

## Independence of the Judiciary

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### Introduction

Judicial independence is regarded as a fundamental aspect of the rule of law. It ensures that, irrespective of whether the case concerns private parties or public authorities, the judge deciding the case will be completely impartial. This gives the community confidence that disputes will be handled fairly, whether they are of a criminal or civil nature.

The judiciary has a vital constitutional role to ensure that the executive authorities and the legislature act within the law, that there is no abuse of power and that the fundamental rights and freedoms of citizens are safeguarded. These values are recognised in, for example, the Basic

Law and the ICCPR. Under BL 39, the provisions of the ICCPR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. It is also relevant that Article 10 of the BoR (which is based on Article 14.1 of the ICCPR) provides, among other things, that:

"In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The independence of the judiciary, in Hong Kong as elsewhere, is essentially made up of two aspects: constitutional independence and independence



of outlook. Judicial independence is underpinned by the method of judicial appointment and the guarantee of security of tenure. A judge also enjoys a large measure of protection against civil liability in respect of acts performed while sitting in that capacity, and his conduct cannot be questioned by the legislature.

The principle that our judges are to exercise the judicial power free from any interference is guaranteed in the Basic Law. BL 80 provides that the Courts of the HKSAR at all levels shall be the judiciary, exercising the judicial power of the Region. Such judicial power, according to BL 85, is to be exercised independently, free from any interference.

There are many factors contributing to the independence of the judiciary. The issues of appointment and removal of judges, judicial immunity and judicial conduct are discussed in the following parts of this article.

### Appointment and Removal of Judges

For the judiciary to be genuinely independent, there must be practical mechanisms to ensure that the appointment, status, tenure and removal of judges are protected from interference by the executive authorities and the legislature.

BL 88 provides that –

"Judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors."

An independent commission was established on 1 July 1997 under the Judicial Officers Recommendation Commission Ordinance (Cap. 92). It consists of nine members, namely the Chief Justice (who is the chairman), the Secretary for Justice, and two judges, a solicitor, a barrister, and three lay members appointed by the CE. All judges of the CFA, CA, CFI and the District Court, magistrates, members of the Lands Tribunal, adjudicators of the Small Claims Tribunal, presiding officers of the Labour Tribunal and coroners are appointed by the CE on the advice or recommendation of the Judicial Officers Recommendation Commission. The Obscene Articles Tribunal consists of a magistrate and two or more adjudicators selected from a panel of adjudicators who are appointed by the Chief Justice.

The security of tenure of judges is provided for by BL 89, which states as follows:

"A judge of a court of the Hong Kong Special Administrative Region may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges.

The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be investigated only for inability to discharge his or her duties, or for misbehaviour, by a tribunal appointed by the Chief Executive and consisting of not fewer than five local judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the



procedures prescribed in this Law."

Under BL 90(1), only the Chief Justice of the CFA and the Chief Judge of the High Court must be Chinese citizens who are permanent residents of Hong Kong. In addition, under BL 90(2), the appointment or removal of judges of the CFA and the Chief Judge of the High Court requires the endorsement of the LegCo and has to be reported to the NPCSC for record. The CPG is not otherwise involved in the appointment of members of the judiciary.

BL 91 provides for the maintenance of the previous system of appointment and removal of members of the judiciary other than judges. Judges and other members of the judiciary are chosen on the basis of their judicial and professional qualities as provided under BL 92. Judges may be recruited from common law jurisdictions outside Hong Kong.

## Judicial Immunity

BL 85 provides that members of the judiciary shall be immune from legal action in the performance

of their judicial functions. The above immunity ensures that judges will decide cases according only to law, without fear of any outside forces, and irrespective of whether the decision would be against the interest of any parties, including the executive authorities. The purpose of judicial immunity under common law is explained in *Sirros v Moore & Others* [1975] 1 QB 118 at 132G as follows:

"This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justices, that being free from actions, they may be free in thought and independent in judgment, as all who administer justice ought to be."

The CA in the case of *Ma Kwai Chun v Leong Siu Chung and another* [2001-2003] HKCLRT 286 held that BL 85 provides an absolute protection for acts done by judicial officers in the administration of justice, in order to ensure that these officers deal with cases without bias, favour or fear and to effectively prevent litigants from commencing



proceedings against these officers personally.

The CA referred to the judgment of the Court of Appeal of Quebec, Canada in *Royer et al v Mignault* (1988) 50 DLR (4<sup>th</sup>) 345, at 352 in discussing the purpose of judicial immunity:

"The purpose of the principle is not, of course, to protect the personal interests of judges, but rather to protect the public interest in an independent and impartial justice system. To this end, judges, in performing their judicial functions, must be able to do so without fear of personal liability for what they say or do in their judicial capacities. Any errors they make may be corrected on appeal (or judicial review, as the case may be), but they should not have to fear that they may be threatened by dissatisfied litigants, or others, with civil actions charging them with malice, bias, or excess of jurisdiction. A judge should not be subject to the influence of personal concerns, conscious or unconscious, when performing his judicial functions."

In *Tam Mei Kam v HSBC International Trustee Ltd and others*, CACV 124/2013, the CA had to deal with the argument that judicial immunity is not absolute under the common law and therefore BL 85, read together with BL 8 and 18, should be interpreted as having the same effect as the common law. The CA referred to the judgment by Buckley LJ in *Sirros v Moore & Others* (at 140A) that "it should now be taken as settled both on authority and on principle that a judge of the High Court is absolutely immune from personal civil liability in respect of any judicial act which he does in his capacity as a judge of that court" and went on to hold that a judge is absolutely immune from personal civil liability for any judicial act done in his capacity as a judge, irrespective of whether he acted under gross error or negligence.

### Judicial Conduct

In order to maintain public confidence in the judiciary and the administration of justice, it is of fundamental importance that judges observe the highest standard of conduct. The judiciary

published the "Guide to Judicial Conduct" in October 2004 (the "Guide"), the purpose of which is to provide practical assistance to judges in dealing with matters relating to judicial conduct, such that the highest standard of conduct is observed, and that judges do their utmost to uphold the independence and impartiality of the judiciary and to maintain the dignity and standing of the judicial office.

Impartiality is the fundamental quality required of a judge. Justice must be done and must be seen to be done. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. There are occasions where the principle of impartiality may operate to disqualify a judge from sitting. The Guide refers to three classes of cases calling for disqualification:

- (a) where there is actual bias;
- (b) where bias is presumed and disqualification is automatic; and
- (c) where there is apparent bias.

## Actual and Presumed Bias

Where it can be shown that a judge is affected by actual bias, the judge must be disqualified from sitting. According to case law in England and Wales, bias is presumed and the judge is automatically disqualified where the judge has pecuniary or proprietary interest in the outcome of the case. The automatic disqualification rule has been extended by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119 ("Pinochet No. 2") to cover a limited case of non-financial interests, namely where the judge's decision would lead to the promotion of a cause

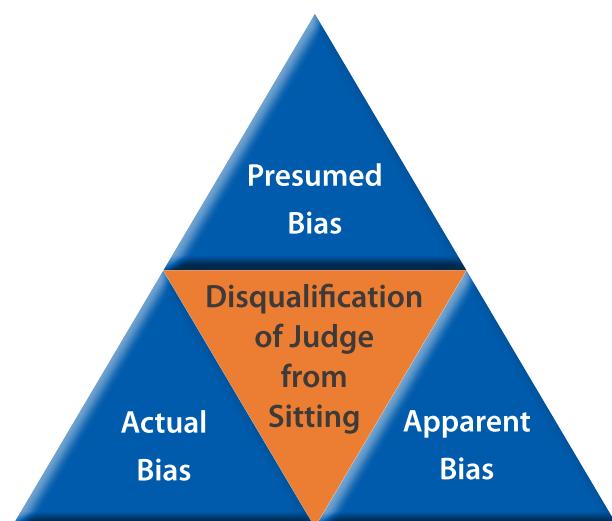
in which he is involved in promoting together with one of the parties.

In *Pinochet No. 2*, the House of Lords allowed the Crown Prosecution's appeal against the lower Court's decision quashing an extradition warrant against Pinochet, the former head of Chile. Subsequently, it transpired that Lord Hoffman – one of the judges who decided against Pinochet – was a director of a charity that was closely tied to one of the interveners in the case. The House of Lords held that Lord Hoffman should be disqualified automatically on ground of his political interest. This is because the charity which Lord Hoffman directed – as an arm of Amnesty International – shared a political interest with the Spanish Government and the Crown Prosecution (which sought to extradite Pinochet to Spain).

## Apparent Bias

The test for deciding whether there is apparent bias is as follows:

"A particular judge is disqualified from sitting if the circumstances are such as would lead a reasonable, fair-minded and well-informed





observer to conclude that there is a real possibility that the judge is biased."

The above test has effectively been adopted by the Appeal Committee of the CFA in *Deacons v White & Case LLP & Others* [2004] 1 HKLRD 291. In this case, the trial judge informed the parties at the beginning of the trial that he and a partner of the plaintiff had been close friends when at university together and for some time thereafter but that they had only very infrequently been in contact since the judge joined the bench in 1993. Subsequently, the judge decided to recuse himself on the application by the defendants. Some of the defendants applied to the CA to challenge the earlier orders made by the recused judge with a view to arguing that, having recused himself from the trial, he ought equally not to have dealt with the earlier interlocutory applications so that those orders should be set aside. Such application was, however, dismissed by the CA. The CFA's Appeal Committee, in refusing to grant leave of appeal, held that the correct test to be applied is the reasonable apprehension of bias test as set out above. It further held that the CA has applied the correct test in dismissing the appeal by the Applicants.

The question of whether there is apparent bias which should lead to the disqualification of the judge should be considered by taking into account all material facts of the case. However, judges should not yield to tenuous, trivial or frivolous grounds and should not accede too readily to suggestions of apparent bias.

In *Francis Cheung & Another v Insider Dealing Tribunal* [2000] 1 HKLRD 807, the Applicants sought to quash certain findings of the Insider Dealing Tribunal on the ground that a member of the Tribunal knew the first Applicant. The member in question did disclose to the Tribunal that he and the first Applicant were both members of the executive committee of an old boys association. The Tribunal had disclosed the relation to all parties at the beginning of the hearing and no objection had been taken. The member in question continued to sit as a member of the Tribunal and he did not inform the other two members of the Tribunal his dissenting view, being the minority view, on the matter.

The concern was therefore whether the private life of the member in question did meddle with his public duty as a member of the Tribunal. The



suggestion was that as a friend, acquaintance or simply a fellow member of the old boys association, the member in question was likely to have been in effect biased against the first Applicant in an attempt to impress the other two members with his impartiality towards, and the absence of any partiality for, the first Applicant. It was held that the first Applicant could have objected to the membership of the member in question as soon as he learned of it, which must have been very early on in the 7-week hearing or even before. However, the first Applicant did nothing to challenge the membership. It was held that the first Applicant could not have had any fear of bias. It could not be right for him to wait until he learned of the unfavourable result and only then set about making his objection. The application was dismissed by all three judges of the CA and the Applicants' attempt to seek leave to appeal to the CFA was rejected by the Appeal Committee of the CFA.

## Illustrations

The Guide has set out some practical illustrations. It would appear inevitable that a judge should disqualify himself or herself where the relationship between the judge and the litigant, a material witness or counsel in the case is one of spouse or close relative including a parent, brother or sister, child or son-in-law or daughter-in-law. However, friendship, including a close friendship or a past professional association with counsel or solicitor in the case, such as former pupils, members of the same chambers or partners in the same firm, usually would not require disqualification.

The apparent bias test may be applicable in a case with possible financial implications for the

judge where the automatic disqualification rule discussed above is not engaged. For instance, a judge owns a mortgaged flat and, with falling interest rates, has made an application to the mortgagee bank to refinance the loan at a lower interest rate. If, while the application is pending, the same bank were to come before the judge seeking to recover a loan made to some other customer, there is no question of the automatic disqualification rule applying since the judge is not interested in the outcome of the bank's action against that other customer. Nonetheless, because of the judge's pending application to the plaintiff bank regarding his mortgage interest rate, the apparent bias test would have to be applied.

Apart from the relationship of the judge with the relevant persons involved in the case before him and the possible financial implications to the judge, an allegation of apparent bias may be based on the fact that the judge has commented adversely against a person in a previous case. The Guide discusses this situation and states that where a judge in a previous case has held against a person, whether as a witness or a litigant, this by itself would usually not be expected to result in disqualification. But the circumstances may be such that the question of disqualification has to be considered.

In *HKSAR v Habibullah Abdul Rahman*, CACC 302/2008, the Applicant together with other persons was convicted in September 2008 in the District Court upon a charge of conspiracy to defraud. The Applicant and the other defendants lodged an appeal against conviction in the CA which was listed for hearing in September 2009. At a hearing for directions before the appeal, the proposed composition of the Court for the appeal was revealed to the parties. The Applicant later



suggested that it was not appropriate for Wright J to sit as a member of the appeal court hearing the appeal.

The application to recuse Wright J was advanced on the footing that in 2005, Wright J, then a District Court judge, presided over a lengthy trial the subject matter of which was a number of conspiracies to defraud companies and individuals ("the first trial"). The contention was that Wright J's involvement, and certain findings of fact, in the first trial would lead a fair-minded and informed observer to conclude that in relation to the forthcoming appeal there was a real possibility that the appellate tribunal, to the extent that Wright J was a member of it, would be biased.

The Applicant was not a defendant in the first trial, nor was he called to testify as a witness. The main prosecution witness, namely Lui, in the first trial testified about a time when she was told by the Applicant, who was the financial controller of the company in question, that certain financial consequences would flow if the share price of the company fell below the stipulated level. Counsel for the Applicant submitted that one of the questions which the CA would be called upon to

determine in the forthcoming appeal was whether the judge below correctly inferred dishonest knowledge on the part of the Applicant. It was submitted that for something in the order of four months Wright J gathered an impression of the daily activities within the offices of the company in question. He concluded that the company was immersed in a culture of dishonesty. The fair-minded informed observer would therefore conclude that there was a real possibility of a subconscious notion in the mind of Wright J that any senior officer of the company must have been part of that culture, an impression that goes beyond an inference that might or might not be drawn from the mere fact that the person was a company's financial controller.

The CA decided that there arose no real possibility that the ability of Wright J to apply an objective judgment to the issues arising in the forthcoming appeal would be affected by his involvement or his findings in the first trial. The CA considered that a fair-minded observer would be informed by the following facts. The Applicant was neither a party nor a witness in the first trial. When Wright J concluded in the first trial that Lui was telling the truth when she testified that the Applicant



said that the price of the shares could not be allowed to fall below the stipulated level, he was not testing that contention against any evidence to the contrary and therefore did not arrive at any conclusion as to the veracity of the Applicant.

The CA held that, even then, the finding in the first trial that the Applicant made that comment was not a finding that the Applicant had acted dishonestly. There was no suggestion in the evidence that the Applicant himself was party to the establishment and operation of bogus trading accounts and there was no finding to that effect by Wright J. Moreover, when Wright J held that there was a culture of dishonesty at the company in question – an observation made in that case in the context of share dealings – he made no finding that the Applicant was part of that culture.

The CA pointed out that even if Wright J said anything adverse to the Applicant in the first trial, there would be no logic in an assumption that the Applicant must therefore have been party to dishonesty in respect of the conspiracy in the forthcoming appeal. The CA took into account that the first trial was heard three and a half years ago and commented that the details of the case

and the impressions created by a trial that long ago would fade from a judge's memory with the passage of time.

Finally, in the forthcoming appeal, Wright J was not called upon to determine facts. His appellate role would be to assess whether the analysis by which the judge below reached conclusions adverse to the Applicant was flawed in logic or in law. That assessment and its basis has to be disclosed in the appellate judgment and conducted in the cold light of the matters to be put before the CA, namely, the reasoning of the judge below, the testimony said to support or gainsay it, and the submissions of counsel. The CA decided that while it was not suggesting that a judge who is designated to sit in an appellate capacity is thereby necessarily immune from recusal: it depends on all the circumstances, but in this case it is a point that must carry weight.

