

Judges and judging in the Court of Final Appeal: a statistical picture

August 2010

With the changing of the guard in Hong Kong's highest judicial office, it is a good time to take stock of how our final court has operated in its first 13 years of existence. While many have written on individual CFA decisions, our aim is to provide a different perspective: to capture decision-making in quantitative terms and to present a jurimetrics perspective of judges and judging in the CFA.

Rising caseload

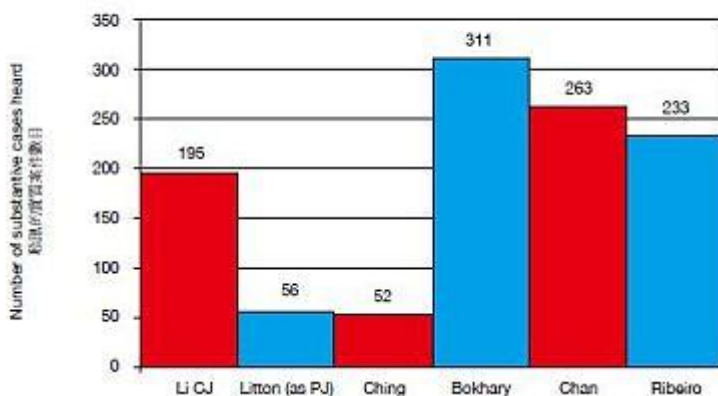
Soon after its establishment in 1997, one of the most significant challenges confronting the CFA was an increase in the number of litigants seeking to be heard. In the decade preceding 1 July 1997, the Privy Council decided 108 substantive appeals from Hong Kong. In the decade following, the CFA decided 244 substantive appeals. These figures alone point to the substantial increase in the number of cases going before the final court after 1997. In its first 13 years, the CFA has decided 325 cases, averaging about 25 cases per year.

In terms of applications for leave to appeal, the CFA in its first decade disposed of more than five times as many applications than the Privy Council in Hong Kong applications from 1987 to 1997. Since 1997, we estimate that the CFA disposed of approximately 1162 applications for leave, averaging 89 applications per year.

The sharp rise in caseload in the early days of the CFA led the court to begin to apply the Rule 7 procedure that allows cases to be filtered out without a hearing. With the deployment of Rule 7 in 2001, a fall was recorded in the number of leave hearings with a corresponding fall in the number of substantive hearings for 2001 and 2002. After 2002, however, another increasing trend began, reaching a high water mark of 38 decided appeals in 2006. The number of leave applications continues to rise and, in 2009, the court disposed of 161 applications, being the most disposed of in any one year.

The court's burgeoning caseload was a foreseeable consequence of relocating the final court to Hong Kong thereby reducing costs and other barriers to accessing the court. An increase in decisions from the final court has also meant a greater volume of potentially new law for lower courts and members of the legal profession to cope with.

Figure 1 Number of cases heard by Li CJ and the PJs
圖一 首席法官李國龍及常任法官所聆訊的案件數目



A new system of judges

The CFA is composed of a Chief Justice, not less than three permanent judges (PJs) and no more than 30 non-permanent judges (NPJs) who are either from Hong Kong or another common law jurisdiction. International attention is often paid to the CFA and its jurisprudence because of the repute of its overseas judges who are retired or serving jurists of the UK Supreme Court, formerly the House of Lords, the Australian High Court, and the New Zealand Supreme Court and Court of Appeal. These judges are appointed for a three-year period and, when scheduled to do so, will fly into Hong Kong to sit on a panel of five judges to hear appeals for a short period of time.

Figure 2 Number of cases heard by overseas NPJs

圖二 海外非常任法官聆訊的案件數目

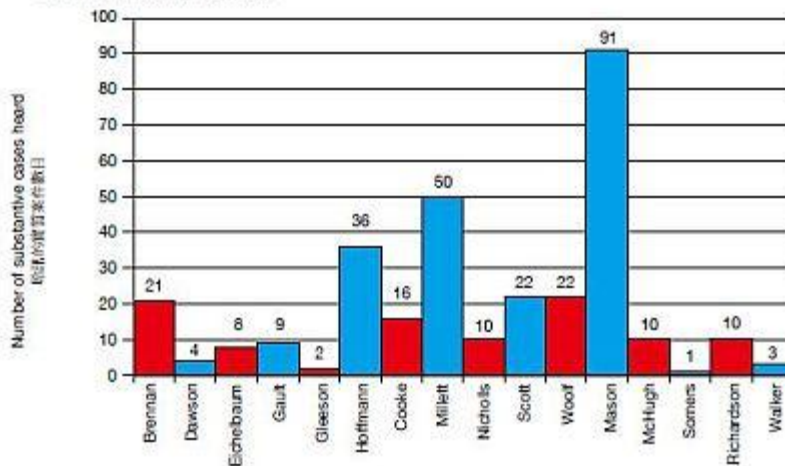
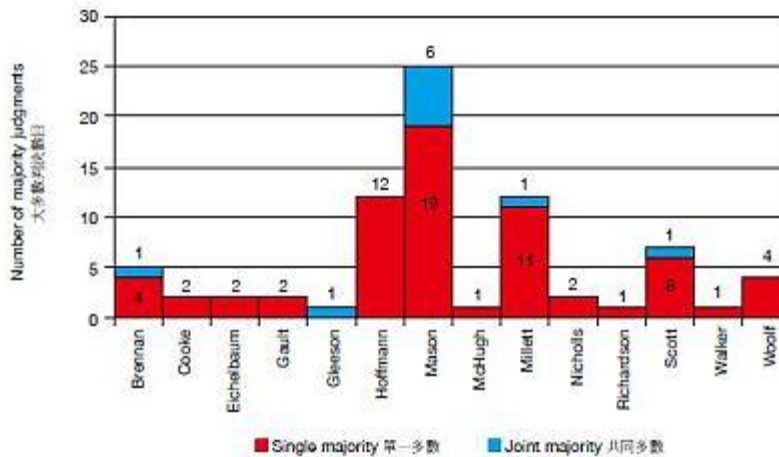


Figure 3 Number of majority judgments by overseas NPJs

圖三 海外非常任法官撰寫的大多數判決數目



The overseas judge arrangement, built into the Basic Law in Article 82, was adopted to ensure a continuity of international legal expertise of the highest calibre after the abolition of appeals to the Privy Council. Yash Ghai noted that the continuity was seen as being necessary to ‘reassure the business community’ and ‘enhance the court’s prospects of independence’: see *Hong Kong’s New Constitutional Order*, 2nd ed, 1999, pp 323-324.

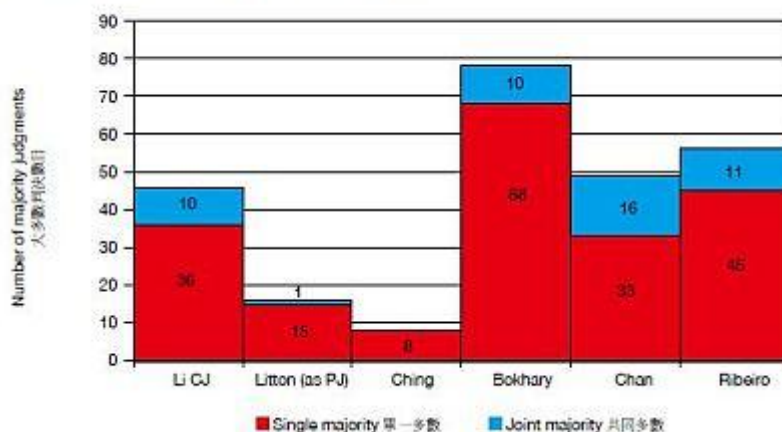
The law does not require an overseas judge to sit in each case, but Chief Justice Li has developed such a convention, resulting in 97% of all cases having an overseas NPJ. While the overseas NPJs rarely dissent, a few show leadership in writing the majority decisions. Sir Anthony Mason NPJ and Lords Millett and Hoffmann are the most active NPJs. New Zealand judges have had fewer opportunities to make an impact. Mason NPJ stands out by his exceptionally greater involvement (sitting in 91 appeals, ie 41 more than the NPJ hearing the second greatest number, and writing 25 majority judgments).

Permanent judges bearing brunt of judicial work

The new system of judges has changed the conditions for final justice quite significantly, from a court of final adjudication overseen by judges of foreign nationality sitting in a court in London to a court composed of four judges of local origin sitting with a judge from another jurisdiction. This new composition has made the final court more indigenous, given greater permanency to decision-making and judgment writing, and maintained an international influence within the final court.

The current PJs (Bokhary, Chan and Ribeiro PJJ) have from their appointment dates on average sat on 94% of all appeals. The Chief Justice has presided over 60% of all appeals, which is considerable given his many other commitments as head of the judiciary. The Chief Justice and PJs are also primarily responsible for deciding leave applications in panels of three whether with or without a hearing. With the rise in leave applications this becomes an increasing burden for the permanent judges.

Figure 4 Number of majority judgments by Li CJ and the PJs
圖四 首席法官李國能及常任法官聆訊的大多數判決數目

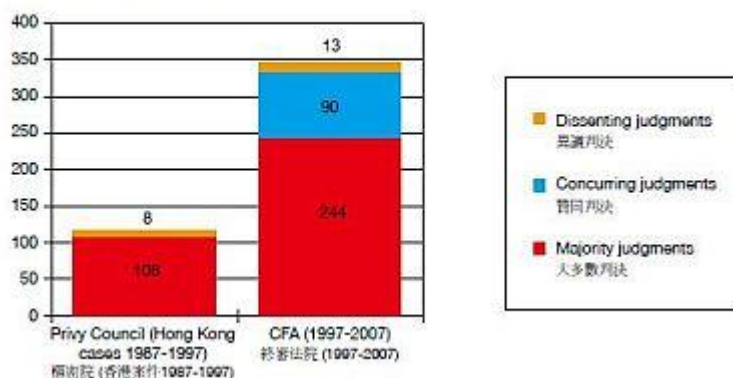


One obvious advantage of concentrating decision-making within a smaller group of judges is the potential to achieve greater consistency in the application of law and in the development of a coherent body of jurisprudence in distinct areas. The court's jurisprudence on constitutional rights is a good example of this, and it is no coincidence that the panel consisting of the Chief Justice, Bokhary, Chan, Ribeiro PJJ and Mason NPJ have sat to hear more than 40% of these cases.

Judgment writing

The historical role of the Privy Council, to advise the King (or Queen) of England, gave rise to a tradition that the Privy Council would only give a single judgment in respect of any appeal heard by its judicial committee. The tradition was abolished in 1966, allowing for dissenting judgments, but the practice of the Judicial Committee was such that often, only a single judgment continued to be given. This tradition, however, was not carried on by the CFA.

Figure 5 Comparison of the total number of majority, concurring and dissenting judgments
圖五 大多數、贊同及異議判決的總數比較



In the 108 substantive Hong Kong appeals heard by the Privy Council between 1987 and 1997, there were eight dissenting opinions and not one separate concurring judgment. By contrast, in the 244 cases decided during the first decade of the CFA, there were 90 separate concurring and 13 dissenting judgments. So while dissent continues to be rare, other judicial views have become plentiful. This is perhaps one of the most significant

achievements of the Li Court: to achieve consensus in decision-making while leaving room for a diversity of legal viewpoints.

The written reasons given by the final court as a whole have substantially lengthened since the Privy Council days. The average number of words written for a decided case in the Privy Council was 4758. The average drops slightly to 4436 words when the average per judgment instead of per case is taken. For the corresponding period, the average number of words written for a decided case in the CFA was 7673. Interestingly, the average drops to 4716 words when calculated per judgment – a figure which is closer to the Privy Council average. So while individual CFA judges are writing only slightly longer judgments than their counterparts in the Privy Council, the effect now of having multiple judgments per case has meant more laborious reading for all in order to appreciate in fullness how the court decided the case.

Appeal results

On the surface the CFA appears to allow a significantly higher number of substantive appeals (54%) when compared with the Privy Council (40%) in the relevant two decades. This high proportion of appeals allowed must, however, be looked at in the context of the leave filter. The 132 appeals allowed by the CFA must be considered in light of the estimated 665 leave applications dismissed by the CFA in the same period.

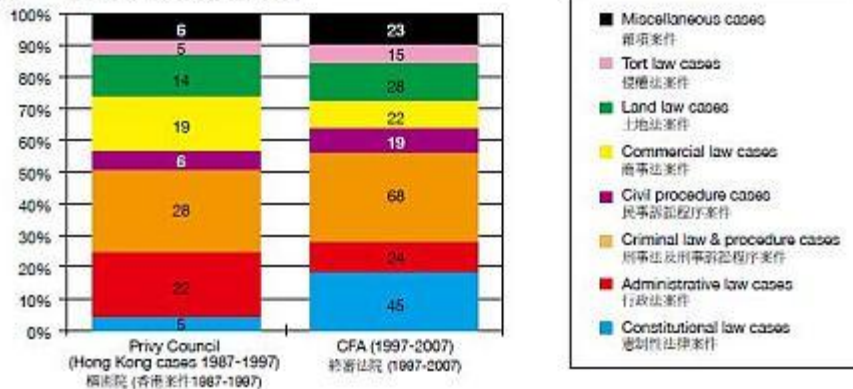
Taking the leave hurdle into account, the odds of an appeal succeeding at the CFA may be expressed as slightly more than one in 10, or 10.4%. While only 43 appeals were finally allowed by the Privy Council in its last decade of Hong Kong appeals, the odds of those appeals being allowed were in fact almost one in five, or 19%, when taking into consideration the petitions for special leave dismissed. Some of the barriers to the Privy Council, such as the cost and difficulties of overcoming geographical accessibility, case management and administration from Hong Kong to London, may have contributed to the filtering out of cases with less chance of success on appeal.

The results in cases involving government give rise to an interesting comparison. In both the CFA and Privy Council, the government party would tend to win more than lose in public law cases but the tendency was stronger in the Privy Council (62% compared to 55% in the CFA). However, in criminal appeals, the figures were the opposite. The Government won 67% of Privy Council criminal appeals but won only 38% of the CFA ones. Again this latter figure must be put in the context of a leave application successful rate of about 17%. Nevertheless this statistic serves to underline the independence of the post-1997 final court in matters concerning the government.

Greater attention to public law cases

Various indicators suggest that the CFA, when compared to the Privy Council, has given relatively more attention and deliberation to constitutional and administrative law ('public law') cases.

Figure 6 Proportion of substantive cases by type
圖六 實質上訴案件比率 (以類別分類)



While the CFA dealt with a considerably lower proportion of administrative law cases (9.8%) than the Privy Council (20.4%), the CFA's new constitutional law jurisdiction has accounted for 18.4% of its substantive caseload from 1997 to 2007, as opposed to only 4.6% at the Privy Council. Overall though there has been only a slight increase in the proportion of public law cases from 25% before the Privy Council to 28.3% before the CFA. The proportion of criminal law cases rose slightly from 25.9% at the Privy Council to 27.9% before the CFA.

The average number of hearing days for public law cases before the Privy Council was 2.2 days which is no different from the overall average number of hearing days per case. Public law cases in the CFA were heard over an average of 2.6 days, which is 0.7 days more than the CFA overall average. This meant that CFA public law litigants had more 'air time' than the average CFA litigant, whereas public law appeals in the Privy Council were given the same amount of hearing time as any other appeal.

The CFA also took relatively more time (relative to its average case) to come to its reasons in public law cases. For the Privy Council, the mean for public law cases was 51 days, as compared with the overall mean of 53 days to release its reasons. For the CFA, however, the mean for public law cases was 31 days, in contrast with an overall mean of 24 days. It would seem that the CFA judges were taking more time to mull over and deliberate the challenging points of constitutional and administrative law.

CFA judges also tend to use more words in their public law judgments. The average number of words written by the CFA per public law case was 10,018, in sharp contrast to the 5044 average per case by the Privy Council. In terms of the number of words per judgment, the CFA average is still substantially greater than the Privy Council average (5530 words versus 4697 words).

Conclusion

Following the enactment of the Hong Kong Court of Final Appeal Ordinance (Cap 484), in July 1995, it was known that Hong Kong's final court after 1997 would have the following features: a Chief Justice, at least three additional PJs, a roster of visiting and local NPs who would be asked to sit as an additional judge from time to time, and essentially the same jurisdiction as that of the Privy Council.

Through the CFA, there have been three significant changes in the conditions for final justice. First, in response to the increase in appeal applications, the CFA has had to apply greater jurisdictional measures to control its docket. Secondly, the change in the system of judges has substantially affected the process of decision-making. For example, there is now a greater diversity of legal opinions emanating from the final court, although dissent still remains relatively infrequent. Thirdly, there has been a change in how the final court treats public law cases.

With Rule 7 some may have anticipated the increased caseload, but this did not appear to be of great concern then, explaining why it was only in 2001 that the court began to make use of this procedure.

As the brunt of judicial work is now carried out by the PJs, the immediate question is whether there needs to be more than three PJs. The Chief Justice has heavy administrative duties when wearing his hat as head of the Judiciary. There seems to be a diminishing importance to the role of the local NPJs and much of the work that may have been intended for them would appear to have been given to the PJs. Until recently, the pool of local NPJs had diminished and the data on judgment writing by local NPJ shows that they have written very little. PJs are responsible for all the leave determinations and for writing the bulk of the judgments, which have become longer and more numerous per case. However a fourth PJ could reduce the frequency of having an overseas NPJ.

The visiting NPJ system, albeit limited to only one visiting judge per case, has worked well. A handful of the visiting NPJs have been of great assistance to the CFA, particularly in public law cases. They have brought international influence to the court and, given their distinction as senior international jurists, have probably influenced much of the decision-making, even when they have had no direct hand in the majority judgment. Their visitation system that parachutes them in and out for short stints contributes to efficient justice. From time to time they have provided a different voice with their separate judgments. We are doubtful whether the system would have had the same beneficial impact had it been possible to have more than one visiting NPJ sitting on a particular case. Two distinguished jurists (possibly from different jurisdictions) on one appeal could well give rise to a greater difference of opinion amongst the members of the court. While a diversity of views can be important and has its place, for a young final court like the CFA, however, it was more important to speak with a fewer number of authoritative voices, at least in its early years when jurisprudential certainty and consistency are of high importance.

The findings that shed light on the CFA's special treatment of public law cases reflect society's many discontents with the Government and increased resort to rights litigation. The CFA's response has been to hear these disputes fully and decide them conscientiously.

Final justice in Hong Kong is no longer a rare opportunity enjoyed only by those who can afford the cost of accessing the Privy Council in London. But with the increased ease of reaching the final court, there is a reduced likelihood of obtaining a hearing of the full court. Once inside the doors, however, the litigants are greeted with a new set of conditions for final justice that guarantees the same independence, quality and international influence that characterised the work of the Privy Council.

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