

Common Law in Hong Kong

Name

Institution

COMMON LAW IN HONG KONG

Abstract

There are 4 sources of law in Hong Kong: The Basic Law, the National laws in annex III, Common law and equity and finally laws that are passed by the legislature. Common law in Hong Kong is as a result of the 170 years of colonization by the British. The British used the system of common law and it was applied in the courts before 1997. After 1997 Hong Kong was handed over to China and their new Basic law required that common law continue its application. Hong Kong also has its National laws that are laid down in annex III.

Common Law

Common law is a system of law where judicial decisions are determined based precedents(School of Law, 2010). It is basically a body of law that uses precedents in the determination of cases. Precedents are the decisions that were made in earlier cases and are to be adhered to in similar cases(School of Law, 2010). They are commonly known as case laws. The common law system originated from the United Kingdom and it was passed to the colonies of the UK. It is known as common law because it was the system that was common to all colonies of the UK. Common law systems follow what is known as *stare decisis* which means that the courts are expected and obligated to follow the precedents that were set(Hage & Akkermans, 2014). *Stare decisis* is a doctrine under common law that is the very backbone of decisions by courts in the common law.

What are the features of the common law system?

In common law, the decisions of higher courts are binding. They are supposed to be followed by all subordinate courts until an amendment by way of legislation is made. Another way of changing a binding decision is when a higher court overturns the decision. The subordinate courts are usually governed by what the higher courts have decided(Hage & Akkermans, 2014). In any matter

COMMON LAW IN HONG KONG

regarding the law, the higher court makes decisions knowing that all the lower courts will have to follow the same decision. The decision of the highest Court in the land can only be reviewed by the same court or when parliament amends the law through legislating. New rulings on a decision usually make a new precedent and overturn the precedent that existed.

Stare decisis a doctrine under common law. It means that courts should stand by decisions that were earlier made by the courts. The doctrine of *stare decisis* is a key feature of the common law(Hage & Akkermans, 2014). Cases with similar situations and tracts of facts should be decided in the same way. *Stare decisis* allows courts to use the decisions that were made not only in their jurisdictions but also in the other common law countries(Young, 2011). Cases with similar circumstances should apply the same reasoning and judges should apply the facts to the precedents that have been set. Under the doctrine of *stare decisis* Court usually have two options to either follow the rulings of earlier cases or for higher courts to overturn the decision and come up with new precedent(Young, 2011). When the Final court of appeal of the land makes a decision it becomes binding to all other subordinate courts and consequently is the precedent to be followed.

Under common law, there is the application of reason and scientific analysis of the facts so as to come to the truth of the matter(Young, 2011). The judges sit down as the lawyers analyze the law and present evidence in an orderly manner and analyses the matter by reason and the law. The law and the legal process are regarded as the only way of attaining the desired justice. Procedural justice and substantial justice are an integral part of the common law system

Are there any references to the common law or common law system in the basic laws?

The Basic Laws were enacted by the National People's Congress for the administration of the Hong Kong Special Administrative Region. It came into force in 1997. The Law stated that all the laws

COMMON LAW IN HONG KONG

that were in place prior to the enactment shall remain so except if it contravenes the Basic laws(E. C. Ip, 2016). Common law in Hong Kong is subject to amendment by the legislators. The basic system of Basic law is known as “one country, two systems”. This phrase goes to mean that Hong Kong is not allowed to practice socialism for 50 years since 1997. Socialism was only to be practiced in China while in Hong Kong Capitalism was the main system(E. Ip, 2019). Article 8 of The Hong Kong Basic Law states that, “all laws in force before 1997, including the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained unless the laws seem to contravene or go against the law or it has been amended by the legislator”(Mason, 2011).

Article 84 of the Basic Law relates to common law in Hong Kong. It states that in the Hong Kong Court, precedents from other common law jurisdictions can be used to determine cases(Mason, 2011). This is evident in the decisions that have been made by the Courts over the years. Under Common law, judicial precedents are to be adhered to. Precedents in all Common law jurisdictions are regarded as good law and can be applied in any common law country. The judicial precedents in Hong Kong are not restricted to the case laws of the country but all case laws in common law jurisdiction.

The Basic law gives discretion to the Final court of appeal to invite and allow judges from the other common law jurisdiction to participate in decision making in Courts(LJ & 2007, n.d.). The judges can be invited to participate in the entire judicial process and give their opinions of the law. This shows that under common law, all countries apply the same precedents and are governed by previously decided cases. The Court of final appeal can see what other jurisdictions do and get expert advice from the judges. As of now, nine highly-respected overseas judges can be invited to

COMMON LAW IN HONG KONG

sit on a full bench during the judicial proceedings. In Hong Kong, there are common law offenses that are stated under Duty lawyer services.

How is and was a common law system run before and after 1997

Common law was as a result of Britain colonizing Hong Kong. There are many cases that have been determined using common law principles. These cases have been decided based on the laws that were set up in earlier cases(Wesley-Smith, 1994). Judicial precedent has been applied in many cases in Hong Kong. Hong Kong courts have been applying doctrines of stare decisis and have over the years invited judges from other common law jurisdictions to give their opinion and experiences of the common law. Case laws have been used by the United Kingdom and applied in the courts(Wesley-Smith, 1994). In Hong Kong, the judges have been writing their judgments using the English language. The courts write their judgments using either English or Chinese.

The judiciary in Hong Kong after 1997 has always been independent. The judiciary is not influenced by any other body of government. Under common law, the judiciary is usually independent. In Hong Kong judges are sometimes drawn from other common law jurisdictions. Since 1997 every case that is heard in the final court of appeal has had an external judge to boost the independence of the judiciary(E. Ip, 2019). For international law judges, Hong Kong brings in judges from countries such as the UK, Australia, and Canada. The Court of final appeal has the final adjudication rendering binding decisions that every subordinate court follows as the precedent(E. Ip, 2019).

Presiding judges from other common law countries are appointed on a temporary basis. In any appeal, a five bench judge usually hears the proceedings before determination(Mason, 2011). The five-judge bench consists of one non-permanent judge, three permanent judges and the chief

COMMON LAW IN HONG KONG

justice. If the chief justice is unavailable or unable to convene the bench, one of the permanent judges usually takes his place and another non-permanent judge is added to the bench. This practice shows how far Hong Kong has come and has improved its common law system(Mason, 2011). The non-permanent judges usually lay down and use the principles of the common law. The court can thus maintain a strong link between with other common law jurisdictions.

Prior to 1997, the British were in charge of Hong Kong. The Supreme Court was the highest court of the land and heard first instance cases and appeals from lower courts. The Supreme Court heard appeals from magistrate and district courts. This was a common law system example where adjudication was by the Supreme Court and their decisions were final and binding to the subordinate court. Later on, in 1976 the Supreme Court consisted of the High Court and the Court of Appeal(Jordan, 1997). The Supreme Court was governed by precedents from common law jurisdictions. The judges applied judicial precedents and during appeal, they set up binding decisions. The Judges determined how the law was to be interpreted. The outcomes of the laws were not dependent on the statutes but rather it was based on the precedents of the English courts. The Supreme Court judges would apply judicial precedents(Jordan, 1997).

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COMMON LAW IN HONG KONG

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