

Chapter 2

The Legal System

“When we speak of the ‘rule of law’ as the foundation of our system, we mean not only that no man is above the law, but that every man, whatever his rank or position, be it the Chief Executive or the average citizen, is subject to the ordinary law and amenable to the jurisdiction of the courts” — Secretary for Justice, Mr Wong Yan Lung, SC, at the Ceremonial Opening of the Legal Year on January 14, 2008.

The legal system of the Hong Kong Special Administrative Region (HKSAR) differs from that of the Mainland, and is based on the common law.

The constitutional framework for the legal system is provided at the international level by the Sino-British Joint Declaration and at the domestic level by the Basic Law, enacted by the National People’s Congress (NPC) of the People’s Republic of China (PRC) under Article 31 of the Chinese Constitution. Both the Joint Declaration and the Basic Law guarantee the continuance of the existing legal system after China resumed the exercise of sovereignty over Hong Kong on July 1, 1997.

Continuation of the Legal System

Common law principles, and nearly all the ordinances that were in force before July 1, 1997, continue to apply in the HKSAR. Some ordinances required adaptation to bring them into line with the Basic Law and to reflect Hong Kong’s new status as a Special Administrative Region of the PRC. Most of these ordinances have now been adapted and those that have not required further consideration of the policy issues involved.

The existing courts and tribunals were re-established on July 1, 1997 (though some were renamed). The Hong Kong Court of Final Appeal was established on that date and replaced the Judicial Committee of the Privy Council as the highest court of appeal for Hong Kong. All serving judges were reappointed by the HKSAR’s Chief Executive on July 1, 1997. All judicial proceedings that had been instituted before July 1, 1997 were continued by virtue of the Hong Kong Reunification Ordinance.

Law in the HKSAR

The laws in force in the HKSAR are:

- (1) the Basic Law;
- (2) national laws listed in Annex III to the Basic Law;
- (3) the laws in force before July 1, 1997 that were adopted as laws of the HKSAR by the NPC's Standing Committee (including the common law, rules of equity and customary law as well as statutory law); and
- (4) laws enacted by the HKSAR's legislature.

National laws relating to defence and foreign affairs, as well as other matters outside the HKSAR's autonomy, may be applied locally by way of promulgation or legislation by the HKSAR. Currently, 12 national laws apply in the HKSAR.

All ordinances in force in the HKSAR are bilingual, and their Chinese and English texts are equally authentic. Those ordinances, and their subsidiary legislation, are published in both a hard-copy loose-leaf edition and on the internet.

International Treaties and Agreements Applying to the HKSAR

Under the Basic Law, multilateral treaties can apply to the HKSAR. There are approximately 235 such treaties. In certain areas, the HKSAR can conclude its own bilateral agreements and 164 such agreements have been concluded. Lists of these treaties and agreements and the English texts of the agreements are available on the internet.

Court Challenges under the Basic Law

Since July 1, 1997, Hong Kong has, for the first time, a detailed written constitution. Litigants are able to base their arguments on provisions of the Basic Law, and challenge actions that they believe are inconsistent with them.

Legal challenges based on the Basic Law have been launched in a wide variety of cases. Constitutional challenges have included the right of abode in Hong Kong of various categories of persons, the right to use the Chinese language in courts, the freedom to travel and enter the HKSAR, the Court of Final Appeal's power of final adjudication, the right to legal representation and the freedom of speech and of assembly. The gradual development of a body of jurisprudence on the Basic Law reinforces its effectiveness in determining the rights, obligations, powers and privileges guaranteed to the people of Hong Kong.

Arbitration and Alternative Dispute Resolution

Arbitration in the HKSAR is governed by the Arbitration Ordinance, which provides a domestic regime derived from English law and for international arbitrations incorporating the Model Law adopted by the United Nations Commission on International Trade Law ('the UNCITRAL Model Law'). The Department of Justice has published a consultation paper on arbitration law reform which proposes to

abolish the distinction between domestic and international arbitrations and recommends that the UNCITRAL Model Law be adopted as the basis of the arbitration regime in Hong Kong.

HKSAR awards can be enforced in more than 135 jurisdictions that are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. A system for reciprocal enforcement of arbitration awards between the HKSAR and the Mainland, based on the spirit of the New York Convention, has been in place since January 2000.

The Hong Kong International Arbitration Centre (HKIAC) was established in 1985 to be a focus for dispute resolution in Hong Kong and the region. The HKIAC provides advisory and support services for the resolution of local and international disputes by arbitration, adjudication and mediation. In 2008, the International Court of Arbitration of the International Chamber of Commerce established a branch of its secretariat in Hong Kong to administer arbitration cases in the region.

The Secretary for Justice chairs the Working Group on Mediation. The Working Group's primary purpose is to promote the use of mediation in Hong Kong.

The Secretary for Justice

The Secretary for Justice heads the Department of Justice, and is the Chief Executive's legal adviser and a member of the Executive Council. The Secretary for Justice chairs the Law Reform Commission and the Legal Practitioners' Liaison Committee, is the Deputy Chairman of the Fight Crime Committee, and is a member of the Judicial Officers Recommendation Commission and the Operations Review Committee of the Independent Commission Against Corruption.

The Secretary for Justice is the representative of the HKSAR Government in all actions brought by, or against, it and is also responsible for the drafting of all government legislation.

The Secretary for Justice is responsible for all prosecutions in the HKSAR, with responsibility for deciding whether a prosecution should be instituted in any particular case, and, if so, for instituting and conducting the prosecution.

The Department of Justice provides legal advice to all government departments and bureaux. It has five law divisions, each headed by a Law Officer to whom the Secretary for Justice delegates certain powers and responsibilities.

The Civil Division, headed by the Law Officer (Civil Law), provides legal advice to the Government on civil law, drafts commercial contracts and franchises and conducts civil litigation, arbitration and mediation, on behalf of the Government.

The International Law Division, headed by the Law Officer (International Law), advises the Government on issues relating to public international law. The division's lawyers participate in the negotiation of agreements and arrangements with other jurisdictions and, as members of the Chinese delegation, at the Hague Conference on Private International Law. The division also handles requests to and from the HKSAR for international legal co-operation.

The Law Drafting Division, headed by the Law Draftsman, drafts all legislation, including subsidiary legislation, and assists in steering legislation through the Executive and Legislative Councils. It also compiles the loose-leaf edition of the Laws of Hong Kong and maintains the computer database of Hong Kong's legislation, which is available on the internet.

The Solicitor General heads the Legal Policy Division, which includes the Law Reform Commission Secretariat. The division provides legal policy input on a wide variety of topics being considered by the Government, and advises on issues affecting the administration of justice, human rights, constitutional law, Mainland law and the Basic Law.

The Director of Public Prosecutions heads the Prosecutions Division. The division's counsel conduct most criminal appeals, including those to the Court of Final Appeal, and the majority of trials in the Court of First Instance and the District Court. When necessary, they prosecute in the Magistrates' Courts. The division also provides legal advice on the criminal law to law enforcement agencies and other government departments.

The Law Reform Commission

The Law Reform Commission considers and reports on those topics referred to it by the Secretary for Justice or the Chief Justice. Its membership includes judges, academics, practising lawyers and prominent community members.

Since its establishment in 1980, the commission has published 54 reports covering subjects as diverse as commercial arbitration, divorce, data protection, fraud and hearsay in civil proceedings. The recommendations in 29 of these reports have been implemented, either in whole or in part. The commission is currently considering a range of subjects, including charities, class actions, double jeopardy and sexual offences.

The Legal Profession

Lawyers in Hong Kong are admitted as either barristers or solicitors. Solicitors have limited rights of audience whereas barristers have unlimited rights of audience in all courts. Lawyers practising within one branch of the profession are not, at the same time, allowed to practise within the other branch.

Hong Kong has 6 193 practising solicitors and 710 local law firms, plus 65 foreign law firms, 1 242 registered foreign lawyers, and 20 registered associations between foreign law firms and local law firms. Around 350 solicitors are also notaries public, and are members of the Hong Kong Society of Notaries.

The Law Society is responsible for maintaining professional and ethical standards of solicitors, foreign lawyers and foreign law firms and for considering complaints against these legal professionals.

The governing body for Hong Kong's 1 065 barristers is the Hong Kong Bar Association. The Bar's Code of Conduct governs their conduct and etiquette.

The Judiciary

A key element in the success and continuing attraction of the HKSAR is that its judicial system operates on the principle, fundamental to the common law system, of the independence of the judiciary from the executive and legislative branches of government. The courts make their own judgments, whether disputes before them involve private citizens, corporate bodies or the Government itself. And the Government is advised on matters relating to pay and conditions of service of judicial officers by an independent Standing Committee on Judicial Salaries and Conditions of Service.

The Court of Final Appeal is the highest appellate court in the HKSAR. The court is headed by the Chief Justice. There are three permanent judges and a panel of six non-permanent Hong Kong judges and 10 non-permanent judges from other common law jurisdictions. In hearing and determining appeals, the court will consist of five judges, and the court may, as required, invite a non-permanent Hong Kong judge or a non-permanent judge from other common law jurisdictions to sit on the court. The Chief Justice is the head of the Judiciary. He is assisted in the overall administration by the Judiciary Administrator.

The High Court, comprising the Court of Appeal and the Court of First Instance, is headed by the Chief Judge of the High Court. Sitting in the High Court in addition to the Chief Judge are 10 Justices of Appeal and 32 Judges of the Court of First Instance. The Registrar, Senior Deputy Registrars and Deputy Registrars of the High Court deal mainly with interlocutory and taxation matters.

The Court of Appeal hears civil and criminal appeals from the Court of First Instance, the District Court and the Lands Tribunal. The Court of First Instance has unlimited jurisdiction in all civil and criminal matters. Civil matters are usually tried by Court of First Instance judges sitting without juries, although there is a rarely used provision for jury trials in certain cases, including defamation. Criminal offences in the Court of First Instance are tried by a judge with a jury of seven, or when a judge so orders, a jury of nine. The Court of First Instance also hears appeals from the Magistrates' Courts and the Labour and Small Claims Tribunals.

The District Court is one level below the Court of First Instance. It comprises a Chief District Judge and 32 judges. They sit without a jury in criminal and civil proceedings. There are also a Registrar and three Deputy Registrars dealing with interlocutory and taxation matters. The District Court tries criminal cases except murder, manslaughter and rape. The maximum term of imprisonment is seven years. Its general civil jurisdiction is limited to claims up to \$1 million, or recovery of land where the rateable value does not exceed \$240,000. It has jurisdiction over employees' compensation and matrimonial matters including divorce, custody, maintenance and adoption. It also has jurisdiction to hear stamp duty assessment appeals.

The Magistrates' Courts process about 90 per cent of the cases in Hong Kong annually. Led by the Chief Magistrate, the team consists of six Principal Magistrates, 62 Permanent Magistrates and 10 Special Magistrates sitting in seven locations.

Magistrates exercise criminal jurisdiction over a wide range of offences. In general, their sentencing power is limited to two years' imprisonment and a fine of \$100,000. Specific statutory provisions empower magistrates to impose sentences of up to three years' imprisonment and a fine of \$5 million. Magistrates also handle cases in the Juvenile Courts which deal with offences, except homicide, committed by children and young persons below 16 years of age. Special Magistrates handle minor offences such as traffic contraventions. Their sentencing power is limited to a maximum fine of \$50,000 or as specified in their warrants of appointment.

In addition, there are five tribunals. The Lands Tribunal handles tenancy claims, rating and valuation appeals, applications for compulsory sale of buildings for redevelopment, and compensation assessments when land is resumed by the Government or reduced in value by development. The Labour Tribunal handles claims arising from contracts of employment. The Small Claims Tribunal handles civil claims of up to \$50,000. The Obscene Articles Tribunal determines whether articles are obscene or indecent. It also classifies articles submitted by authors and publishers. The Coroner's Court conducts inquests and inquires into the causes of and circumstances connected with a death.

In accordance with the Basic Law and the Official Languages Ordinance, the courts can use both official languages in any proceedings.

Legal Aid

Eligible applicants receive legal aid through the provision of the services of a solicitor and, if necessary, a barrister in court proceedings to ensure that a person who has reasonable grounds for pursuing or defending a legal action is not prevented from doing so because of a lack of means. Publicly funded legal aid services are provided through the Legal Aid Department and the Duty Lawyer Service.

Legal Aid Department

The Legal Aid Department provides legal aid services to any person in Hong Kong, resident or non-resident, who satisfies the criteria for legal aid, namely the means and merits tests.

Ordinary Legal Aid Scheme for Civil Cases

Legal aid under the Ordinary Scheme is available for civil proceedings in the District Court, Court of First Instance, Court of Appeal and Court of Final Appeal covering cases on the major areas of the livelihood of the community including family and matrimonial disputes, personal injury claims, employment disputes, disputes related to landed properties, contractual disputes, immigration matters and professional negligence claims.

An applicant must pass the means and merits tests to qualify for legal aid. For the means test, the applicant must show that his financial resources, the aggregate of his annual disposable income and total disposable capital after deduction of certain statutory allowances, do not exceed \$165,700. The Director of Legal Aid may waive the upper financial eligibility limit in meritorious cases where a breach of the

Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights as applied to Hong Kong are at issue. For the merits test, the applicant must satisfy the Director of Legal Aid that he has reasonable grounds for bringing or defending the civil proceedings. An aided person may be required to pay a contribution depending on his financial resources and is required to pay back all the expenses incurred in the proceedings that are not recovered from the opposite party out of property recovered or preserved on his behalf in the proceedings.

An applicant who is refused civil legal aid may appeal to the Registrar of the High Court, or in Court of Final Appeal cases, to a Review Committee.

During the year, 15 168 applications for legal aid were received, and legal aid was granted to 7 418 applicants. The Legal Aid Department's expenditure on civil cases was \$346.4 million, and \$798.6 million was recovered for the aided persons.

Supplementary Legal Aid Scheme

This scheme provides legal assistance to applicants whose financial resources exceed the limit stipulated in the Ordinary Legal Aid Scheme but do not exceed \$460,300. Under this scheme, legal aid is available for cases involving personal injury or death as well as medical, dental or legal professional negligence, where the claim for damages is likely to exceed \$60,000. The scheme also covers claims under the Employees' Compensation Ordinance irrespective of the amount of the claim.

The scheme is self-financing and funded by contributions paid by aided persons and a percentage payment deducted from damages or compensation recovered on their behalf. In 2008, 146 applications for legal aid were received and legal aid was granted to 95 applicants. Expenditure was \$21.6 million and \$39.3 million was recovered on behalf of the aided persons.

Legal Aid in Criminal Cases

In criminal cases, legal aid is available for trials in the Court of First Instance and the District Court, committal proceedings in the Magistrates' Courts, appeals from the Magistrates' Courts and for appeals to the Court of Appeal and the Court of Final Appeal.

Legal aid is granted to applicants who pass the means test provided the Director of Legal Aid is satisfied that it is in the interests of justice for legal aid to be granted. The Director of Legal Aid has the discretion to grant legal aid in a criminal case even if the applicant's financial resources exceed the financial eligibility limit if he is satisfied that it is desirable in the interests of justice to do so, subject to payment of a contribution. An applicant who is refused legal aid may apply to a judge for legal aid to be granted to him, provided that he passes the means test. Applicants charged with or convicted of murder, treason or piracy with violence, may apply to a judge not only for legal aid for the trial and appeal, but also for exemption from the means test or payment of a contribution.

Appeals against refusal of legal aid for appeals to the Court of Final Appeal are heard by a Review Committee which is chaired by the Registrar of the High Court

and comprises a barrister and a solicitor. During the year, 3 413 applications for criminal legal aid were received and legal aid was granted to 2 235 applicants. Total expenditure on criminal cases was \$83.3 million.

The Official Solicitor

The Director of Legal Aid was appointed the Official Solicitor under the Official Solicitor Ordinance which took effect on August 1, 1991.

The Official Solicitor's main duties are to act as guardian ad litem or 'next friend' in legal proceedings for persons under a disability of age or who are mentally incapacitated, as representative of deceased persons' estates for the purpose of legal proceedings, as Official Trustee and Judicial Trustee and to act as committee of the estate of mentally incapacitated persons. The Official Solicitor's caseload for 2008 was 464, an increase of 4 per cent over the previous year.

Director of Intellectual Property

This statutory office was established in 1990 under the Director of Intellectual Property (Establishment) Ordinance. The Intellectual Property Department operates the Trade Marks, Patents, Designs and Copyright Licensing Bodies Registries. It is also responsible for making recommendations on policy and legislation related to intellectual property protection, providing civil intellectual property legal advice to the Government and promoting public awareness of and respect for intellectual property rights.

Rights of the Individual

Legal Protections

Chapter III of the Basic Law prescribes the fundamental rights and freedoms of people in Hong Kong. In particular, Article 39 (which forms part of Chapter III) provides that the provisions of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as applied to Hong Kong shall remain in force.

Additionally, the Hong Kong Bill of Rights Ordinance gives domestic effect to the provisions of the ICCPR as applied to Hong Kong.

Protection is also provided in the Sex Discrimination Ordinance, the Disability Discrimination Ordinance, the Family Status Discrimination Ordinance and the Race Discrimination Ordinance, which are enforced by the Equal Opportunities Commission. The Personal Data (Privacy) Ordinance — administered by the Privacy Commissioner for Personal Data — protects the right to privacy with respect to personal data.

United Nations Human Rights Treaties and Reporting

Fifteen international human rights treaties are applicable to Hong Kong. Seven of these (the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on

the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women, and the United Nations Convention on the Rights of Persons with Disabilities) require governments to submit periodic reports to the United Nations (UN) treaty monitoring bodies plus other information requested by them. Hong Kong normally submits its reports as part of corresponding reports submitted by China, with the exception of the ICCPR which China has not yet ratified.

The UN Human Rights Council conducts a Universal Periodic Review (UPR) of human rights in all UN member states. Hong Kong's report is submitted as part of China's report for the review.

With the exception of the ICCPR, Hong Kong Government representatives attend hearings of relevant treaty bodies as part of the Chinese delegation. In the case of the ICCPR, Hong Kong attends it under the leadership of the Chinese Permanent Ambassador to the UN.

During the year, Hong Kong submitted its second report on ICERD as part of China's report to the UN Committee on the Elimination of Racial Discrimination. In November, Hong Kong's second report on CAT was examined by the UN Committee Against Torture, as part of China's fourth and fifth reports. The report of Hong Kong under the UPR mechanism was submitted to the UN as part of China's report in November.

Promotion of Racial Equality and Harmony

The Race Discrimination Ordinance

The Race Discrimination Ordinance was enacted in July to protect the rights of individuals against discrimination, harassment and vilification on racial grounds. Sections of the Ordinance empowering the Equal Opportunities Commission to carry out its work were implemented in October. Full implementation of the Ordinance is expected to take place in 2009.

The Committee on the Promotion of Racial Harmony

The Committee was established in 2002. It advises the Government on promotion of racial harmony and equality, formulates proposals for race related public education and publicity, and oversees a funding scheme to subsidise publicity and public education activities by non-governmental organisations. Secretariat support is provided by the Race Relations Unit of the Constitutional and Mainland Affairs Bureau (CMAB).

The Race Relations Unit

The unit was set up in 2002 to promote the interests of ethnic minorities in Hong Kong. It operates a hotline for complaints and enquires about race relations, runs an outreach education programme in schools, sponsors language classes conducted by non-governmental organisations, produces radio programmes in different ethnic minority languages in collaboration with the Government's radio

station, Radio Television Hong Kong, and provides a number of other support services to help members of ethnic minorities to integrate into the community.

Support Service Centres for Ethnic Minorities

In order to strengthen support services for ethnic minorities, the Government announced during the year a new initiative to sponsor non-governmental organisations to establish and operate four support service centres for ethnic minorities. The purpose is to provide a telephone interpretation service to members of ethnic minorities to facilitate their access to essential public services and to organise language classes and other activities to facilitate their integration into the community. The centres are expected to come into operation in 2009.

Children's Rights

The Government has supported various initiatives to enhance awareness of children's rights enshrined in United Nations Convention on the Rights of the Child (CRC).

It has set up a Children's Rights Forum to enable better communication with children and advocates of children's rights, and provide children with additional opportunities to express their views.

The Government has established a Children's Rights Education Funding Scheme which provides financial assistance to non-governmental organisations carrying out activities to promote children's rights. Administrative support for the Forum and the Funding Scheme is provided by the Children's Rights Unit of the CMAB.

Equal Opportunities Commission

The Equal Opportunities Commission (EOC) is an independent statutory body established under the Sex Discrimination Ordinance in 1996 to implement the Sex Discrimination Ordinance, the Disability Discrimination Ordinance and the Family Status Discrimination Ordinance.

The EOC is also entrusted with the implementation of the Race Discrimination Ordinance which was enacted in July 2008 and expected to be fully operational in 2009.

The EOC's functions include handling complaints, encouraging conciliation, providing assistance to aggrieved persons, and undertaking public education, research and training programmes to promote equal opportunities and eliminate discrimination on the grounds of sex, marital status, pregnancy, disability, family status and race (to be effected in 2009).

In 2008, the commission received 3 540 enquiries and 767 complaints relating to the three anti-discrimination ordinances; and 193 complaint cases were conciliated.

Office of the Privacy Commissioner for Personal Data

The Office of the Privacy Commissioner for Personal Data (PCPD) was established in 1996 as an independent statutory body under the Personal Data (Privacy) Ordinance (PDPO) to monitor, supervise and promote compliance with the ordinance.

In February, the PCPD invited the privacy authorities from the UK and British Columbia, Canada to an open forum to share with participants their views on data protection from the regulator's perspective. Following the success of the Privacy Awareness Week (PAW) 2007, the PCPD launched the PAW 2008 jointly with its Asia Pacific Privacy Authorities counterparts from Australia, Canada and New Zealand in August to raise awareness of the importance of protecting privacy in the region.

To meet the growing demand for more in-depth knowledge on personal data privacy, the PCPD held thematic seminars for a wide spectrum of data users from different sectors. In addition, it organised seminars on the 'Introduction to the PDPO' for the general public throughout the year.

In 2008, the PCPD handled 946 complaints and 13 112 enquiries. Seven enforcement notices were issued and four cases were referred to the Police for prosecution. There were two successful convictions pertaining to data access request and non-compliance with enforcement notice respectively. Because of public concern about leakage of personal data incidents, the PCPD stepped up measures to promote compliance with the PDPO. The PCPD handled 16 matching applications and 96 compliance checks. An inspection into the patients' personal data system of a hospital under the Hospital Authority (HA) was conducted to see whether compliance with security requirements of personal data under the PDPO could be improved. A report afterwards made 37 recommendations, all of which were adopted by the HA.

Websites

Administration Wing, Chief Secretary for Administration's Office:

www.admwing.gov.hk

Department of Justice: www.doj.gov.hk

Judiciary: www.judiciary.gov.hk

Legal Aid Department: www.lad.gov.hk

Home Affairs Bureau: www.hab.gov.hk

Constitutional and Mainland Affairs Bureau: www.cmab.gov.hk

Intellectual Property Department: www.ipd.gov.hk