



Earlier this year, a few senior judicial appointments were announced. The Judicial Officers Recommendation Commission (the “JORC”) recommended the appointment of:

- (1) The Right Honourable The Lord Woolf of Barnes, The Right Honourable The Lord Scott of Foscote and The Right Honourable Sir Ivor Richardson as non-permanent judges from other common law jurisdictions to the CFA; and
- (2) The Honourable Mr Justice Geoffrey Ma Tao Li as the Chief Judge of the High Court.

The CE accepted these recommendations and made the appointments after obtaining the endorsement of the LegCo on 3 July 2003¹ as required by BL 90(2) and, in the case of the three non-permanent CFA judges, also section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap 484). In addition, the CE is also required to report the appointments to the NPCSC for the record.

ROLE AND COMPOSITION OF THE JORC

It should be noted that these appointments were made on the recommendation of the JORC. BL 88 provides that judges of the courts of the HKSAR are appointed by the CE on the recommendation of an independent commission composed of:

- (1) local judges;
- (2) persons from the legal profession; and
- (3) eminent persons from other sectors.

As a statutory body established by the Judicial Officers Recommendation Commission Ordinance (Cap 92) and independent of the HKSARG, the JORC consists of:

- (1) the Chief Justice of the CFA;
- (2) the Secretary for Justice; and
- (3) 7 members (2 judges, 1 practising barrister, 1 practising solicitor, and 3 persons not connected with the practice of law) appointed by the CE.

The composition of the JORC complies with BL 88.

JUDGES OF THE CFA

As of September 2003, the CFA consists of the following judges:²

Chief Justice

The Honourable Mr Justice Li

Permanent judges

- (1) The Honourable Mr Justice Bokhary
- (2) The Honourable Mr Justice Chan
- (3) The Honourable Mr Justice Ribeiro

Non-permanent judges

- (1) 8 non-permanent Hong Kong judges³
- (2) 10 judges from other common law jurisdictions⁴

¹ The relevant resolutions of the LegCo were gazetted as LN 171 and 172 of 2003.

² For an updated list of the judges of the CFA, please visit www.judiciary.gov.hk.

³ Under s 12(3) of the Hong Kong Court of Final Appeal Ordinance (Cap 484), a person shall be eligible to be appointed as a non-permanent Hong Kong judge if he is:

- (a) a retired Chief Judge of the High Court;
- (b) a retired Chief Justice of the CFA;
- (c) a retired permanent judge of the CFA;
- (d) a Justice or retired Justice of Appeal of the CA; or
- (e) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years,

whether or not he is ordinarily resident in Hong Kong.

⁴ Under s 12(4) of Cap 484, a person shall be eligible to be appointed as a judge from another common law jurisdiction if he is:

- (a) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction;
- (b) a person who is ordinarily resident outside Hong Kong; and
- (c) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.



Thanks to the popularity of courtroom drama, even laymen are aware of many legal concepts — or at least know them by name. In this article, you will know more about something you might have come across on TV: the doctrine of precedent (or doctrine of *stare decisis*).

The doctrine of precedent has it that a court is bound to follow the *ratio decidendi* of a superior court's decisions and often its own previous decisions. A *ratio decidendi* is the legal precept applied by the judge in resolving the issue before the court. When we say a court is bound by a certain decision, we in fact mean that the court is bound by the *ratio decidendi* of that decision.

And here comes another related concept: *obiter dicta*. The term refers to a court's comments in a judgment that are said "by the way". They may include a correct commentary of the law. Though highly persuasive, they are not binding on subsequent cases, unlike the *ratio decidendi* of a decision.

By this time you will probably have realized the importance of the doctrine of precedent — to ensure that the courts' decisions are consistent and predictable. As similar cases are ruled by the courts in similar ways, people will find it easier to lead their lives and make decisions, being more or less aware of the possible consequences.

Then how is the doctrine of precedent operated in our judicial system?

Application of the doctrine to the courts in the HKSAR

In the light of the common law doctrine of precedent applicable before the Reunification, we can derive the following principles:

1. The highest court in the HKSAR is the CFA. It is not bound by its own or any other courts' decisions, but in practice it is likely to take a consistent view of the law.
2. The CA is bound by every previous decision of the CFA. The CA is in general bound by its own previous decisions, but the main exceptions are:
 - (a) where the previous decision is inconsistent with any decision of a superior court (eg the CFA); or
 - (b) where it is inconsistent with another previous decision of the CA; or
 - (c) where it was made in ignorance of some inconsistent statutory provisions or of some authorities binding on the CA.
3. All courts and tribunals (eg the District Court, the Labour Tribunal, etc) in the HKSAR follow previous decisions of the CFA and the High Court, ie the CA and the CFI. The CFI follows previous decisions of the CFA and those of the CA.

Binding effect of English decisions delivered before 1 July 1997

Before the Reunification, the court of final appeal for Hong Kong was the Judicial Committee of the Privy Council (the "Privy Council"). Hong Kong courts were bound by the decisions of the Privy Council and, in practice, by the decisions of the House of Lords on questions of English law applicable in Hong Kong.

In relation to the binding effect in the HKSAR after 1 July 1997 of the decisions of the Privy Council delivered before 1 July 1997, the CA said in *Bahadur v Secretary for Security* [2000] 2 HKC 486 at p 495B–D that "decisions of the Privy Council delivered before the resumption of sovereignty over Hong Kong by the [PRC] continue to be binding since the resumption of sovereignty on all courts of Hong Kong, save for the Court of Final Appeal. That is because decisions of the Privy Council represented part of the common law of Hong Kong. They were therefore part of the laws enforced in Hong Kong when the Basic Law came into operation and were preserved by art 8 of the Basic Law."

Binding effect of English decisions delivered after 1 July 1997

BL 84 expressly provides that the courts of the HKSAR may refer to precedents of other common law jurisdictions. The CFA replaced the Privy Council as the highest court of the HKSAR at the Reunification. Therefore, decisions of the Privy Council made after 1 July 1997 are not binding. The CFA serves as the fountain of the common law for Hong Kong.

Although English decisions delivered after 1 July 1997 are no longer binding, the HKSAR courts will clearly continue to seek guidance from them, especially those of the Privy Council and the House of Lords, which are influential throughout the common law world.

Court of Final Appeal¹

- 1 It is the highest appellate court in the HKSAR and it hears appeals on civil and criminal matters from the High Court.

High Court : Court of Appeal²
Court of First Instance³

- 2 It hears appeals on criminal and civil matters from the Court of First Instance, the District Court and the Lands Tribunal.
- 3 (a) It operates as an appeal court for (i) criminal cases heard in the Magistrates' Courts; and (ii) cases heard in various tribunals, eg, the Labour Tribunal and the Small Claims Tribunal.
- (b) It tries the most serious criminal offences, eg, murder, armed robbery. Cases are tried by a judge sitting with a jury.
- (c) It has unlimited jurisdiction over all civil matters, eg, breach of contract, personal injury, intellectual property.

District Court⁴Lands Tribunal⁵

- 4 (a) In criminal trials, a judge sits alone without a jury. The maximum term of imprisonment the court can impose is 7 years.
- (b) It deals with various types of civil action. For a contract, quasi-contract or tort claim, it must be for an amount over \$50,000 but not more than \$1,000,000.
- 5 It deals with four main categories of cases, ie, tenancy cases, compensation cases, specified appeal cases and building management cases. There is no limit on the amount of compensation and rent which it may determine.

Magistrates' Courts⁶Labour Tribunal⁷Small Claims Tribunal⁸Obscene Articles Tribunal⁹Coroner's Court¹⁰

- 6 The Magistrates' Courts exercise criminal jurisdiction. The maximum sentencing power of a Magistrate is, subject to certain exceptions, 2 years' imprisonment and a fine of \$100,000.
- 7 Subject to certain exclusions (eg, cases handled by the Minor Employment Claim Adjudication Board), it hears cases related to monetary disputes between employees and employers. There is no upper limit as to the amount that may be claimed. Rules of evidence do not apply rigidly to proceedings in the Tribunal and legal representation is prohibited.
- 8 It provides an informal, quick and inexpensive means to deal with claims not exceeding \$50,000. Legal representation is prohibited and rules of evidence do not apply.
- 9 One of its main functions is to determine whether an article is obscene or indecent within the meaning of the Control of Obscene and Indecent Articles Ordinance (Cap 390).
- 10 It conducts inquests into the causes and circumstances connected with reportable deaths and other deaths which a coroner considers should be investigated in the public interest.

* For further details, please visit the website of the Judiciary at www.judiciary.gov.hk.



Between February and April this year, we conducted a Readers Survey to explore ways to improve this publication. We would like to thank all those who responded for taking the effort to send us their views. We have received a total of 107 completed questionnaires, and the feedback is very encouraging. The majority (over 97%) of them comes from our primary target readers (ie civil servants).

The respondents find the Bulletin informative (89%), useful (65%) and interesting (72%). They (53%) have preference for reading the Bulletin in paper form, but most of those (over 80%) who have read the electronic version find it satisfactory in terms of file size/partition and legibility. Regarding the contents of the Bulletin, the respondents have suggested various topics for coverage in future issues, the idea being to provide a systematic introduction of the Basic Law to the readers (including issues that are relevant to the work of civil servants). The majority of the respondents (95%) do not propose introduction of any new columns to the Bulletin.

In view of these comments and feedback, we shall retain the existing regular columns and continue with our systematic introduction to various parts of the Basic Law. We have in previous issues discussed the HKSAR's autonomy, the Basic Law as the interface between the HKSAR and the Mainland's legal systems, as well as the fundamental rights of Hong Kong residents. This and the next few issues will focus on the judicial system and the external affairs powers/functions of the HKSAR. Relevant court decisions and interesting sidelights in more reader-friendly style will be presented to readers. We shall continue to improve on the Bulletin and would welcome readers' further feedback and comments on future issues.

{ Abbreviations }

BL	Basic Law / Basic Law Article
BoR	Hong Kong Bill of Rights
CA	Court of Appeal
CE	Chief Executive
CE in C	Chief Executive in Council
CFA	Court of Final Appeal
CFI	Court of First Instance
CPG	Central People's Government
ExCo	Executive Council
HKSAR	Hong Kong Special Administrative Region
HKSARG	Government of the HKSAR
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LegCo	Legislative Council
NPC	National People's Congress
NPCSC	Standing Committee of the NPC
PRC	People's Republic of China
The Interpretation	The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China

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