbolic role of expatriate judges became more obvious.

IV. Expatriate Judges after the Change of Sovereignty

The problem of shortage of local judges remained a great concern of the legal profession in Hong Kong after the handover. As Merry pointed out, “the judiciary remained disproportionately expatriate at the turn of the century”.¹¹⁶ This is particularly true for the higher level courts. To solve this problem in the new High Court (including both the Court of Appeal and Court of First Instance (CFI)), some expatriate district judges were borrowed to sit on the High Court bench. Besides, some retired expatriate judges were also invited back to help.¹¹⁷ Retired High Court judge William Waung was also aware of this phenomenon, and he commented that:

¹¹⁸

“The inability to recruit the right lawyers to the senior judiciary has resulted in a perpetual lack of judges in the Court of First Instance. We have seen specially from the last 10 years, an extraordinary large numbers of temporary judges sitting more or less on a permanent basis”.

In recent years, there sees a gradual improvement of the situation. In August 2012, the Government announced 23 new judges in the district court and magistracy. Nearly all the new names were Chinese speakers. That was why Merry opined that “this feels like a watershed: the full localization of the Hong Kong judiciary. At Last”.¹¹⁹ In addition, there was also a news report saying that the Judiciary had been trying to avoid recruiting expatriate judges.¹²⁰

By 31st October 2015, in the Court of Appeal, in addition to the Chief Judge, 8 out of 12 Justices are Chinese; in the CFI (the original High Court), 21 out of 25 judges are Chinese; in the District Court, 31 out of 37 judges are Chinese, in the Magistrates, 80 out of 82 magistrates are Chinese.¹²¹ So the CFI, District Court and Magistrates are almost completely localized. Even for both the Court of Appeal and the CFI together,

¹¹⁶ Malcolm Merry, “Not Entirely Legal – Part 55”, LexisNexis Hong Kong Blog, 11 October 2012, <http://lexisnexishk.com/2012/10/11/not-entirely-legal-part-55-no-shortage-of-judges-generous-retirement-terms-judiciary/> (Last accessed 11 August 2015).

¹¹⁷ See Malcolm Merry, above n. 116.

¹¹⁸ William Waung, “Judicial Independence in Hong Kong”, Standnews, 5 August 2015, <https://thestandnews.com/politics/judicial-independence-in-hong-kong/> (Last accessed 21 August 2015).

¹¹⁹ See Malcolm Merry, above n. 116.

¹²⁰ “Heavy workload and strict requirement, Hong Kong has difficulty recruiting judges”, South China Morning Post (Chinese Net), 31 December 2012, http://www.google.com.hk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCAQFjABahUK Ewi3gYnWvqDHAhVEEpQKHc8fBpg&url=http%3A%2F%2Fwww.nanza.com%2Ftc%2Fhk-macau-tw%2F14c314778c6d736%2Fgong-zuo-fan-mang-tiao-jian-yan-ge-xiang-gang-nan-zhao-mu-fa-guan&ei=6KHJVbftD8Sk0ATPv5jACQ&usq=AFQjCNF-ShmkKC7POYxtlBumNLLZWJ_Hg&bvm=bv.99804247.d.dGo (Last accessed 11 August 2015).

¹²¹ See <http://www.judiciary.gov.hk/en/organization/judges.htm>, last visited on 30 October 2015.

you only need 8 extra candidates at most to reach 100 percent localization.¹²² There are 97 Senior Counsel in the local Bar which are equivalent to the QCs before the change of sovereignty.¹²³ Nobody will accept the argument that Hong Kong can't find 8 extra Senior Counsel to join the benches. There is therefore no more excuse to say there is a shortage of local talents.

1. Legal Basis for the HKSAR to Have Expatriate Judges

As early as in 1980s, the British and Chinese Governments reached an agreement that, with some restrictions, the Judiciary of the HKSAR would still be allowed to have expatriate judges. This included not only allowing those expatriate judges who were serving on Hong Kong courts prior to the handover to continue to serve after the handover,¹²⁴ but also allowing the HKSAR to recruit judges from other common law jurisdictions. This arrangement has been described as an “understandable reluctance” due to Hong Kong’s lack of “the depth and breadth of legal talent”.¹²⁵

A review of the Basic Law and other relevant legislation reveals that the Chief Justice of the Court of Final Appeal (CFA) and the Chief Judge of the High Court are required to be “Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country”,¹²⁶ and that the permanent justices of the CFA are required to have practiced in Hong Kong for at least 10 years.¹²⁷ Apart from that, there is neither residency nor nationality restriction for all other judicial positions. This actually is clearly reflected in Article 92 of the Basic Law which provides that:
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“Judges and other members of the judiciary of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions”.

¹²² It should be noted that the remaining ones are non-Chinese by ethnicity, but they may have received legal training in Hong Kong or have substantial connection with Hong Kong. So the actual rate of localization may be even high than the calculation in this paper.

¹²³ See the Bar list in 2015.

¹²⁴ This arrangement was subsequently written into the Basic Law. Paragraph 1 of Article 93 of the Basic Law provides that:

Judges and other members of the judiciary serving in Hong Kong before the establishment of the Hong Kong Special Administrative Region may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before.

¹²⁵ Frank Ching, “Recruiting overseas judges the right thing to do for now”, South China Morning Post, 8 May 2013, <http://www.scmp.com/comment/insight-opinion/article/1232435/recruiting-overseas-judges-right-thing-do-now> (Last accessed 19 August 2015).

¹²⁶ Paragraph 1 of Article 90, Basic Law. See also, Section 6(1A), Hong Kong Court of Final Appeal Ordinance (HKCFAO).

¹²⁷ Section 12(1A), HKCFAO. This virtually may be considered as a permanent residency requirement, requiring the permanent judges to be permanent residents of the HKSAR. This is because, basically a person who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the HKSAR could become HKSAR permanent residents. For a detailed definition of HKSAR permanent resident, see Section 2 of Schedule 1 of Immigration Ordinance.

¹²⁸ Article 92, Basic Law.

Further than that, Article 82 of the Basic Law even explicitly empowers the CFA to “invite judges from other common law jurisdictions to sit on the Court of Final Appeal”.¹²⁹ That is to say, recruitment of expatriate judges after handover has got constitutional guarantee.

2. Expatriate Judges in the CFA

Among all the positions in the Judiciary, the greatest concern was over the judicial positions in the CFA — a court which would bear the responsibility to replace the Privy Council as the final appellate court under the judicial system of the future HKSAR.

2.1 Composition of the CFA and the Non-permanent Justices

The CFA is composed of the Chief Justice and not less than three permanent justices (PJ).¹³⁰ Throughout the past 18 years, there are only three PJs at any one time. Apart from the Chief Justice and three PJs, according to ss. 5(2) and (3) of the Hong Kong Court of Final Appeal Ordinance (HKCFAO), the CFA “may” also invite non-permanent justices (NPs) from Hong Kong or other common law jurisdictions to sit on the Court.¹³¹ Section 9 of the HKCFAO provides that the total number of NPs shall not exceed 30 at any one time.¹³² Between 1997 and 2002, the number of local NPs were greater than that of the overseas NPs.¹³³ However, such a trend was reversed since 2003, and the number of local NPs has been decreasing. In 2003, there were eight local NPs and ten overseas NPs. By 2014, there were only 6 local NPs but 12 overseas NPs. From the establishment of the CFA to 2015, 16 persons had served as local NPs and 23 persons had served as overseas NPs.¹³⁴ One interesting finding is that, among those 16 local NPs, only one (Mr. Justice Patrick Chan Siu-oi) is an ethnic Chinese.¹³⁵

Numbers of Local NPs and Overseas NPs (1996-2014)¹³⁶

Year	Permanent Judges	Local Non-Permanent Judges	Overseas Non-Permanent Judges
1996-1998	3	11	6
1999	3	11	6
2000	3	12	9
2001	3	12	9
2002	3	12	8
2003	3	8	10
2004	3	8	9

¹²⁹ Article 82, Basic Law.

¹³⁰ Section 5, Hong Kong Court of Final Appeal Ordinance (HKCFAO).

¹³¹ Section 5(2) and (3), HKCFAO.

¹³² Section 9, HKCFAO

¹³³ For example, between 1997 and 1998, there were 11 local NPs and 6 overseas NPs. See Hong Kong Judiciary Annual Report [1996-2002] (Hong Kong: The Judiciary).

¹³⁴ Hong Kong Judiciary Annual Reports [2003-2014] (Hong Kong: The Judiciary).

¹³⁵ For the details about the judges of the CFA, see the CFA’s website:

<http://www.hkcfa.hk/en/about/who/judges/introduction/index.html> (Last accessed 28 August 2015).

¹³⁶ Source: Hong Kong Judiciary Annual Reports [1996-2014] (Hong Kong: The Judiciary)..

2005	3	8	9
2006	3	8	11
2007	3	6	10
2008	3	6	10
2009	3	6	13
2010	3	6	11
2011	3	6	13
2012	3	7	14
2013	3	6	12
2014	3	6	12

As at 31st October 2015, there are altogether 19 justices in the CFA, including one Chief Justice, three PJs, five local NPIs and ten overseas NPIs.¹³⁷

Up to now, all overseas NPIs are coming from only three common law jurisdictions, namely, United Kingdom, Australia and New Zealand. As Simon Young pointed out, the first step to implement this practice was Andrew Li CJ's reaching an agreement with the then Lord Chancellor, Lord Irvine in September 1997 to have two serving Law Lords coming to Hong Kong to serve as the NPIs. They could continue to serve on the CFA even after their retirement in the UK. But for Australia and New Zealand, only retired justices would be sent to serve as NPIs.¹³⁸

Li CJ strongly supported the arrangement of having overseas NPIs to sit on CFA. He was quoted as having said that: "I believe that Hong Kong is fortunate to have as

¹³⁷ List of CFA Judges (As at 9 August 2015)

Name	Position
Geoffrey MA	Chief Justice
R A V RIBEIRO	Permanent Judge
Robert TANG	Permanent Judge
Joseph P FOK	Permanent Judge
Henry Denis LITTON	Non-Permanent Judge
Frank STOCK	Non-Permanent Judge
Michael J HARTMANN	Non-Permanent Judge
S K S BOKHARY	Non-Permanent Judge
Patrick CHAN	Non-Permanent Judge
Lord HOFFMANN	Non-Permanent Judge
Lord MILLETT	Non-Permanent Judge
Murray GLEESON	Non-Permanent Judge
Lord NEUBERGER of Abbotsbury	Non-Permanent Judge
Lord WALKER of Gestingthorpe	Non-Permanent Judge
Lord COLLINS of Mapesbury	Non-Permanent Judge
Lord CLARKE of Stone-cum-Ebony	Non-Permanent Judge
Lord PHILLIPS of Worth Matravers	Non-Permanent Judge
James SPIGELMAN	Non-Permanent Judge
William GUMMOW	Non-Permanent Judge

Source: "List of Judges and Judicial Officers (Position as at 9 August 2015), <http://www.judiciary.gov.hk/en/organization/judges.htm#CFA> (Last accessed 18 August 2015).

¹³⁸ Simon N. M. Young, Antonio Da Roza and Yash Ghai, "Role of the Chief Justice", in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2014), 231.

NPJs on the overseas panel distinguished jurists of the highest standing from Australia, New Zealand and the United Kingdom, ...”¹³⁹

2.2 Composition of Each CFA Adjudication Panel

Both the Joint Declaration and the Basic Law are silent on the issue of the number of overseas NPJs in each CFA adjudication Panel. When the Joint Liaison Group finally reached an agreement in October 1991 that the composition of each adjudication panel of the CFA would be four Hong Kong PJs and one overseas justice, both the Bar Association and the Law Society criticized that the restriction on the number of overseas justices was a breach of the Joint Declaration.¹⁴⁰ Notwithstanding such controversy, the 4:1 ratio between local and overseas justices as announced by the Joint Liaison Group remained unchanged.

That ratio has been incorporated into the HKCFAO. While its s. 5 makes it possible to have NPJs to sit on the Court, s. 16 of the same Ordinance makes them an indispensable component for the adjudication panel for every appeal before the CFA. According to s.16, each appeal before the CFA would be heard by a panel of five justices and the composition is as follows:¹⁴¹

1. President of the Court: The Chief Justice or a permanent judge designated to sit in his place when he is not available;
2. Three permanent judges nominated by the Chief Justice; and
3. One non-permanent Hong Kong judge or one judge from another common law jurisdiction selected by the Chief Justice and invited by the Court.

As far as the last component is concerned, Simon Young pointed out that, during the first 13 years of the HKSAR, 97% of the appeals before the CFA were heard by a panel of judges with one being an overseas NPJ. This, according to Young, is a “convention” established by Andrew Li, the first Chief Justice of the HKSAR during his tenure.¹⁴²

3. Roles of Expatriate Judges in Hong Kong after the Change of Sovereignty

The common law system and the Judiciary have been two of the elements which the Hong Kong society treasures the most, especially after the handover. This is largely due to the fact that these two elements have been, both symbolically and practically, guaranteeing the rule of law — the core value in Hong Kong — both before and after the handover.

¹³⁹ “The Chief Justice’s Address at the Opening of the Legal Year”, 11 January 1999, cited in Simon N. M. Young, Antonio Da Roza and Yash Ghai, “Role of the Chief Justice”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 232.

¹⁴⁰ Lindy Course, “Government ‘misled by law bodies’”, *South China Morning Post*, 4 November 1991.

¹⁴¹ Section 16, HKCFAO.

¹⁴² Simon N. M. Young, Antonio Da Roza and Yash Ghai, “Role of the Chief Justice”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 231. It must be noted that there can only be a maximum of one overseas non-permanent judge in each case before the CFA.

3.1 Symbolic Value of Expatriate Judges

The Judiciary has been the government institution which has the greatest public confidence for most of the time after the handover.¹⁴³ Since most of the people do not have any personal experience related to the Judiciary, their confidence in the Judiciary largely comes from the image and impression the Judiciary gives to them, including the behavior and integrity of the judges, as well as the feeling of their impartiality in handling cases.

Yash Ghai pointed out two reasons for a jurisdiction to have expatriate judges adjudicating cases serving on its courts: one is because of the shortage of suitable local candidates; another reason is “the lack of trust of local judges” among the people within the jurisdiction.¹⁴⁴ The first reason is no longer a valid one because as of 2015 Hong Kong is not short of local talents anymore. The second reason seems more likely to be the proper justification for having expatriate judges in Hong Kong today.

It has been noted that the Judiciary in Hong Kong was established by expatriate judges, and the expatriates-dominated Judiciary has also managed to preserve the image of an impartial and corruption-free Judiciary¹⁴⁵ throughout the years (both before and after the handover). In fact, the perception of expatriate judges as a symbol of integrity, fairness, impartiality, the rule of law and judicial independence is not only shared among many people in Hong Kong, but also the international community. The presence of expatriate judges in post-handover Hong Kong is seen as especially crucial for the people overseas, the international investors and those who trade with Hong Kong companies in particular.¹⁴⁶

Though there is no evidence showing that local judges are less competent than expatriate judges, the bias of having less trust in local judges does exist in Hong Kong. Due to this reason, expatriate judges are considered as a symbol of Hong Kong’s commitment of preservation of the rule of law and judicial independence. Such symbolic value is particularly significant in cases against the government or public bodies. As Waikeung Tam pointed out:¹⁴⁷

“If citizens perceive that the courts are not fair in arbitrating their disputes with the government, this perception of unfairness is likely to undermine their incentive to use the judicial branch to pursue their cause”.

¹⁴³ See the two surveys cited in Waikeung Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge: Cambridge University Press, 2013), pp. 85-87.

¹⁴⁴ Yash Ghai, “Themes and arguments”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 25.

¹⁴⁵ In one of his speeches delivered in 2006, Lord Woolf also praised the Hong Kong judiciary for its free from corruption. See, “Lord Woolf in Hong Kong”, UCL (University College London) News, 15 May 2006, <https://www.ucl.ac.uk/news/news-articles/0605/06051501> (Last accessed 21 August 2015).

¹⁴⁶ Simon N. M. Young and Antonio Da Roza, “The judges”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 263.

¹⁴⁷ Waikeung Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge: Cambridge University Press, 2013), p. 70.

Among all the expatriate judges, the overseas NPs in the CFA bear the greatest symbolic value of Hong Kong's preservation of the rule of law and judicial independence. One local litigant in Hong Kong who sued the government said that having overseas NPs sitting on the CFA would give them stronger confidence in the impartiality of the court, for they believe that those overseas NPs could serve the balancing function, preventing situation where the whole adjudication panel is only composed of local judges who may be biased (or being pressurized to decide) in favour of the government from happening.¹⁴⁸

If such concern is valid, the presence of overseas NPs is even more indispensable in adjudicating politically sensitive cases. The case of *Yeung May Wan and Others v HKSAR*¹⁴⁹ demonstrates that both local and expatriate justices are impartial and free from any political influence/interference. In that case, the appellants who were members of the Falun Gong — a group that was proscribed by the Chinese government as an evil cult — were prosecuted for obstruction of a public place, wilfully obstructing police officers acting in the due execution of their duty, and assaulting police officers acting in the due execution of their duty by demonstrating on the public pavement outside the main entrance to the Liaison Office of the Central People's Government. When that case came before the CFA, it was adjudicated by a panel consisting of two ethnic Chinese justices (Chief Justice Andrew Li and Mr. Justice Patrick Chan PJ), Two local non Chinese PJs (Mr. Justice Bokhary and Mr. Justice Ribeiro), and one overseas NPJ (Sir Anthony Mason). The five justices unanimously quashed the convictions of the appellants and held that the appellants were only exercising their constitutional rights to conduct peaceful demonstration and the obstructions resulted should be considered as reasonable and thus did not constitute an offence.¹⁵⁰ The unanimous decision was clear evidence that judicial independence is alive in Hong Kong and the highest court in Hong Kong is free from any political influence. That is true in most if not all other cases. Hence, the above concern has been exaggerated.

Such symbolic value is even more important to the international community as Sir Anthony Mason rightly stated:¹⁵¹

“Hong Kong's reputation as an international financial centre depends upon the integrity and standing of its courts. Further, in the context of Hong Kong's relationship with the central government in Beijing, it is important that the decisions of the Hong Kong court reflect adherence to the rule of law in accordance with internationally adopted judicial standards”.

¹⁴⁸ This view was clearly expressed by Winston Chu, former chairman of the Society for Protection of the Harbour, who sued the government over the reclamation of the Victoria Harbor in 2003. See Waikung Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge: Cambridge University Press, 2013), p. 71.

¹⁴⁹ *Yeung May Wan and Others v HKSAR* [2005] 2 HKLRD 212.

¹⁵⁰ *Ibid.*

¹⁵¹ Hon Sir Anthony Mason AC KBE, “The common law in final courts of appeal outside Britain” (2004) 78 *Australian Law Journal* 183, at 192.

The presence of the overseas NPJs in the CFA not only “adds an international dimension to Hong Kong’s legal system”;¹⁵² it also sends a strong message to the international community that the rule of law and judicial independence remain intact in post-handover Hong Kong. As the Secretary for Justice Mr. Rimsky Yuen pointed out, since the overseas NPJs are all eminent judges, so if the Hong Kong courts lack judicial independence and if they would be interfered in discharging their duties, they definitely would not have had accepted the invitation to take up those judicial positions. In other words, these eminent judges have strong confidence in the rule of law and judicial independence in Hong Kong.¹⁵³ Waikeung Tam strongly emphasized the important role of the expatriate judges in safeguarding the Hong Kong Judiciary from Beijing influence/interference. He was of the opinion that:¹⁵⁴

“Active participation of foreign legal practitioners in the judiciary enhances judicial independence under an authoritarian regime. The presence of a large number of foreign judges, who have a strong belief in the rule of law and/or linkage with prestigious judicial institutions in liberal democracies, has made it more difficult for Beijing to control the judiciary”.

3.2 Practical Roles of Expatriate Judges

While the symbolic value of expatriate judges is important, their practical value and contribution are also of significance to the development of Hong Kong’s legal system. First of all, at the level of CFA, the overseas NPJs can help to ensure that Hong Kong still have high caliber judges sitting in its highest court after the Privy Council ceased to be Hong Kong’s final appellate court. They have contributed to the development of the CFA’s jurisprudence. As noted by Simon Young, the overseas NPJs have been “chosen strategically to sit on cases based on their expertise. For example, Lord Millett NPJ would be sought for insolvency or property cases rather than criminal appeals”.¹⁵⁵ By doing so, the CFA can best make use of the expertise of these prominent overseas NPJs in establishing authoritative precedents for different categories of cases for the lower courts to follow.

Given that the Hong Kong legal system is still a member of the common law family, its Judiciary has to ensure that its decisions are consistent with the general principles

¹⁵² Melissa Kaye Pang, “Hong Kong as a Base for Doing Business in Mainland China”, (June 2013) Business Law Today, http://www.americanbar.org/publications/blt/2013/06/01_pang.html (Last accessed 21 August 2015).

¹⁵³ “Speech by the SJ at Chatham House in London”, Hong Kong SAR Government Press Release, 15 October 2014, <http://www.info.gov.hk/gia/general/201410/15/P201410151108.htm> (Last accessed 21 August 2015). This view was also shared by retired High Court Judge William Waung. See, William Waung, “Judicial Independence in Hong Kong”, Standnews, 5 August 2015, <https://thestandnews.com/politics/judicial-independence-in-hong-kong/> (Last accessed 21 August 2015).

¹⁵⁴ Waikeung Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge: Cambridge University Press, 2013), p. 53.

¹⁵⁵ Simon N. M. Young and Antonio Da Roza, “The judges”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 263-264. Lord Millett has been serving as an overseas non-permanent judge of the CFA since 2000 until now.

of common law. This can be best achieved with the help of the NPJs. That is their second practical role. In *Chen Li Hung v Ting Lei Miao*, Lord Cooke stated that:¹⁵⁶

“I think that it may be inferred that, in appropriate cases, a function of a judge from other common law jurisdiction is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law”.

Third, expatriate judges can also help to enrich the knowledge and skills of the local judges, hence raising the quality of the Hong Kong Judiciary. This is because, while expatriate judges are also coming from common law jurisdictions, given the fact that the jurisprudence of each common law jurisdiction may have its own special characteristics, thus when they come to join the Hong Kong Judiciary, they will bring with them the special jurisprudence of their respective jurisdictions, their skills, experience and expertise. They can then share and exchange their knowledge and skills with local judges, which will eventually benefit the Hong Kong Judiciary.¹⁵⁷ Sir Anthony Mason also noticed that this is one of the merits of having overseas NPJs. According to him:¹⁵⁸

“Although the differences in the jurisprudence of the various common law jurisdictions are minor rather than substantial, there are subtle points of difference, and NPJs from other jurisdictions can offer distinctive contributions and perspectives”.

This view was shared by Mr. Justice Mortimer — a local NPJ — who was of the opinion that Hong Kong’s overseas judge system allows “international or inter-common law input” into the CFA.¹⁵⁹ Such contribution has been phrased differently by a local barrister PY Lo as maintaining the connection between Hong Kong and other common law jurisdictions.¹⁶⁰

Fourth, as Mr. Justice Patrick Chan pointed out, “people who are working and living in Hong Kong are of different nationality and ethnicity, so it is both necessary and justifiable for the court to have expatriate judges who may better respond to the judicial demands of different litigants”.¹⁶¹

¹⁵⁶ *Chen Li Hung v Ting Lei Miao* (2000) 3 HKCFAR 9, cited in Jill Cottrell and Yash Ghai, “Concurring and dissenting in the Hong Kong Court of Final Appeal”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 301.

¹⁵⁷ Ge Feng, “Listen to Justice Patrick Chan’s talk about matters relating to Hong Kong’s rule of law in the past”, *Zhihe Dongfang*, 21 September 2014, <http://zhihedongfang.com/article-1805> (Last accessed 11 August 2015).

¹⁵⁸ “Sir Anthony Mason: A Non-permanent Fixture on the CFA” (August 2010) *Hong Kong Lawyer*, <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/Sir-Anthony-Mason-A-non-permanent-fixture-on-the-CFA> (Last accessed 4 September 2015).

¹⁵⁹ Simon N. M. Young and Antonio Da Roza, “The judges”, in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 264.

¹⁶⁰ P.Y. Lo, “Hong Kong’s Two Constitutional ‘Outsiders’”, *Blog of the International Journal of Constitutional Law and ConstitutionMaking.org*, 1 February 2013, <http://www.iconnectblog.com/2013/02/hong-kongs-two-constitutional-outsiders/> (Last accessed 21 August 2015).

¹⁶¹ See Ge Feng, above n. 156.

The invaluable influence and contribution that the overseas NPs bring forth to the Hong Kong legal profession is also vividly described by one Senior Counsel:¹⁶²

“From the bar table, one can sense the confidence each overseas judge brings to our permanent judges in difficulty cases and the influence they can bring to bear as the judges confer among themselves.

...

The overseas judge always sits on the extremely left of the presiding judge in the “junior” seat. He ... takes care not to dominate the proceedings or to upstage the local members. By questions put with an old world courtesy that hides devastating contents, the core of many a shaky argument is penetrated, essential weaknesses of reasoning are exposed, verbosity is sweetly punctured, and the ill-prepared advocate is pulled up in his tracks. That is all to the good. Apart from anything else, it keeps every advocate up to the mark, and it provides some amusement to everyone else in court”.

While acknowledging that expatriate judges, the NPs in particular, have made good practical contribution to the development of jurisprudence in Hong Kong, one inevitable question we need to ask is: are those roles irreplaceable by local talents?

An examination of local jurisprudence from 1991 when the Bill of Rights Ordinance was enacted until now reveals that Hong Kong barristers as well as the Judiciary need to deal with comparative case law and jurisprudence, as well as European and international jurisprudence from that time onwards. After the change of sovereignty, in many cases involving the Basic Law, both Hong Kong barristers and the Judiciary have examined in depth case law from all other relevant common law jurisdictions, be it the US, Canada, Australia, New Zealand, South Africa and so on. The flag desecration case is one good example.¹⁶³ In all those cases, local judges at all levels of courts and our lawyers have not only demonstrated their competence but also accumulated valuable experiences. Given the constitutional permission that precedents from other common law jurisdictions may be referred to, study and citation of foreign cases have become a routine practice of barristers and judges in Hong Kong. It is not exaggerating to say that they may well be the lawyers and judges most involved in comparative study in the common law jurisdictions in the world. The author of this paper submits that none of the practical contribution of expatriate judges is irreplaceable in today’s Hong Kong.

In addition, given the statutory ratio of 4:1 in any CFA adjudication panel, four justices in each panel must be local PJs. The local PJs always play the decisive role in each and every case before the CFA. Comparative jurisprudence also prove that in many cases, particularly in human rights cases, local circumstances may justify the

¹⁶² Michael Thomas, “A practitioner’s perspective”, in in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge: Cambridge University Press, 2014), 201.

¹⁶³ *HKSAR v. NG KUNG SIU AND ANOTHER* [1999] 3 HKLRD 907; (1999) 2 HKCFAR 442. In this case, in addition to local case law, it also referred to cases from Australia, the US, Germany and regional human rights courts and so on.

application of the principle of margin of appreciation. To put it another way, an overseas NPJ can never be decisive in a specific case.

Furthermore, an examination of judgments written by NPJs in all cases decided by the CFA from the change of sovereignty in 1997 to the end of 2014 shows on the one hand the significant contribution made by NPJs, on the other that only one overseas NPJ has ever written a dissenting opinion.¹⁶⁴ It can be interpreted that overseas NPJs have confidence in local PJs, especially the majority of local PJs in each specific case. It also indicates that the quality of those judgments in which overseas NPJs have participated are on par with the quality of similar cases the highest courts in their respective jurisdictions decide. Otherwise, they wouldn't be willing to associate their names with those Hong Kong judgments.

V. Conclusion

This paper has analyzed both practical and symbolic roles of expatriate judges in Hong Kong during three different historical periods. In the first period from British occupation in 1840s to the time before Japanese occupation of Hong Kong during the Second World War, judges were almost exclusively expatriates. As far as today's Hong Kong is concerned, the expatriate judges those days made important practical contribution to the successful introduction and establishment of common law system, judicial independence and rule of law in Hong Kong. Their symbolic role during this period might not be the primary concern of both British and colonial Governments. It

¹⁶⁴ Judgments Written by Overseas NPJs (1997-2014)

Name of Overseas NPJs	No. of Majority Opinions Written	No. of Concurring Opinions Written	No. of Dissenting Opinions
Collins		1	
Clarke	1	1	
Gault	1	1	
Gleeson	2	3	
Gummow	1		
Hoffmann	29	10	
Mason	28	9	
Millet	3	2	1 (Judgment on Interest)
Neuberger	2	2	
Phillips	1	1	
Scott	9	4	
Spigelman	1		
Walker	2		

(The data are based on two sources: (i) data for the period from 1997 to 2010 are from Simon N. M. Young and Antonio Da Roza, "The judges", in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2014), Chapter XX; (ii) data for the period from 2011-2014 are counted by the author of this paper from the judgments published on the CFA's website: <http://www.hklii.hk/eng/hk/cases/hkcfa/>.)

could well be of equal importance if it did attract a significant population to Hong Kong for the purpose of trade and commerce as argued by Norton-Kyshe.¹⁶⁵

The second period is from the time the British resumed its administration in Hong Kong after the Japanese occupation to the time before China resumed its sovereignty over Hong Kong on 1st July 1997. During this period, the British had started to implement localization policy. As far as the Judiciary was concerned, the progress of localization was not smooth and the last expatriate Chief Justice Roberts had at least slowed down if not intentionally reversed localization by appointing and promoting more expatriate judges. By the time of change of sovereignty, there was still significant number of expatriate judges in Hong Kong. The expatriate judges made good practical contribution to the continuing development of Hong Kong's legal system and rule of law despite the fact that a few of them were involved in some scandals. In the later part of the second period, local legal talents had been trained and gained experiences and become mature. It was fair to say that by the time of change of sovereignty they were already competent enough to take over the Judiciary if necessary.

The association of rule of law with the common law system and expatriate judges had become rooted in Hong Kong which gave the presence of expatriate judges an important symbolic value. Moreover, with the approaching of the change of sovereignty, due to people's lack of confidence in China particularly after 4th June event, the symbolic role of expatriate judges became more important.

During the third period after the change of sovereignty, the progress of localization has picked up its speed and by 2015, it is fair to say that localization has almost achieved its objectives. But the Basic Law, which is Hong Kong's mini-Constitution, has guaranteed the presence of expatriate judges primarily through the NPIs in the CFA. As discussed above, the NPIs have, among other practical roles, made good contribution to the establishment of the CFA's jurisprudence. But they are not irreplaceable and local justices sitting on the CFA are equally competent.

Their symbolic value may, however, still be indispensable and invaluable in the foreseeable future. It is because China is not a rule of law country yet despite the fact that it has made big progress towards rule of law in the past four decades. People both in and outside Hong Kong had little confidence in Chinese legal system. Those in the legal field both in and outside Hong Kong know or should know that local judges are equally competent. But ordinary Hong Kong residents and foreigners don't have such in-depth understanding of Hong Kong judges. In their mind, it is most likely they would still associate Hong Kong local judges with Chinese and with China.

While it is true nowadays that rule of law and judicial independence have been firmly established in Hong Kong as its core values, it was not always the case from the very beginning of its colonization. Nor was it true some time as late as in the second half of the 20th century. Ordinary people's perception and confidence can be easily influenced by negative media reports. For example, soon after the State Council's "One Country, Two Systems" White Paper was published in 2015, its description of Hong Kong judges as "administrators" who have to "love the country" aroused great controversies in Hong Kong society and heated debate between democrats in Hong

¹⁶⁵ See Norton-Kyshe, above n. 36.

Kong on one hand and the Hong Kong pro-establishment camp and mainland scholars on the other. This is largely due to the concern of ordinary residents that the Beijing authorities are going to interfere with/undermine the independence that has been enjoyed by the judges in Hong Kong. Lord Neuberger, the UK Supreme Court's President, who sits as an overseas NPJ in the CFA dismissed worries over demands in the White Paper for local judges to be patriotic by saying that "I wonder if there is anything to worry about in the white paper".¹⁶⁶ The author of this paper has argued somewhere else that Lord Neuberger's assurance of no worry about rule of law in Hong Kong will remove hundreds and thousands of ordinary people's concern and worry over the future of rule of law in Hong Kong. Due to his status, his words would be much more effective than hundreds of reports of similar assurance given by Chinese people be they officials or scholars from either Hong Kong or China.¹⁶⁷

Therefore, the symbolic roles of overseas judges, particularly NPJs in the CFA, will remain important so long as Hong Kong's host state, China, has not developed into a fully-fledged rule of law state. The day China becomes a rule of law state will be the day on which it will be no longer necessary for Hong Kong to have expatriate judges.

¹⁶⁶ See "No need to fear Beijing's white paper, says top British judge Lord Neuberger", <http://www.scmp.com/news/hong-kong/article/1580878/no-need-fear-beijings-white-paper-says-top-uk-judge-lord-neuberger>, last accessed on 31st October 2015.

¹⁶⁷ Lin Feng (林峰), Report on the Implementation of the Basic Law in Hong Kong in 2014 (《香港《基本法》的落实状况(2014)》), in The Bluebook: Annual Report on China's Rule of Law (《法治蓝皮书》), 2015, Social Science Literature Press (社科文献出版社).